The Knowing Receipt 'Knowledge' Requirement and Restitution's 'Good Faith' Change of Position Defence: Two Sides of the Same Coin?

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Commentators are divided about whether a claim in unjust enrichment should be available against a recipient of property transferred in breach of trust or breach of fiduciary duty in addition to the traditional claim in knowing receipt. This paper considers the issue from a new angle by focusing on the level of protection offered to recipients under the two competing approaches. A recipient will not be liable in an action for knowing receipt unless she had actual knowledge of the breach that led to the transfer. Similarly, a recipient will not be disqualified from relying on the defence of change of position on the basis that her change of position was not in good faith unless she had actual knowledge of the breach. However, in Australia, a recipient who did not have actual knowledge may nevertheless be liable in an action for unjust enrichment because of circumstances other than the recipient's knowledge that may preclude the operation of the defence of change of position. A conclusion is reached that until the operation of the change of position defence under Australian law has been clarified, recipient liability should not be imposed by way of an unjust enrichment action.

CONCEPTUALLY, personal liability can be imposed on third party recipients of property transferred in breach of fiduciary duty or breach of trust (hereafter referred to as 'misapplied property') by an equitable action of knowing receipt or a claim in unjust enrichment. In *Farah Constructions Pty Limited v Say-Dee Pty Limited* ('*Say-Dee*'),[1] the High Court of Australia stated that recognising a claim of unjust enrichment in these circumstances would tend to nullify the action in knowing receipt[2] and 'bring about an abrupt and violent collision with received principles without any assigned justification'.[3]

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1. (2007) 230 CLR 89.
2. Ibid 157–8.
3. Ibid 158.

Determining the appropriate basis on which to impose recipient liability raises many complex policy issues. If the jurisdiction to correct transfers of misapplied property is too wide, there will be insufficient security of transaction and commercial dealings will be unduly inhibited. This could distort risk allocation and lead to unpalatable economic implications.[4] For example, recipients may become reluctant to spend.[5] Conversely, if the jurisdiction is too narrow, there is a risk that individuals will lose their property in harsh and unfair circumstances.[6]

The equitable action of knowing receipt attempts to balance these competing policy interests by only imposing liability if the recipient is cognisant that she has received misapplied trust property. In contrast, an unjust enrichment claim imposes strict prima facie liability[7] upon the recipient and relies on the availability of defences (in particular, the defence of change of position) to ensure an appropriate balance is struck between security of transaction and the sanctity of property rights.

Part I of this paper provides a brief overview of the *Say-Dee* litigation and explains the actual and potential claims that can be made against third party recipients of misapplied property. Part II considers the wealth of excellent commentary that the issue of recipient liability has generated with a view to ascertaining whether there is consensus on the suitability of allowing a claimant to frame her claim against the recipient in terms of unjust enrichment. As academic and judicial opinions vary widely, a conclusion is reached that the current debate does not definitively resolve this issue. Part III then considers the issue from a new angle. Rather than focusing on historical or conceptual arguments, attention is paid to the level of protection offered to recipients under the two competing approaches.[8] An analysis of the case law suggests that there may not be a significant difference between the standard of fault that the plaintiff is required to show in order to make out a claim in knowing receipt and the standard of fault that disqualifies a defendant from relying on the defence of change of position. Attention is then focused on factors other than the recipient's knowledge of the breach of trust or fiduciary duty that

4. N Kiri, 'Recipient and Accessory Liability: Where Do We Stand Now' (2006) 21 *Journal of International Banking Law and Regulation* 611, 613.
5. This argument is not universally accepted. For example it was raised, but ultimately dismissed in J Martin, 'Recipient Liability after Westdeutsche' [1998] *Conveyancer and Property Lawyer* 13, 19.
6. S Worthington, *Equity* (Oxford: OUP, 2nd edn, 2006) 276; W Blair, 'Secondary Liability of Financial Institutions for the Fraud of Third Parties' (2000) 30 *Hong Kong Law Journal* 74, 74.
7. The orthodox view that unjust enrichment is not a wrong (and that liability is therefore strict, subject to defences) is accepted for the purposes of this paper. However it should be noted that this view is not universally accepted. Some commentators argue that liability for unjust enrichment is in fact based on knowledge. Those who reject the orthodox view draw a distinction between the plaintiff's prima facie right to recover (which arises at the moment of receipt) and the recipient's obligation to make restitution (which is only owed once the recipient has knowledge of the receipt: see, eg, J Tarrant, 'Mistaken Payments: Obligations of a Recipient' (2007) 21(2) *Commercial Law Quarterly* 13; J Tarrant, 'Theft Principle in Private Law' (2006) 80 *Australian Law Journal* 531, 538–9).
8. This issue is given limited consideration in E Bant, *The Change of Position Defence* (Oxford: Hart Publishing, 2009) 200–02.

