The Statutory Change of Position Defences in Western Australia

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Change of position is emerging as a major defence to claims in unjust enrichment. In a previous volume of this Review, the authors examined the defence under Australian common law. In this article, they explore two statutory versions of the defence that were enacted in Western Australia 30 years before the recognition of the defence at common law. In several respects, the statutory defences appear to be wider than the common law equivalent: in determining whether to allow the defence, a court must consider the implications for third parties and may also take account of the relative fault of plaintiff and defendant. Further, the defences appear capable of application beyond claims in unjust enrichment.

AT COMMON LAW, the change of position defence forms part of the law of unjust enrichment.[1] In essence, the defence protects a defendant from liability to restore the value of a benefit it has received at the expense of the plaintiff. It does so, in whole or in part, where the defendant has so changed its position as a result of the receipt that it would be inequitable to order it to make restitution or restitution in full. Although the common law defence of change of position was not recognised in Australia until 1992,[2] statutory versions of the defence have formed part of the law in Western Australia since 1962. Notwithstanding the emergence of a general common law defence, the statutory versions remain relevant for several reasons. The statutory provisions are expressed in mandatory terms, so that relief against

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1. For a discussion of the common law defence, see E Bant & P Creighton 'The Australian Change of Position Defence' (2002) 30 UWAL Rev 208.
2. *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

the defendant must be denied whenever the prescribed criteria are met. This makes an understanding of their terms imperative for those charged with applying Western Australian law. Further, the statutory defences are of wider interest either because they adopt a different position to that now emerging at common law or because they pose questions which have not yet been considered elsewhere.

HISTORICAL BACKGROUND

The statutory defences are currently found in section 65(8) of the Trustees Act 1962 (WA) and section 125(1) of the Property Law Act 1969 (WA).[3] Both provisions were introduced at the same time, as part of a wide-ranging reform of the law in Western Australia relating to property, trusts and succession.

Following a New Zealand precedent,[4] Western Australia enacted section 65 of the Trustees Act 1962[5] which modified the prevailing law as established in *Ministry of Health v Simpson*[6] in three main ways. First, section 65(1) extended the *Simpson* rule, developed in the context of deceased estates, to inter vivos trusts. As a result, beneficiaries or creditors of an inter vivos trust or a deceased estate have a direct personal claim against those who receive property under a wrongful distribution by trustees or personal representatives. The claim is available whether the distribution results from a mistake of fact or of law or from some deliberate wrongdoing. Consistently with *Simpson*, the recipient's liability is strict, in that it is available even against a defendant that received the property in good faith and with no reason to doubt its entitlement. Secondly, section 65(7) reversed the rule that claimants must have first exhausted all remedies against the trustee before proceeding against the recipients. Thirdly, section 65(8) introduced a change of position defence for innocent recipients under wrongful distributions of the deceased estate or trust property.[7]

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3. Originally, Law Reform (Property, Perpetuities and Succession) Act 1962 (WA) s 24(1).
4. Administration Act 1952 (NZ) s 30B, inserted by Administration Amendment Act 1960 (NZ) s 2, substantially re-enacted as Administration Act 1969 (NZ) ss 49-51.
5. The grounds of liability under s 65 are discussed in P Creighton & E Bant 'Recipient Liability in Western Australia' (2000) 29 UWAL Rev 205.
6. [1951] 1 AC 251. In that case, the House of Lords established that persons entitled to be paid from a deceased estate, whether as creditors, beneficiaries or next of kin on an intestacy, could bring a personal claim directly against those to whom the estate had been wrongly distributed. The liability of the recipients was strict, in that it did not depend on proof that they knew or ought to have known that they were not entitled to the property. However, the liability was contingent on the plaintiffs' prior exhaustion of all remedies against the executors. It was no defence to the claim that a recipient had changed its position in reliance on the receipt.
7. Queensland effected similar reforms in Trusts Act 1973 (Qld) s 109. On s 109 generally, see *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439; *Baker v Loel* [1995] QSC 139. In neither of these cases was the defence of change of position raised.

At the same time, Western Australia also followed the New Zealand lead[8] in modifying the common law rule[9] that prevented recovery for money paid under a mistake of law. Section 124(1) of the Property Law Act 1969 provided that relief in respect of a mistaken payment should not be denied merely on the ground that the relevant mistake was one of law.[10] The expansion of liability to restore mistaken payments was tempered by, among other things,[11] the provision of a change of position defence, which is now found in section 125(1) of the Property Law Act 1969.

The statutory defences were designed not merely to moderate the application of the new grounds of liability. The defences were given a wider operation, so that they apply to any claim arising from a wrongful distribution of a trust or estate or from a mistaken payment, whether the claim arises under the relevant statutory provision or in equity or otherwise. They reflect the recognition that in these contexts any form of strict liability can operate harshly where the recipient has received a benefit in good faith and relied on its apparent entitlement to the benefit to alter its position. In this respect, the statutory defences foreshadowed the development of the defence at common law. However, the common law defence is significantly wider in that it is not confined to the particular contexts of wrongful distributions and mistaken payments; it applies more broadly in the law of unjust enrichment. On the other hand, there is nothing in the statutory provisions to indicate that change of position can operate only as a defence to claims in unjust enrichment, whereas it is generally accepted that the common law defence is limited to such claims.[12]

SCOPE OF THE STATUTORY DEFENCES

Section 65(8) of the Trustees Act 1962 (WA) is in the following terms:

> Where a trustee has made a distribution of any assets forming part of the estate of a deceased person or subject to a trust, relief (whether under this section or in equity or otherwise) against any person other than the trustee or in respect of any interest of any such person in any assets so distributed and in any money or property into which they have been converted, shall be denied wholly or in part,

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8. Judicature Act 1908 (NZ) s 94A, inserted by Judicature Amendment Act 1958 (NZ) s 2, in turn modelled on Civil Practice Act 1942 (New York) s 112(f). See generally R Sutton 'Mistake of Law: Lifting the Lid of Pandora's Box' in J Northey (ed) *AG Davis Essays in Law* (London: Butterworths, 1965) 218.
9. *Bilbie v Lumley* (1802) East 469; 102 ER 448.
10. Law Reform (Property, Perpetuities and Succession) Act 1962 (WA) s 23, subsequently re-enacted as Property Law Act 1969 (WA) s 124.
11. Property Law Act 1969 (WA) s 124(2) also precluded recovery of a payment made under existing law or under a common understanding of the law which is subsequently changed.
12. Bant & Creighton above n 1, 228. Whether this should remain the case has become the subject of considerable debate: see below n 82 and accompanying text.

> if the person from whom relief is sought received the assets or interest in good faith and has so altered his position in reliance on his having an indefeasible interest in the assets or interest, that, in the opinion of the Court, having regard to all possible implications in respect of the trustee and other persons, it is inequitable to grant relief or to grant relief in full.

Section 125(1) of the Property Law Act 1969 (WA) states as follows:

> Relief, whether under section 124 or in equity or otherwise, in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of the parties (other than the plaintiff or claimant) to the payment and of other persons acquiring rights or interests through them, it is inequitable to grant relief or to grant relief in full.

Clearly, the sections are not co-extensive. First, section 65(8) operates in the context of a wrongful distribution, whether made as a result of a mistake or otherwise. Section 125(1), on the other hand, applies only to payments made by mistake. Secondly, section 65(8) applies only to distributions by a trustee or personal representative, whereas section 125(1) applies whoever the mistaken payer may be. Thirdly, section 65(8) applies to any property distributed by the trustee, while section 125(1) applies only to payments of money.

Notwithstanding these differences, there is overlap between the sections. Where a trustee mistakenly distributes trust money to a third party, both sections apply to any claim, whether statutory, in equity or otherwise, against the recipient or in respect of the recipient's interest in the money or any assets into which the money has been converted.[13] This area of overlapping application does not matter, provided the defences operate in precisely the same way. As we will see, there is some doubt as to whether they do. It is clearly desirable, given the overlap, that the doubt be resolved in a way that avoids inconsistency between the defences.

INTERPRETING THE PROVISIONS

There are no decisions in Western Australia which examine the operation of either section in any detail.[14] The only comparable statutory provision in Australia

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13. The same is true in New Zealand, where the Administration Act 1969 (NZ) s 51 and Judicature Act 1908 (NZ) s 94B overlap: see P Watts 'Judicature Amendment Act 1958 – Mistaken Payments' in NZ Law Commission *Contract Statutes Review* Report No 25 (Wellington, 1993) 200.
14. The defence under s 65(8) was applied in *Clay v James* [2001] WASC 101, without extensive discussion as to the scope of the provision.

is section 109(3) of the Trusts Act 1973 (Qld), which is in similar terms to section 65(8). Again, however, there are no relevant reported decisions on that section.

Notwithstanding the dearth of direct authority on the operation of the sections, there are alternative avenues for guidance. One obvious source lies in the decisions applying the New Zealand provisions on which the Western Australian defences were based. These can be useful, provided the differences between the statutes are recognised.[15] It is also necessary to be aware that New Zealand interpretations of their statutory defences may have been influenced by the local version of the common law defence, which may differ in some respects from the Australian common law.[16]

A second source of guidance lies in the emerging body of Australian law on the scope and operation of the defence at common law. There will be clear advantages in interpreting the statutory defences as consistently as possible (given the wording of the statutes) with the operation of the common law defence. Most obviously, this will promote consistency between cases within the scope of the statutes and substantially similar cases that fall outside their terms. Even so, there will be instances where the statutory language compels a different result to that available at common law. In such cases, it will be necessary to determine the proper relationship between the common law and statutory versions of the defence, the issue to which we now turn.

INTERACTION BETWEEN COMMON LAW AND STATUTORY DEFENCES

The relationship between the common law and statutory defences in Western Australia has yet to be considered by the courts. On their face, the statutory defences are mandatory in their operation in the sense that relief 'shall be denied wholly or in

15. For example, the New Zealand versions express the court's role in permissive terms ('relief may be denied'), whereas the Western Australian provisions are mandatory ('relief shall be denied'). Further, the Administration Act 1969 (NZ) s 51 contains a requirement, not found in the Australian equivalents, that the defendant altered its position 'in the *reasonably held belief* that the distribution was properly made and would not be set aside' (emphasis added): see *MacMillan Builders Ltd v Morningside Industries Ltd* [1986] 2 NZLR 12, 17; P Watts 'Company Law' [1999] NZL Rev 23, 40-41. By contrast, the Judicature Act 1908 (NZ) s 94B contains no requirement of reasonable belief.

16. See *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211. We have demonstrated previously that the New Zealand version of the common law defence appears to differ from the Australian version, chiefly in not requiring reliance on the receipt, and in the role played by fault. Similarly, decisions on the common law defence from jurisdictions such as England must be treated with some caution, since the defence there appears to be wider in some respects than its Australian counterpart: see Bant & Creighton above n 1.

part' where the requisite criteria are met. It follows that, if the defendant would obtain relief under a statutory defence, but not at common law, then the statutory defence must apply. However, it is possible that in some circumstances the common law defence might be made out more readily than the statutory version, particularly if the common law version continues to evolve in a more liberal form. It will be important, then, to determine whether it will be available in those contexts covered by the statutory defences, namely wrongful distributions of trusts and estates and mistaken payments.

It has been suggested[17] that section 125(1) would apply to mistaken payment cases to the exclusion of the common law defence. The common law defence would, on the other hand, apply to cases involving mistaken provision of goods or services, assuming that such cases are amenable to claims in unjust enrichment.[18] However, in *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd,*[19] the court concluded that the equivalent New Zealand provision[20] was not a code, so that both the statutory and common law defences could be considered. The court reasoned that there was nothing in the section to exclude the operation of the common law defence. The statute merely provided that relief should be denied in certain circumstances; it did not preclude the denial of relief in other cases.

Two main objections have been raised to this 'contentious'[21] aspect of the *Waitaki* decision. The first is that, because the common law defence operates more widely than section 94B, the effect of the decision is to render the statutory defence redundant. However, as we will see below, that is not necessarily so, at least in Western Australia. Here, the statutory defence has the potential to afford a defence where there is none at common law and to that extent necessarily survives.