may lead to a different outcome under an action for knowing receipt versus unjust enrichment. Various scenarios are identified in which a plaintiff may fail in an action for knowing receipt but succeed in a claim for unjust enrichment (because the change of position defence will not be available). This analysis leads to the conclusion that until the operation of the change of position defence has been clarified, recipient liability should not be imposed by way of an unjust enrichment action.

THE *SAY-DEE* LITIGATION

1. The factual background

The facts in the *Say-Dee* litigation were uncomplicated and largely uncontested.[9] In 1998, Say-Dee Pty Ltd ('Say-Dee') and Farah Constructions Pty Ltd ('Farah') formed a joint venture and purchased a property (No 11 Deane St, Burwood) with a view to developing it. Mr Elias (the owner of Farah and experienced real estate developer) was responsible for, amongst other things, managing the development application lodged with the Burwood Council.[10]

The Burwood Council formed the view that the parties' original development proposal should be rejected on the basis that it was too large for the site.[11] The Council also informed Mr Elias that No 11 Deane St should be amalgamated with the adjoining properties in order to ensure that the site's maximum development was achieved.[12] Mr Elias and his wife and two daughters each then entered into a contract for the purchase of one of four units in the building on No 15 Deane Street.[13] Mr Elias also caused a company he controlled (Lesmint Pty Ltd) to purchase No 13 Deane St, Burwood[14] before officially withdrawing the joint venture's second development application.[15]

The parties gave very different accounts of the extent to which Mr Elias disclosed the information he received from the Council. Say-Dee's owners acknowledged that they were informed of the Council's formal refusal but maintained that they had not been informed of the Council's view that amalgamation was necessary to maximise No. 11 Deane Street's development potential.[16] They also acknowledged that Mr Elias told them that he was buying properties in the area, but denied

9. *Farah Construction Pty Ltd v Say-Dee Pty Ltd* [2004] NSWSC 800 (*'Say-Dee (trial)'*) [6].
10. Ibid [13].
11. Ibid [17]. This view was expressed in a report discussed at a Council Committee meeting on 20 June 2000 attended by Mr Elias and on several other occasions throughout the development application process (by way of a report from the Council dated 3 April 2001 (ibid [20]) and in a letter from the Council to Mr Elias dated 12 March 2002: *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309 (*'Say-Dee (COA)'*), [33].
12. *Say-Dee (trial)*, above n 9, [17].
13. Ibid [23].
14. *Say-Dee (COA)*, above n 11, [9].
15. Ibid [34].
16. *Say-Dee (trial)*, above n 9, [27].

that he disclosed that these properties were adjoining to No. 11 Deane Street[17] (although contradictions in affidavit material cast doubt on this assertion).[18] Mr Elias maintained that he informed Say-Dee of the opportunity to acquire these adjoining properties and that Say-Dee indicated that it was not in a position to participate.[19] Say-Dee's financial status at the relevant time was consistent with Mr Elias' evidence.[20]

2. The actual and potential claims

Farah commenced proceedings on 19 March 2003 seeking the appointment of a trustee for sale of No. 11.[21] Say-Dee resisted Farah's action by filing a cross-claim[22] in which Say-Dee claimed that it had an equitable interest in Nos 13 and 15 Deane Street.[23]