The other objection is that, where Parliament has chosen to afford a defence in limited circumstances only, those limitations should not be abrogated by applying a more extensive common law defence. Such reasoning is clearly appropriate to an exhaustive code. However, section 65 is evidently not intended to be exhaustive. The remedies granted by the section are additional to rights and remedies otherwise available[22] and the express exclusion of the common law rule in one subsection[23]

17. C McClure 'Restitutionary Defences – A Selection' (Perth: WA Law Society, 1993) 5: see also R Grantham & C Rickett 'Change of Position in New Zealand' (1999) 5 NZBLQ 75, 77.
18. It is controversial whether the provision of pure services can constitute enrichment: see Bant & Creighton above n 1, 210, n 10.
19. Above n 16.
20. Judicature Act 1908 (NZ) s 94B.
21. Grantham & Rickett above n 17, 77; see also C Cato 'Restitution, Mistake and Change of Circumstances' [1999] NZLJ 132, 134.
22. S 65(4).
23. S 65(7) commences: '[n]otwithstanding any rule of law to the contrary...'.

suggests that other parts of the section are intended to operate in addition to the common law. Although the provisions in the Property Law Act 1969 are less explicit in this respect, it is arguable that, given the joint genesis of the Western Australian provisions, neither statutory defence was intended to oust its common law counterpart. Further, as Watts has noted,[24] where Parliament has intervened to repair the failings of the common law on a limited basis and those failings have since been righted, it is unduly cautious to refuse to give effect to the (now more developed) common law principle in cases covered by the statute. At the time the statutory defences in New Zealand and Western Australia were enacted, the common law defence of change of position was very much in its infancy. Now that the common law defence has matured, it would be 'ironic if a legislative attempt to correct defects in the common law resulted in other flaws becoming ossified in the common law'.[25]

COMMON ELEMENTS OF THE DEFENCES

In order to raise a defence under either section 65(8) or section 125(1), a defendant must establish:

(i) that it received a benefit in good faith;
(ii) that it changed its position; and
(iii) that it made the change in reliance on its entitlement to receive the benefit.

We will consider each of these elements in more detail, before examining the issue of whether the defence is available where a change of position occurs in anticipation of the receipt.

Receipt in good faith

The defendant must have received a benefit[26] in good faith. In this context, a defendant will usually prove good faith by showing that it was not aware of any reason to doubt its entitlement to receive the benefit in question. However, knowledge that one is *not* entitled to the benefit is not fatal. For example, in *Waitaki,*[27] the plaintiff mistakenly insisted that it owed $500 000 to the defendant, despite the latter's repeated protests to the contrary. The defendant finally agreed to accept payment, expecting that the plaintiff would eventually discover its error. The defendant placed the funds on deposit with a view to repaying them when called upon by the plaintiff. In these circumstances, the court accepted that the defendant

24. P Watts 'Restitution' [1999] NZL Rev 373, 376-378.
25. *Hungerfords v Walker* (1989) 171 CLR 125, Mason CJ & Wilson J 148.
26. In the form of a payment for the purposes of s 125, or an asset or an interest in an asset under s 65(8).
27. Above n 16.

had received the payment in good faith. Clearly, it would have been different if the defendant had known of the mistake but had concealed it from the bank.[28]

The good faith requirement should also exclude a case where a defendant had surmised that there may have been a mistake but consciously refrained from enquiring further. In such circumstances, avoiding the truth smacks of dishonesty. However, good faith should not be defeated by mere carelessness or naivety: a defendant may still have acted in good faith even though a reasonable person in the circumstances would have realised there had been, or may have been, a mistake.[29] Of course, the more unreasonable the defendant's behaviour appears, the more likely it is that a court will find, as a matter of fact, that the defendant was not acting in good faith.

Although both sections explicitly require good faith only at the time of receipt, in practice it must persist until the change of position has taken place, in order to satisfy the additional requirement of reliance.[30] For example, after receiving a payment in good faith, the defendant may have become aware that it had been made by mistake. If the defendant still proceeded to spend the money, it could not show that it had acted in reliance on the validity of the payment. Any knowledge sufficient to defeat good faith would also preclude proof of reliance.[31]

Change of position

Both sections require that 'the defendant has ... altered his position.' This makes it clear that *the defendant* must have effected the change. It is not enough that the defendant's position has altered. However, it is doubtful that the defendant must have been solely responsible for its new position. It should be sufficient that the defendant has done something to bring about the circumstances under which a loss has occurred, whether as a result of a supervening disaster or the actions of a third party. For example, on receipt of a mistaken payment, the defendant may have purchased a painting which has subsequently been destroyed by fire. Alternatively, the defendant may have declined an opportunity to sell shares, which have subsequently depreciated. In these cases, the defendant should be able to satisfy

28. Ibid, Henry J 217.
29. For example, in *Scottish Equitable plc v Derby* [2001] 3 All ER 818, the court accepted that the defendant did not realise that his insurance company had miscalculated his payment, notwithstanding the fact that the mistake had the effect of quadrupling his fund in five years and that his financial manager might have been expected to have noticed the error. The position is otherwise under the Administration Act 1969 (NZ) s 51, where the defendant must have acted 'in the reasonably held belief that the distribution was properly made'. See Watts above n 15, 40-41.
30. Discussed below pp 57-59.
31. Bant & Creighton above n 1, 219.

the requirement that it altered its position, even though the loss was at least partly attributable to factors beyond the defendant's control.[32]

It might be argued that the defendant must at least have performed some positive act to contribute to its changed circumstances, so that the sections would exclude cases where a defendant has merely abstained from action. In *Westpac Banking Corporation v Nangeela Properties Ltd,*[33] when dealing with a similar defence under section 311A(7) of the Companies Act 1955 (NZ), Somers J stated:

> To do nothing is not to change, or alter, anything. What the statute envisages is some positive action in reliance on a reasonable belief as to the validity of the payment.

However, the better view is that a defendant can alter its position by commission or omission.[34] Clearly, the defendant can effect a reduction in its net wealth by either means: the recipient of a mistaken payment might respond either by making a gift of $1,000 to charity or by choosing not to claim a $1,000 social security benefit to which it is entitled. In either event, it has given up $1,000 in reliance on the payment.