Assuming that Mr Elias breached a fiduciary obligation owed to Say-Dee, Australian law currently recognises that personal liability may be imposed on a third party recipient of misapplied property in one of two ways.[24] First, the beneficiary may make a personal claim in equity if the third party received the property with knowledge that it was misapplied property by way of an action in knowing receipt.[25] Second, if the third party knowingly participated in the breach of fiduciary duty or trust, the beneficiary may make a personal, equitable claim against the third party.[26] Australian law recognises a proprietary response to the misapplication of assets commonly referred to as the 'theft principle'. Under the 'theft principle' the beneficiary can assert their equitable proprietary interest against the third party recipient provided the recipient still has the property (or its traceable proceeds) in its possession and is not a bona fide purchaser for value

17. Ibid [34]–[36].
18. Ibid [39]–[48].
19. Ibid, [29]–[33].
20. Ibid [53].
21. This claim was made pursuant to section 66G of the Conveyancing Act 1919 (NSW).
22. In its cross-claim Say-Dee conceded that if its cross-claim failed, the orders sought by Farah must be made (see *Say-Dee (COA),* above n 11, [10]).
23. Originally Say-Dee also claimed an interest in No 20 George St, a property situated at the rear of No 11 Deane St. This property was purchased by Mr Elias, his wife and his two daughters in very similar circumstances to and at the same time as No 15 Deane St. This claim, however, was abandoned at the start of the trial, possibly because No 20 George St was not a site contemplated for amalgamation by the Council: see *Say-Dee,* above n 1, 109.
24. J Dietrich & P Ridge, 'The Receipt of What?: Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment' (2007) 31 *Melbourne University Law Review* 47 provides a very useful overview of the various claims. See also *Koorootang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16, 100.
25. This claim is commonly referred to as the first limb of *Barnes v Addy* (1874) LR9 Ch App 244. For a discussion of the nature of liability for knowing receipt, see C Mitchell & S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford: Hart Publishing, 2010) 115.
26. This claim can also be brought against those who participated in the breach of fiduciary duty but did not receive misapplied property as a result.

without notice.[27] However, as this article focuses on the imposition of personal liability, the property claim based on the 'theft principle' will not be considered in detail.[28]

Say-Dee's cross-claim relied on several of these causes of action. Say-Dee claimed that it was entitled to a remedy against Farah on the basis that its failure to pass on relevant information about the development prospects of No 11 constituted a breach of its fiduciary obligations.[29] Mr Elias was said to have breached fiduciary obligations he personally owed Say-Dee[30] and Lesmint was said to be liable on the basis that it was Mr Elias' alter ego.[31] Say-Dee sought to impose liability on Mr Elias' family members on the basis that they knowingly received trust property.[32] Say-Dee also argued that liability could be imposed on the family members on the basis that they knowingly participated in Farah's breach of fiduciary duty.[33]

3. Reasoning – at trial and in the Court of Appeal

At trial, Palmer J held that there had been no breach of fiduciary duty.[34] As a result, his Honour did not need to consider whether Say-Dee had a claim in knowing receipt.

27. The 'theft principle' was first recognised by the High Court in *Black v S Freedman & Co Ltd* (1910) 12 CLR 105. Under the 'theft principle' stolen money is trust money in the hands of the thief. After the theft, the victim is dispossessed of the stolen funds but retains the right to possession at common law. In equity, the thief's common law possessory title is held on trust for the victim. As Tarrant notes, 'the theft principle creates an equitable property right in favour of the victim in addition to their continuing legal property rights to the [stolen property]': see Tarrant, *Theft Principle in Private Law*, above n 7, 535. This allows the victim to trace the property (or its proceeds) in equity even where the property is now in the possession of a third party (unless, of course, the third party is able to show that she is a bona fide purchaser for value without notice of the trust). For a clear explanation of the theft principle and its application, see Tarrant *Theft Principle in Private Law*, above n 7, J Tarrant, 'Property Rights to Stolen Money' (2005) 32 *University of Western Australia Law Review* 234. For further discussion of the property-based claim, see Mitchell & Watterson, above n 25. For a judicial explanation of the nature of the property-based claim in the context of facts that may raise a knowing receipt claim, see *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 707.
28. Not everyone would classify this third claim as a property-based claim. For example, Edelman and Bant argue that *Black v S Freedman & Co Ltd,* ibid, can be rationalised as unjust enrichment claim: see J Edelman & E Bant, *Unjust Enrichment in Australia* (Melbourne: OUP, 2006) 132–4). They argue that the unjust enrichment analysis of *Black v S Freedman* was approved by Finkelstein J in *Spangaro v Corporate Investment Australia Funds Management Ltd* [2003] FCA 1025.
29. *Say-Dee (COA)* above n 11, [11].
30. *Say-Dee,* above n 1, 140.
31. Ibid. The exact nature of the claim made against Lesmint was never fully articulated.
32. Ibid 140–59.
33. Ibid 159–66.
34. Palmer J was not satisfied that Mr Elias (and therefore Farah) had failed to disclose to Say-Dee the proposed acquisitions of Nos 13 and 15 Deane St. His Honour also found that Say-Dee had declined Mr Elias' invitation to participate in the acquisitions: *Say-Dee (trial)* above n 9, [55]. For the sake of completeness, Palmer J considered whether Farah's fiduciary obligations compelled it to offer Say-Dee the chance to participate in the acquisition and development of the

The Court of Appeal took a markedly different view of the facts.[35] Whilst Tobias JA (with whom Mason P and Giles JA agreed) accepted that Mr Elias had communicated the Council's rejection of the development proposal, his Honour took the view that Mr Elias had failed to convey important and relevant information, namely the Council's view on the need for amalgamation.[36] His Honour held that this failure meant that Say-Dee had not given its informed consent to the acquisitions of the surrounding properties.[37] Farah and Mr Elias were therefore held to have breached fiduciary obligations owed to Say-Dee.[38]

Mr Elias' family members were also found to be liable in the Court of Appeal on the basis of the knowing receipt limb of *Barnes v Addy*.[39] Although Mr Elias' family members had no actual knowledge of Farah's breach of fiduciary duty,[40] knowledge was imputed to them. Tobias JA reasoned that as Mr Elias had acted as their agent in the acquisition of No. 15, they were to be treated as having Mr Elias' knowledge of Farah's breach of fiduciary duties.[41]

Although he was able to bring Say-Dee's claim within the doctrine of knowing receipt (as traditionally understood), Tobias JA went on to consider whether the doctrine was in fact based in unjust enrichment (even though Say-Dee did not conduct its case on this basis).[42]

Despite acknowledging that the authorities favour the proposition that liability under the first limb of *Barnes v Addy* requires some form of knowledge on the part of the recipient,[43] Tobias JA ultimately concluded that it was time to abandon the knowledge requirement. His Honour stated that there was 'no reason why the proverbial bullet should not be bitten'[44] and, in turn, imposed strict restitutionary liability on Mr Elias' family members.[45] In reaching this conclusion, Tobias JA placed particular reliance on Hansen J's judgment in *Koorootang Nominees Pty*

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adjoining properties. Influenced by the terms of the admittedly informal agreement reached by the parties, Palmer J reasoned that as Farah had simply contracted to manage the development of No. 11 Deane St, it was not required to involve Say-Dee in any project that extended beyond the boundaries of No 11 Deane St: [75].

35. J Watson, 'Breach of Fiduciary Duty: Whether Volunteer Who Innocently Receives Property Must Restore It' (2006) 80 *Australian Law Journal* 167, 173.
36. *Say-Dee (COA)* above n 11, [59].
37. Ibid [61].
38. Ibid [198].
39. Above n 25.
40. *Say-Dee (COA)*, above n 11, [211].
41. Ibid [175], [215]–[216].
42. In its appeal submission to the High Court, Say-Dee's counsel conceded that he did not make any submissions on the restitution principle: see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (High Court of Australia) [2006] HCATrans 425.
43. *Say-Dee (COA)*, above n 11, [209].
44. Ibid [232].
45. Tobias JA did not consider whether Lesmint would be liable on this basis, presumably because his Honour believed the knowledge finding against Lesmint was not as contentious as the finding against the family members.

Ltd v Australia and New Zealand Banking Group Ltd,[46] other lower court decisions said to support the approach adopted by Hansen J,[47] the academic writings of Professor Birks, Lord Nicholls[48] and Justice Keith Mason[49] and the lack of direct High Court authority precluding the adoption of such a view.[50] This authority and academic commentary will be discussed in Part II of the paper.