This broader view was adopted in *Nangeela* by McMullin J:

> Occasions may arise where a payee will also be able to make out a case under [section 311A(7)], perhaps by deciding to give away a right or a remedy or even taking no action on a course otherwise available to him. Inaction may be the result of a conscious decision which, nonetheless, results in an alteration of position. Deciding not to pursue a guarantor would be an example.[35]

Even on this approach, the defendant would still need to show that it had consciously chosen not to act. An unthinking failure to claim an available benefit would not suffice, either because it would not be a change effected by the defendant[36] or because it could not be said to have been a change incurred in reliance on the receipt.[37]

Not every change of circumstances instigated by the defendant will satisfy the statutory criterion. The change must be of a kind that would make it 'inequitable to

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32. Eg *Gertsch v Atsas* [1999] NSWSC 898, where the court accepted among the second defendant's relevant changes the purchase of a car which was later stolen. It would be a further question whether the defendant could show that it acted in reliance on the validity of its receipt. See below pp 57-59.
33. [1986] 2 NZLR 1.
34. This is recognised at common law: see Bant & Creighton above n 1, 210-211.
35. *Nangeela* above n 33, 8-9. The defendant failed to establish the defence because it could not show that it consciously chose not to enforce an undertaking by a third party in reliance on the plaintiff's payment.
36. Ibid, Richardson J 5.
37. Ibid, McMullin J 8.

grant relief' against the defendant. This is generally satisfied by showing that the change caused the defendant to lose the value of the original enrichment it received. For example, in *Waitaki*, the defendant was unable to recover the funds it deposited with the finance company because the company collapsed and the security for the loan proved to be insufficient. The majority found that the defendant had thus changed its position in a material way.[38] Further, if the defendant has changed its position, but could readily revert to the original position, it is unlikely to be inequitable to require the defendant to account for the benefit it received.[39] Consequently, the defendant will need to show the extent to which the change was irreversible. For example, if a defendant, relying on the payment, has contracted to purchase an item, it may be able to rescind the executory contract. It may still have changed its position, but only to the extent of any amount of compensation payable to the vendor. Its defence would then be limited to that amount, rather than the value of the original receipt.

A defendant will generally not be able to rely on the defence where it has retained the value of the original receipt. There is usually nothing inequitable in requiring the defendant to restore a benefit it has retained in one form or another. Exceptionally, a defendant may be able to show that, even though it has retained the value of the original benefit, being required to make restitution would place it in a worse position than if it had never received the benefit. This might arise where money could not compensate the defendant for the incidental prejudice it would suffer through having to make restitution.[40] Although such an argument may fall

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38. It is not entirely clear why Thomas J dissented from this conclusion, even though he found there was a sufficient change of circumstances to meet the requirements of the common law. It may be that he thought the relevant change was the collapse of the finance company, which was not in itself a change in the defendant's position, even though it rendered the defendant's loan irrecoverable. Such a view would drastically reduce the scope of the statutory defence, confining it to cases where the defendant's action directly caused the loss of value. Alternatively, Thomas J may have treated the defendant as a trustee of the funds paid by mistake. On this view, any loss in the value of the investment would be a loss suffered by the beneficial owner and not a loss to the defendant. This, too, is unconvincing. First, the defendant was not a trustee for the plaintiff. It merely invested the funds with a view to having them available to meet its personal liability to repay the plaintiff. Secondly, even if it were a trustee, the collapse of the finance company would have altered the defendant's position. As a trustee, the defendant would probably have been liable to its beneficiary for failure to act prudently in the investment of the trust funds.

39. Eg *Scottish Equitable v Derby* above n 29, in which the defendant had received an overpayment of some £172 451 through the carelessness of his life assurance company. He had used part of the overpayment to purchase a pension from an insurance company. As the insurance company was prepared to 'unwind' the pension policy and refund the purchase price, the defendant had not irretrievably changed his position.

40. R Nolan 'Change of Position' in P Birks (ed) *Laundering and Tracing* (Oxford: OUP, 1995) 135; Bant & Creighton above n 1, 223.

outside the scope of the common law defence,[41] it may suffice to meet the statutory requirement that granting relief against the defendant would be inequitable.

Finally, to be able to satisfy the reliance requirement, the change must have been of an exceptional kind: the defendant must have changed its position in a way that it would not have done but for its belief that it was entitled to the property. This will usually exclude expenditure on everyday items since the defendant would have made them in any event.[42] However, spending on everyday items might still qualify where the defendant's level of expenditure increased because of its mistaken belief as to its enhanced wealth.[43] Exceptional change is more readily established by extravagant expenditure, although even this would be excluded if the defendant would have engaged in such extravagance in any event.[44] Alternatively, the defendant might show it abstained from claiming a benefit it would have otherwise claimed.[45]

Reliance

The reliance requirement not only demands that the change be 'exceptional', it also introduces issues as to the defendant's state of mind when it acted. In section 65(8) the defendant recipient must have 'altered his position in reliance on his having an indefeasible interest in the assets or interest', whereas under section 125(1) the recipient must have 'altered his position in reliance on the validity of the payment.' Although expressed in different ways,[46] both sections require that the defendant has acted on the assumption that there was no ground for reversing the transaction by which the benefit was conferred. The defendant must have assumed, in the context of section 65(8), that it was entitled to receive the property under the trust, or, in the context of section 125(1), that it was entitled to receive the payment.

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41. It may fall within a more general restriction on restitutionary relief: see Bant & Creighton above n 1, 224.
42. *David Securities* above n 2, 385-386.
43. Eg *Clay v James* above n 14; *Philip Collins Ltd v Davis* [2000] 3 All ER 808; *Gertsch v Atsas* above n 32.
44. In *Gertsch v Atsas* above n 32, para 141, the court found that even without the mistaken payment the second defendant would have stretched his resources to their limit to provide his daughters with sumptuous weddings, with the result that that expenditure could not count as a relevant change of position.
45. Eg *Palmer v Blue Circle Southern Cement Ltd* (1999) 48 NSWLR 318, in which the defendant abstained from applying for social security benefits in reliance on his receipt of workers' compensation payments.
46. The same notion is expressed in the Trusts Act 1973 (Qld) s 109(3) as acting in reliance on 'the propriety of the distribution'; and in the Administration Act 1969 (NZ) s 51 as acting in the reasonable belief that 'the distribution was properly made and would not be set aside'. By contrast, the common law requires that the defendant acted in reliance on the *receipt* of the benefit: *David Securities* above n 2, 385.

In other words, the defendant must have acted on the basis that its receipt of the benefit was 'free from challenge or attack'[47] by the plaintiff.