It is important to understand just how hard the Court of Appeal bit down. Rather than simply recognising a new unjust enrichment action, the Court of Appeal held that the equitable action commonly referred to as knowing receipt in fact rested on unjust enrichment principles. In turn, the Court of Appeal took the very bold step of reformulating the knowing receipt action by abandoning the longstanding knowledge requirement (albeit by way of comments that are strictly obiter).[51]

4. Reasoning – High Court

The High Court overturned two key findings of fact made by the Court of Appeal. First, it held that Mr Elias had made sufficient disclosure.[52] Secondly, it held that the Court of Appeal was wrong to reverse the trial judge's finding that Mr Elias offered Say-Dee the opportunity to participate in the purchase of Nos 13 and 15 Deane Street.[53] Based on these findings, the court concluded that there had been no breach of fiduciary duty. The High Court also concluded that, even if there had been a breach of fiduciary duty, Mr Elias' family members would not have been liable on the basis that they knowingly received trust property.[54]

The High Court then levelled severe criticism at the Court of Appeal for reformulating the knowing receipt action, describing the step taken by the Court of

46. Above n 24; see *Say-Dee (COA)* above n 11, [218]–[220].
47. *NIML Ltd v Man Financial Australian Ltd* [2004] VSC 449; *Tara Shire Council v Garner* [2003] 1 Qd R 556; *National Australia Bank v Rusu* [2001] NSWSC 32.
48. *Say-Dee (COA)*, above n 11, [221].
49. See ibid [231].
50. Ibid [232].
51. The High Court noted though that the Court of Appeal's reasoning appears to be offered as an independent ground of the decision, rather than simply as helpful obiter dicta: *Say-Dee*, above n 1, 149.
52. The High Court agreed with the Court of Appeal that Farah, as a fiduciary, was obliged to disclose the Council's view that amalgamation was necessary and the information that Nos 13 and 15 were available for purchase: *Say-Dee*, above n 1, 137. However, unlike the Court of Appeal, the High Court held that both of these pieces of information had been disclosed.
53. *Say-Dee*, ibid 136.
54. It was held that such a remedy could not be granted for two reasons. First, the family members had not received trust property because the information they received was not a recognised form of property: see *Say-Dee*, ibid 143–4. Second, even if Mr Elias was in fact acting as his family members' agent (something which had not been proven in the lower courts), it was not appropriate to impute Mr Elias' knowledge about the Council's attitude and availability of properties suitable for amalgamation to the family members as such information had not been obtained by Mr Elias in his role as agent: see *Say-Dee*, ibid 148.

Appeal as 'a grave error'.[55] Given the radical nature of the step taken by the Court of Appeal, the High Court is correct in finding that this was an inappropriate step for an intermediate court to take,[56] especially when the issue was not pleaded at trial or argued on appeal.[57] The High Court also questioned the use made by the Court of Appeal of earlier decisions said to support the unjust enrichment approach[58] and noted that Professor Birks, the leading proponent of the view accepted by the Court of Appeal, later retracted his opinion.[59] The High Court also noted the Court of Appeal's failure to identify which unjust factor applied on these facts.[60]

The High Court also observed that recognising such an action would tend to nullify the action in knowing receipt[61] and 'bring about an abrupt and violent collision with received principles without any assigned justification.'[62] This suggests that it is unlikely to welcome a strict liability unjust enrichment action against recipients of misapplied property with open arms.[63] In fact, Professor Chambers has argued that the Court of Appeal's decision 'was overturned with such vengeance that it is hard to imagine any Australian court exploring these issues ever again'.[64] Professor Bryan disagrees. He believes that the unjust enrichment approach may yet find favour with the Australian judiciary.[65] It is hoped that this article, by identifying recipients who would be liable under an unjust enrichment claim but not under a knowing receipt claim, can assist courts facing this issue to decide whether an unjust enrichment claim strikes a better balance between security of transaction, the sanctity of property rights and the need to treat trust beneficiaries and recipients of misapplied assets fairly.

55. Ibid 149.
56. Ibid 150–1, 155. There was uncertainty as to whether in giving recognition to the unjust enrichment claim, the Court of Appeal was abandoning the notice requirement for knowing receipt or recognising a new avenue of recovery. Whatever the case, the High Court believed such a step to be inappropriate
57. Ibid 149. This was said to cause injustice to both parties as neither was given the opportunity to put arguments on this issue to the court.
58. Ibid 152–5.
59. Ibid 156–7 citing P Birks, 'Receipt' in P Birks & A Pretto (eds), *Breach of Trust* (Oxford: Hart Publishing, 2002) 213, 223.
60. Ibid 156.
61. Ibid 157–8.
62. Ibid 158.
63. Kirby describes the High Court's decision in *Say-Dee* as 'rather antagonistic towards the introduction of restitutionary remedies': see M Kirby, 'Overcoming Equity's Australian Isolationism' (2009) 3 *Journal of Equity* 1, 17.
64. R Chambers, 'Knowing Receipt: Frozen in Australia' (2007) 2 *Journal of Equity* 40, 49.
65. M Bryan, 'Recipient Liability under the Torrens System: Some Category Errors' in C Rickett & R Grantham, *Structure and Justification in Private Law: Essays for Peter Birks* (Oxford: Hart Publishing, 2008) 339, 359.

THE UNJUST ENRICHMENT DEBATE

Well reasoned arguments can be found both in support of and against[66] the recognition an unjust enrichment claim against recipients of misapplied property. This part considers such arguments with a view to determining whether the arguments resolve the issues under consideration. The more extreme argument that the action of knowing receipt is in fact a claim of unjust enrichment is dealt with first. The less extreme proposition that it is appropriate to recognise an alternative claim based in unjust enrichment is then considered.

1. The true nature of the knowing receipt action

The approach adopted by the Court of Appeal in *Say-Dee* radically altered the existing equitable rules[67] which academics and the judiciary alike have assumed require the claimant to establish that the recipient has acted with some degree of fault (ie knowledge of the breach of trust).[68] In order to accept the approach of the Court of Appeal, it is necessary to accept that all cases to date on the subject have been both wrongly argued and decided.[69] However, several bold academics and judges believe that we should do just that on the basis that doing so would give the law greater coherence and consistency.[70] The leading proponent of such a view was (until he recanted in 2003) unjust enrichment enthusiast Peter Birks.[71] Lord Nicholls has also argued extra-judicially that equity should now follow the law because unjust enrichment provides a better response to the underlying mischief of misappropriated trust assets.[72] Lord Millett, also writing extra-judicially, has also lent his support to this argument.[73]

66. See eg C Rickett & R Grantham, 'Unjust Enrichment – Reason, Place and Content' in Rickett & Grantham, ibid 5, 11.
67. Worthington, above n 6, 183.
68. J Moore, 'Case Note: *Spangaro v Corporate Investment Australia Funds Management Ltd*' (2005) 29 *Melbourne University Law Review* 573, 593.
69. B Strahorn, 'The End of Knowing Receipt? A Riposte to Unjust Enrichment' (2006) 80 *Australian Law Journal* 765, 775; L Smith, 'Unjust Enrichment, Property and the Structure of Trusts' (2000) 116 *Law Quarterly Review* 412, 412 & 430; *Sav-Dee,* above n 1, 158 where the High Court stated that '[i]t is inherent in the Court of Appeal's conclusion that for many decades the courts have misunderstood the tests for satisfying the first limb of *Barnes v Addy*: that is improbable'.
70. K Mason, 'Where has Australian Restitution Law Got To and Where Is It Going?' (2003) 77 *Australian Law Journal* 358, 368.
71. See, eg, P Birks, 'Misdirected Funds: Restitution from the Recipient' [1989] *Lloyd's Maritime and Commercial Law Quarterly* 296.
72. Lord Nicholls, 'Knowing Receipt: The Need for a New Landmark' in W Cornish (ed), *Restitution: Past, Present and Future: Essays in Honour of Gareth Jones* (Oxford: Hart Publishing, 1998) 231, 238.
73. P Millett, 'Tracing the Proceeds of Fraud' (1991) 107 *Law Quarterly Review* 71, 85. See also J Payne, 'Unjust Enrichment, Trusts and Recipient Liability for Unlawful Dividends' (2003) 119 *Law Quarterly Review* 583.