Thus, the defendant's knowledge of a vitiating factor will preclude the defence under both sections.[48] This is consistent with the decision in *Waitaki*, where a majority in the Court of Appeal found that the defendant's knowledge that the payment had been made by mistake prevented it from showing that it had acted in reliance on the validity of the payment. The result may seem harsh on the defendant, which acted in good faith and in a reasonable manner in the face of the plaintiff's obstinate refusal to acknowledge its mistake. Even so, it is difficult to support the wider approach adopted by Henry J, who dissented on this issue. His Honour held that the defendant had acted on the assumption that the payment was valid in the sense that the money had been paid with the bank's knowledge and while it knew that the defendant claimed not to be entitled to the funds. In our view, this interpretation is unpersuasive. It treats a payment as valid if it was 'not unlawful', whereas 'the validity of a payment' normally refers to its immunity from legal challenge. The only escape from the apparent harshness would appear to be by resort to the common law defence, where the reliance requirement may be interpreted more liberally,[49] or discarded altogether.[50]

Even though the defendant must have assumed that the conferral of the benefit was valid as against the plaintiff, it is not necessary that the defendant believed it was entitled to keep the benefit for itself. For example, in *Thomas v Houston Corbett & Co*,[51] the plaintiff was induced by a dishonest employee, Cook, to pay £1 381 to the defendant. Cook told the defendant that he was entitled to keep £541 of this amount for himself, but that the balance was payable to other parties. Relying on this, the defendant paid the balance of £840 to Cook. The New Zealand Court of Appeal found that the defendant had acted in reliance on the validity of the payment, even though he believed he was entitled only to part of it. In short, the defendant

47. *Waitaki* above n 16, Henry J 217.
48. This is not necessarily the case at common law. We have argued that, given that the common law defence requires 'reliance on receipt', it is possible for a person to act in reliance if it acts consistently with its understanding of the terms on which it has received the benefit. In our opinion this achieves a more appropriate allocation of risk than occurs under the statutory test: see Bant & Creighton above n 1, 218-219. It also provides a more satisfactory solution in a case like *State Bank of New South Wales Ltd v Swiss Bank Corporation* (1995) 39 NSWLR 350: see below p 59.
49. Bant & Creighton above n 1, 218-219.
50. In England, the touchstone is broader, namely whether it appears 'inequitable in all the circumstances to require [the defendant] to make restitution': *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 580. See also *Scottish Equitable v Derby* above n 29, in which the Court of Appeal accepted that it was only necessary to prove a causal link between receipt and loss, rather than to prove detrimental reliance.
51. [1969] NZLR 151.

must have acted on the basis that it was entitled as against the plaintiff to receive the benefit, even if it was not entitled to retain it beneficially.

If the plaintiff has mistakenly paid money to the defendant for the benefit of a third party, the defence may still be available even though the defendant has actually applied the money to the benefit of a fourth party. Suppose bank A is deceived into paying funds to bank B to the account of C. B receives the funds but credits them to D's account in the unreasonable belief that A intended to benefit D. If A sued B to recover its mistaken payment, it is arguable that B acted in reliance on the validity of the payment, in the sense that it assumed that it was immune to challenge by A. If so, this would create a distinction between the statutory and common law position.[52] It would seem that the only way to avoid this difference would be to argue that it would not be inequitable to grant relief against the defendant in these circumstances. Through its careless dealing with the funds, it will have lost the benefit of the defence.[53]

Anticipatory change of position

It is unclear whether the defences extend to an anticipatory change. Such a change occurs where the defendant alters its position in the expectation that it will receive a benefit, prior to actually receiving it. For example, a person named as a beneficiary in the will of a recently deceased person might assume that he is entitled to the bequest, expend money on that assumption and then receive the specified sum. If the relevant provision in the will subsequently turns out to be invalid, he might then seek to rely on section 65(8) or section 125(1) to defend any claim made to recover the mistaken payment.

It is likely that the two statutory conditions will be treated as sequential, so that the defendant must first have received the benefit in good faith and *then* have altered its position in reliance. This is the more natural reading of section 65(8) and, even more so, of section 125(1), where 'reliance on the validity of the payment' appears to assume that a payment has already been made. Against that, it might be argued that the two conditions in each section should be treated as independent. That is, it should be sufficient to show: (i) that the defendant received the benefit in good faith; and (ii) that he altered his position in reliance on having an indefeasible interest in the benefit, or in reliance on the validity of the payment, made or to be made.

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52. Under the Australian common law, B could not prove it relied on its receipt if it acted on an unreasonable belief that the funds were for D: *State Bank of NSW v Swiss Bank Corp* above n 48. See further Bant & Creighton above n 1, 219-220. Contrast the Administration Act 1969 (NZ) s 51, where the defence is only available if the recipient reasonably believed that the *distribution* had been properly made and would not be set aside.
53. The question of whether the defendant's fault in dealing with the benefit affects the defence is discussed further at pp 65-66 below.

There would be no rule as to which must occur first. This interpretation would reflect the policy that it would be equally inequitable to grant relief to the named beneficiary whether he acted before or after receiving the bequest. In each case he would have acted in reliance on his entitlement to receive the benefit, and the value of the benefit received would have been diminished accordingly. It would also correspond with the prevalent view at common law that the change of position can precede reliance.[54]

Some support for the latter view might be found in *Thomas v Houston Corbett & Co*.[55] The defendant paid £840 to the fraudster, Cook, after being told by Cook that a payment of £1 381 had been made to his (the defendant's) account. It seems that in fact the £1 381 was probably not paid into the defendant's account until later on the same day.[56] Even so, the New Zealand Court of Appeal found that the defendant had paid £840 to Cook in reliance on the validity of the payment of the £1 381. McGregor J treated the issue in a way that suggests that the defence might be generally available where the defendant acts in reliance on an anticipated receipt:

> Apart from the £1 381 received *or to be received*, the appellant had insufficient funds to his credit with the bank to meet the cheque for £840. The cheque was handed to Cook on his assurance that £1 381 was paid *or was being paid* to the appellant's bank. In my opinion this £840 was given to Cook in reliance on the payment and its validity.[57]

Indeed, it is arguable that, on the merits, the outcome should be the same whether Cook had paid £1 381 into the defendant's account before the defendant handed over his cheque or on the following day.[58]

However, the decision may be of more limited significance. It might be confined to cases where the defendant acted in the belief that the payment had been made, even if in fact it had not been. This interpretation is still difficult to reconcile with the

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54. *Dextra Bank & Trust Company Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193. See E Bant & P Creighton 'Mistake of Fact and Change of Position: Sound Advice from the Privy Council?' (2002) 2 OUCLJ 271. Contrast *South Tyneside MBC v Svenska International plc* [1995] 1 All ER 545. See also *Philip Collins v Davis* above n 43, 827; *Nangeela* above n 33, Richardson J 5.
55. Above n 51. *Re Island Bay Masonry Ltd* (1998) 8 NZCLC 261, discussed by Watts above n 13, 39-40, is another possible example. Watts notes that the approach taken by Gallen ACJ 'essentially treats the transaction as one composite transaction. It is a version of the running account principle'.
56. Above n 51, North P 164.
57. Ibid, 176 (emphasis added). North P 164 merely stated that he was not deterred from finding the defendant relied on the payment by the fact that the defendant may have paid over £840 a few hours before £1 381 was paid into his account: ibid, 164.
58. Nolan above n 40, 163-170; P Key 'Change of Position' [1995] 58 MLR 505, 513; P Birks 'Overview: Tracing, Claiming and Defences' in P Birks (ed) *Laundering and Tracing* above n 40, 328-329.

view that the conditions are sequential. Alternatively, it can be viewed as a case where the receipt and the act in reliance were virtually simultaneous,[59] so that the issue of anticipatory receipt did not truly arise.

THE INTERESTS TO BE CONSIDERED BY THE COURT

Once the defendant has established the prerequisites for the defence, the court must assess whether it would be inequitable to grant relief, in part or in whole, against the defendant. The test to be applied is not one of 'fairness' at large. It is whether the defendant has 'so altered his position ... that ... it is inequitable to grant relief'. Any assessment of whether it would be inequitable to grant relief quite naturally tends to focus on the potential impact upon the defendant. However, granting relief might also have implications for those third parties who would be affected by a successful claim against the defendant. Recognising this, both statutory versions of the defence in Western Australia require the court to have regard to the implications for other persons in assessing whether it would be inequitable to grant relief. While it is quite consistent with equitable principle to consider the interests of third parties when determining the appropriate relief as between plaintiff and defendant,[60] the language used in each section to identify the relevant interests to be considered might easily be a source of confusion or even contradiction.

In section 65(8), the court is required to take into account the implications for 'the trustee [who made the wrongful distribution] and other persons'. Clearly, a decision to allow the defence to the recipient of wrongly distributed funds may affect the trustee: a claim against the recipient which is partly or wholly unsuccessful may well exhaust the 'other remedies' available to the plaintiff, and so permit the plaintiff to pursue its remedy against the trustee.[61]

It is not entirely clear who the 'other persons' would be. On one view, 'other persons' could mean anyone other than the trustee, including both the plaintiff and the defendant and other persons affected by an order for relief. This would be consistent with the intention that the court should –

> weigh the hardship of the plaintiff, through withholding part of the relief, against the hardship to the defendant by requiring him to make repayment in full as well as any hardship occasioned to other persons who might have been affected.[62]

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59. *Thomas v Houston Corbett* above n 51, McGregor J 176.
60. See eg *Giumelli v Giumelli* (1999) 196 CLR 101; *Nelson v Nelson* (1995) 184 CLR 538.
61. Trustees Act 1962 (WA) s 65(7)(b).
62. Mr H Guthrie MLA 'Comments on the Amendments to the Law Reform (Property Perpetuities and Succession) Bill' (WALRC, undated). See also WALRC *Report on the Law of Trusts* (c 1962) 26, 56-57, 67-68, 139-140.

However, this interpretation would create an inconsistency with section 125(1). As originally drafted,[63] it directed the court to have regard to all possible implications in respect of 'the parties to the payment and ... other persons'. However, while the Bill was still in Committee,[64] the clause was amended to read that the court should have regard to all implications in respect of 'the parties *(other than the plaintiff or claimant)* to the payment and of other persons acquiring rights or interests through them'. This requires the court to consider the implications for the payer (where that is someone other than the plaintiff or claimant),[65] the defendant and third parties claiming through them, but not the plaintiff. Mr Guthrie MLA, who moved the amendment, stated that it was necessary to bring the section into line with 'a similar section in the trustees legislation'.[66] He further explained that the amendment ensured that the plaintiff was not given 'special privileges' and indicated that 'the persons whose interests are to be defended are the dependants and the beneficiaries'.[67]

Presumably, the amendment was intended to bring section 125(1) into line with section 65(8), there being no other 'similar section in the trustees legislation'. However, if section 65(8) is read so as to allow consideration of the implications for the plaintiff, the amendment to section 125(1) will have failed to achieve that purpose. The consequence would be that a court might face conflicting directions from the legislature. Suppose, for example, that a trustee, acting under a mistake, distributes trust funds to the wrong person who then spends the money. The true beneficiary might sue under section 65 to recover against the recipient. The defendant could rely on both section 65(8) and section 125(1).[68] Under section 65(8), the court would need to consider the implications for the plaintiff in deciding whether to grant relief to the defendant, be precluded from doing so under section 125(1).

This anomaly can be avoided if the relevant considerations are seen as entirely 'defence-sided'. The statutory defences only apply where the court considers that it would be inequitable to *grant* relief to the plaintiff. Presumably, it can never be inequitable to the plaintiff to grant it the relief to which it is prima facie entitled. It might be inequitable to the plaintiff to *deny* it relief, but that is not the statutory criterion. Consequently, section 125(1) directs the court to consider matters that would make it inequitable to grant relief to the plaintiff, including the potential impact on persons (other than the plaintiff and those claiming through the plaintiff) whose interests might be affected if relief were granted. This is not to say that the

63. See Parliamentary Bills 1962 (WA) s 24.
64. *Hansard* (HR) 14 Nov 1962, 2791.
65. Eg a trustee for the plaintiff who mistakenly misapplies the trust funds.
66. *Hansard* above n 64.
67. Ibid.
68. S 125(1) applies to relief whether under s 124 or in equity or otherwise in respect of any payment made under mistake.

plaintiff's position is to be ignored. Ultimately, the arguments supporting the defence must be weighed against the plaintiff's prima facie entitlement to a remedy, to determine whether the defendant has *so* changed its position that it would be inequitable to grant relief. However, there is no place for considering the further implications for the plaintiff if relief is to be denied. So, for example, it should make no difference whether the plaintiff is poor and desperately needs the funds or whether it is a wealthy corporation that could easily sustain the loss.[69] While this approach may not be quite what was originally contemplated by the Law Reform Committee, it at least counters their objection that the amendment would 'nullify the whole purpose of the sub-section'.[70]

It is possible to read section 65(8) consistently with this approach. The direction to have regard to the implications for 'other persons' could be read down so as to exclude the plaintiff and those claiming through the plaintiff, since it could never be inequitable to them to grant relief to the plaintiff. The natural sense of the text suggests that 'other persons' does not include the defendant. Even so, the implications for the defendant must inevitably be considered in determining whether it would be inequitable to grant relief.[71] To this extent, it is possible to achieve consistency of approach between the two statutory defences. However, one apparently unresolvable contradiction would still remain. Where proceedings to recover a mistaken distribution of trust funds are brought by the trustee rather than by the beneficiary, the implications for the trustee must be taken into account under section 65(8) but not under section 125(1), where the implications for the plaintiff are specifically excluded.