There is also express support for such a view in several modern English cases. In *El Ajou v Dollar Land Holdings*[74] (trial), Millett J (as he then was) expressly stated that knowing receipt could be 'classified as a receipt-based restitutionary claim'.[75] In *Twinsectra Ltd v Yardley* Lord Millet noted the 'powerful academic support for the proposition that liability of the recipient is the same as other cases of restitution'.[76] In *Royal Brunei Airlines Sdn Bhd v Tan,*[77] Lord Nicholls confidently asserted that '[r]ecipient liability is restitution based'.[78] It is also possible to find similar statements made by judges in other common law jurisdictions. In New Zealand, Smellie J made statements to the same effect in *Equiticorp Industries Group v R.*[79] In Australia, Hansen J in *Koorootang v ANZ Banking Group*[80] favoured the view that 'the liability of a recipient of trust property is restitution-based',[81] although his Honour did not decide the case on this basis. In *Tara Shire Council v Garner,*[82] Atkinson J noted the possibility that the first limb in *Barnes v Addy* was a 'restitution-based principle aimed at avoiding injustice'.[83]

However, as the comments referred to in the preceding cases were obiter, proponents of recasting knowing receipt also refer to cases said to have been resolved on the basis of strict, restitutionary liability. Initially, unjust enrichment advocates placed particular reliance on the decision in *Lipkin Gorman v Karpnale Ltd.*[84] In this case, a firm of solicitors was able to recover misappropriated client funds that had been lost by an errant solicitor at the defendant gaming club. As Grantham and Rickett have noted, this case was initially treated as the paradigm illustration of the applicability of unjust enrichment principles to determine recipient liability on the basis of strict liability, subject to defences.[85] Professor Burrows even went as far as to argue that the decision finally gave an 'authoritative blessing' to restitution and unjust enrichment.[86]

Some commentators argue that strict liability was imposed in this case because the plaintiff sought to assert that the property in the recipient's hands was its legal property.[87] As the High Court in *Say-Dee* noted, the first limb of *Barnes v Addy*

74. [1993] 3 All ER 717
75. Ibid 736.
76. [2002] 2 All ER 377, 404. See also *Dubai Aluminum v Salaam* [2003] 2 AC 366, 391.
77. [1995] 3 All ER 97
78. Ibid 103. This comment was referred to in the Australian case of *NAB v Rusu,* above n 47, [43].
79. [1996] 3 NZLR 586, 604.
80. Above n 24.
81. Ibid 105.
82. Above n 47.
83. Ibid 576.
84. [1991] 2 AC 548. The fact that the court considered the availability of the defence of change of position lends support to such an argument: at 577.
85. R Grantham & C Rickett, *Enrichment and Restitution in New Zealand* (Oxford: Hart Publishing, 2000) 280.
86. AS Burrows, *The Law of Restitution* (London: Butterworths, 2nd edn, 2002) 2. See also Nicholls, above n 72, 241.
87. M Halliwell, 'The Underlying Concept of Accessory Liability for Breach of Trust' [1995] *Conveyancer and Property Lawyer* 339, 344; S Hedley, *Restitution: Its Division and Ordering*

was not argued or even mentioned by the House of Lords in *Lipkin Gorman*[88] nor was the precise ground of restitution (ie, the unjust factor) clearly indentified in the judgments.[89] However, the case can be understood as a claim in unjust enrichment. Edelman and Bant argue that the unjust factor was ignorance.[90] Furthermore, much of the discussion of whether the solicitors could trace their property at common law could be viewed as directed toward the question of whether the defendant club had been enriched at the plaintiff's expense.[91]

In any event, even if *Lipkin Gorman* was resolved on the basis of a claim in unjust enrichment, there is nothing in the judgment that suggests a reformulation of the claim of knowing receipt. In *Say-Dee* the High Court of Australia stated that '[t]he restitution basis reflects a mentality in which considerations of ideal taxonomy prevail over a pragmatic approach to legal development'[92] that flies 'in the face of seriously considered dicta'.[93] Thus it seems unlikely that the first limb of *Barnes v Addy* will be reformulated as an unjust enrichment claim, at least in Australia.