ASSESSING THE INEQUITY OF GRANTING RELIEF

Several factors can be identified as potentially relevant to determining whether it would be inequitable to grant relief against the defendant. These include:

(i) the potential impact on the defendant;
(ii) the potential impact on third parties; and
(iii) the relative fault of plaintiff and defendant.

Each of these factors requires further elaboration.

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69. A similar conclusion was reached in relation to the Judicature Act 1908 (NZ) s 94B in *Menzies v Bennett* (unreported) NZ Sup Ct 14 Aug 1969, noted in RJ Sutton 'Case and Comment: More on Money Paid under Mistake' [1970] NZLJ 5.
70. Guthrie above n 62, 2.
71. Similarly, the direction to have regard to the implications for other persons in the Judicature Act 1908 (NZ) s 94B must mean persons other than the defendant, yet there can be no doubt that a court must consider the impact on the defendant of any order in favour of the plaintiff.

Impact on the defendant

As mentioned above, both sections provide that the defendant must have 'so altered his position ... that ... it is inequitable to grant relief.' This suggests that it must be inequitable to grant relief *because of* the change of position. Accordingly, the defendant could not rely on the fact that judgment for the plaintiff would operate harshly because of the defendant's impecunious state, unless that poverty was attributable to the change of position.[72] Nor could the defendant rely on the fact that it had acted innocently throughout, or that the benefit had been conferred entirely due to the fault of the plaintiff. The argument must be that the circumstances and extent of the defendant's change of position make it inequitable to require the defendant to restore to the plaintiff the full value of the benefit received.

Impact on third parties

It appears that the defendant can also rely on the fact that an order against it would be inequitable to third parties whose interests have been affected by the defendant's change of position. Such hardship might be shown, for example, where the defendant relied on the value of the benefit it received to establish its creditworthiness when obtaining an unsecured loan. If the defendant were required to make restitution in full, the creditor's ability to recover on its loan might be prejudiced. A more remote impact might be shown where the defendant has enrolled a child at an expensive school in reliance on the payment. As a result, the child might be said to have 'acquired a right or interest'[73] from the defendant for the purposes of section 125(1). An order that the defendant repay the sum might have adverse implications for the child, in that it might have to leave the school and suffer further disruption to its education. This does not mean that a court would refuse to grant relief on this ground alone; it is merely a factor that the court might take into account.

It might further be argued that where the defendant has relied on the receipt to make a gift to, say, a charity, a court should apply the defence so as to protect the charity from the adverse implications of granting relief against the defendant. After all, if the defendant were required to repay the plaintiff, the defendant might in turn be able to recover its gift to the charity on the ground that it made the gift under a mistake as to its true financial position. If accepted, this argument would erode the

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72. Cf *Scottish Equitable plc v Derby* above n 29. However, in *Menzies v Bennett* above n 69, Beattie J did take into account the defendant's financial hardship in applying the Judicature Amendment Act 1958 (NZ) s 94B.

73. Perhaps as the third party beneficiary under a contract between the defendant and the school: Property Law Act 1969 (WA) s 11.

rule that in order to invoke the defence, the defendant's loss must be irrecoverable.[74]

However, it is difficult to see why the third party donee should be protected in this way. Even a plaintiff that had carelessly made a mistaken payment would seem to have a better claim to the benefit than the donee. If so, then it would not be inequitable for the third party to lose a benefit that was conferred by mistake, unless the third party had itself changed its position in reliance on the gift.

Fault

Having identified the arguments that might show it would be inequitable to award relief, it will be necessary to consider other facts that could show it would *not* be inequitable, despite the change of position. The statutory language does not confine these counter-arguments to the circumstances and extent of the defendant's change of position. Hence, they might well include the extent to which the defendant's fault caused the loss. For example, in New Zealand, the courts have taken the view that it is not inequitable for the defendant to bear a loss which was attributable to its own carelessness. That carelessness might have played a part in bringing about the enrichment in the first place or in causing its subsequent loss. Thus, in *Thomas v Houston Corbett & Co*,[75] the New Zealand Court of Appeal assessed the relative fault of plaintiff and defendant in allowing the plaintiff's employee, Cook, to perpetrate his fraud. Finding that the defendant bore a minor share of the blame, the court reduced by one third the defence otherwise available in respect of the £840 that had been paid to Cook and thereby lost.

Some commentators have objected that consideration of relative fault makes application of the defence too subjective and unpredictable.[76] It would also attribute to fault a wider significance than has been recognised to date in the Australian common law.[77] However, the statutory criterion of whether relief would be 'inequitable' seems sufficiently broad to include consideration of a defendant's culpable contribution to the loss in question. Even so, in our view, two limits should apply if fault is to be assessed. First, the defendant's conduct in dealing with the benefit should be judged according to its own understanding of the terms or basis on which it received the benefit. For example, if the defendant believes that it is entitled to the money, it should not be regarded as being at fault for investing it in a

74. See above p 56.
75. Above n 51.
76. Grantham & Rickett above n 17, 78.
77. In the Australian common law, fault has been treated as relevant only to the issue of the defendant's good faith. See Bant & Creighton above n 1, 224-228, where we have also argued that the common law should be developed consistently with the approach advanced here in relation to the statutory defence.

risky venture.[78] By contrast, if the plaintiff transferred funds to the defendant for the benefit of a third party, the defendant might be unable to rely on the defence if it applied the funds elsewhere.[79] Secondly, the *plaintiff's* fault should not be used to provide the defendant with a defence it would not otherwise have had. To do so would undermine the principle that the plaintiff is not to be denied restitution simply because it was careless in conferring the benefit in the first place.[80]

The defendant's fault, relative to that of the plaintiff, might thus be a ground for denying the defence, even though there has been a change of position. However, this factor should not be viewed in isolation. Even where the defendant is at fault, it might still be inequitable to order the defendant to make full restitution. This may arise, for example, from considering the implications for third parties. For instance, a trustee may have been principally to blame for mistakenly distributing trust funds to the defendant, who should also have realised it was not entitled to receive them. Under section 65(7), the trustee can only be made liable for the loss after remedies against the recipient have been exhausted. In a claim by the true beneficiary against the recipient, the court might allow at least a partial defence to the defendant if it has changed its position, so as to shift at least some of the liability for the loss to the trustee.[81]

APPLICATION OF THE DEFENCE BEYOND CLAIMS IN UNJUST ENRICHMENT

At common law, the defence operates within the law of unjust enrichment. It is controversial whether the defence can also apply to other claims such as those arising from the law of wrongs.[82] For example, if strict personal liability for the unauthorised receipt of trust property is recognised in equity,[83] and if the liability is

78. As in *Gertsch v Atsas* above n 32, where the second defendant invested the money in a business venture which failed.
79. If the defence were denied, the result would be the same as under the Australian common law, although reached by different means. At common law, the defence would be denied on the ground that the defendant has not relied on the receipt: see Bant & Creighton above n 1, 219-220.
80. See Bant & Creighton above n 1, 226.
81. The court is expressly directed to consider the implications for the trustee under s 65(8). In this case, s 125(1) would operate in the same way, as the trustee would be a party to the payment other than the plaintiff or claimant.
82. Birks above n 58, 325-326; C Harpum 'Knowing Receipt: the Need for a New Landmark – Some Reflections' in WR Cornish, R Nolan, J O'Sullivan & G Virgo (eds) *Restitution – Past Present and Future* (Oxford: Hart Publishing, 1998) 250; P Hellwege 'The Scope of Application of Change of Position in the Law of Unjust Enrichment: A Comparative Study' [1999] RLR 92.
83. P Millett 'Tracing the Proceeds of Fraud' (1991) 107 LQR 71; D Nicholls 'Knowing

a response to a wrong committed by the defendant rather than to the defendant's unjust enrichment,[84] the defence would not be available if it applies only to cases of unjust enrichment.

While the resolution of this argument falls outside the scope of this article, it is clear that the denial of the defence in such a case under the general law could produce a conflict with the regime under section 65(8), where the defence is apparently available to the recipient. In any event, the recognition of the defence in the context of section 65(8) may weaken the objection to its availability as a defence to a corresponding claim in equity.

Even if the defence were allowed under the general law in cases of receipt of trust property, some anomalies would remain. It is clear that if a defendant innocently receives a stolen painting and, in reliance on the security of its receipt, gives it away to charity, that change of position will provide no defence to a claim in conversion.[85] However, if the same defendant innocently received the painting under a wrongful distribution by a dishonest trustee and changed its position in precisely the same way, it would have a good defence.

It is also notable that section 65(8) and section 125(1) appear capable of applying to proprietary claims. For example, suppose an executor distributed $100 000 to a charity under a mistaken assumption as to the validity of a testamentary provision. The charity placed the funds in a deposit account. If the funds were still intact when the mistake came to light, the true beneficiaries could assert that the charity held the funds (or, more accurately, its chose in action against the bank for $100 000) on trust for them.[86] Suppose, however, that the charity had, in reliance on the apparent bequest, employed an extra worker, and had paid her $40 000 by the time the mistake was discovered. If the worker's payments had been drawn from the deposit account, the beneficiaries' proprietary claim would be limited to the remaining $60 000 in the account. The question is whether the position would be different if the charity had paid the worker from its current account, leaving the $100 000 in the deposit account. In principle, the beneficiaries could assert their equitable title to the $100 000 in the deposit account. However, it could be argued that it would be inequitable, given the charity's change of position, to grant relief by way of constructive trust over the entire balance. The defence would not depend on denying the beneficiaries' equitable

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Receipt: the Need for a New Landmark' in Cornish et al ibid, 231; *Koorootang Nominees Pty Ltd v ANZ Banking Group Ltd* [1998] 3 VR 16, 105.

84. Swadling argues that the defendant is not enriched because the plaintiff retains the equitable interest in the property. Rather, the defendant is liable for acting inconsistently with the plaintiff's property rights, by analogy with the tort of conversion: see W Swadling 'Some Lessons from the Law of Torts' in P Birks (ed) *The Frontiers of Liability* Vol 1 (Oxford: OUP, 1994) 47; Creighton & Bant above n 5, 220.
85. Sale of Goods Act 1895 (WA) s 21, confirming the common law position.
86. *Re Hallett's Estate* (1880) 13 Ch D 696; *Re Diplock* [1948] Ch 465.

interest in the $100 000; the defendant would merely argue that it would be inequitable to rely on that interest to claim the full amount.[87]

The defence might also operate in a case where the defendant used wrongly distributed trust funds to improve its own property. Even if the plaintiff could prove a quantifiable increase in the value of the property, a court might take the view that it would be inequitable to grant a proprietary remedy in the form of a charge or a constructive trust for a proportionate share in the property, either of which might lead to a forced sale of the property.[88]

It may be that these proprietary claims do not involve the law of unjust enrichment.[89] If the statutory defences are available in such cases, this again demonstrates that they may operate beyond the bounds that are thought to constrict the common law version of the defence.

CONCLUSION

The courts face difficult questions of interpretation in determining the proper scope and application of the Western Australian statutory defences. Amongst the most important of these are whether the statutory provisions oust or supplement the common law in the areas covered, and whose interests are to be weighed in deciding whether it would be inequitable to grant relief against the defendant. Regardless of how those questions are resolved, it can be seen that the statutory defences are in some ways wider and in some ways narrower than the common law. For example, the statutory defences appear to be narrower than the common law in requiring reliance on the validity of the transaction by which the benefit was conferred. By contrast, they may be wider in so far as the court may have regard to the implications for third parties in deciding whether to deny relief to the plaintiff. Indeed, the defence could be used as a means of shifting responsibility for a loss to a third party. Further, the statutory defences may permit greater consideration of the respective fault of the parties than has been recognised to date in the Australian common law. Finally, the breadth of the range of claims against which the defence may be raised suggests that it may not be confined within the law of unjust enrichment, as the common law version is thought to be.

The statutory versions of the defence of change of position will continue to be of interest primarily to those required to apply the law in Western Australia, where they continue to operate in conjunction with the common law. More broadly, the

87. Just as in estoppel cases, where it may be inequitable for the true owner to rely on its title as against a party it has induced to act to its detriment.
88. *Re Diplock* above n 86.
89. *Foskett v McKeown* [2001] AC 102, Lord Browne-Wilkinson 108, Lord Millett 129.

statutory formulations may provide a useful template if and when courts elsewhere attempt a more comprehensive definition of the common law defence than has yet been offered. In the meantime, the wider applications of the statutory versions may provide a fertile source of arguments for parties seeking to extend the scope of the defence at common law.