2. An additional cause of action based on unjust enrichment

There is more support in the case law and commentary for the proposition that a claim in unjust enrichment should exist alongside the knowing receipt claim. Lord Nicholls has argued that whilst this would definitely be a radical step for the courts to take, equity is not hampered by a fear of innovation.[94] Proponents of this view argue that the action of knowing receipt sets the standard too high[95] and that innocent recipients should be required to repay the windfall they have received.[96]

(London: Butterworths, 2001), 215; W Swadling, 'A Claim in Restitution?' [1996] *Lloyd's Maritime and Commercial Law Quarterly* 63; P Jaffey. 'Two Theories of Unjust Enrichment' in JW Neyers, M McInnes & SGA Pitel (eds), *Understanding Unjust Enrichment* (Oxford: Hart Publishing, 2004) 139; G Virgo, *The Principles of the Law of Restitution* (Oxford: OUP, 1999) 11-17; M Bryan, 'The Liability of the Recipient: Restitution at Common Law or Wrongdoing in Equity' in S Degeling & J Edelman (eds), *Equity in Commercial Law* (Sydney: Law Book Co, 2005) 327, 345; D Sheehan, 'Disentangling Equitable Personal Liability for Receipt and Assistance' [2008] *Restitution Law Review* 41. In *Box v Barclays Bank plc* [1998] Lloyds Rep Bank 185, Ferris J expressly states that the claim in *Lipkin* was exclusively a common law claim. For those confused about why the gaming club was not able to argue that it was a bona fide purchaser for value, it was because the contracts were void under the Gaming Act 1845.

88. Above n 84. See *Say-Dee*, above n 1, 153.
89. Bryan, above n 87, 336.
90. Edelman & Bant, above n 28, 275.
91. As the errant solicitor had the authority to withdraw the funds, he obtained legal title. Hence the plaintiff firm needed to be able to trace its property so that it could be said that the gaming club was enriched at its expense.
92. *Say-Dee*, above n 1, 158.
93. Ibid 159. Strahorn asserts that the argument that a claim in knowing receipt is always a claim in unjust enrichment has largely been abandoned: see Strahorn, above n 69, 775.
94. Nicholls, above n 72, 245.
95. Martin, above n 5, 22.
96. Payne, above n 73, 589; Moore, above n 68, 596; Kiri, above n 4, 614. See also C Harpum, 'The Basis of Equitable Liability' in P Birks, *The Frontiers of Liability* (Oxford: OUP, 1994) 9, 19.

After all, the recipient is only being required to relinquish a gain she was never meant to have.[97] Furthermore, the defences available to the defendant are said to 'ensure fairness'[98] and guard against the possibility of 'too much restitution'.[99]

(a) Arguments against recognising such a cause of action

A person so inclined could describe almost any existing private law claim in terms of unjust enrichment.[100] Although its language is broad and open-ended,[101] in Australia unjust enrichment has only been recognised as a 'unifying legal concept'[102] rather than as a general doctrine.[103] In the language of Professor Jaffey, Australia has accepted the weak (descriptive) theory of unjust enrichment (which asserts the existence of claims that can be explained by the receipt of a benefit) over the strong (normative) theory (which asserts that there is a legal category of unjust enrichment analogous to contract or tort).[104]

There are four essential elements required to establish an unjust enrichment claim.[105] First, the defendant must have received an enrichment. Second, the enrichment so received must have been at the plaintiff's expense. Third, the enrichment must fall within one of the recognised grounds of restitution (the 'unjust factors'). Finally, the defendant must not be able to raise a defence. The expansion of unjust enrichment into the area of recipient liability could be opposed on the basis that the defrauded beneficiary will not be able to make out the second and third elements of the unjust enrichment claim.

The first element that is said to be problematic is the requirement that the beneficiary claimant fit her claim within one of the recognised unjust factors. Under Australian law, whether an enrichment is unjust is determined by reference to well established categories, not a general evaluation of whether it is fair for the recipient to retain the benefits conferred upon her.[106] In *David Securities v Commonwealth Bank of Australia*,[107] the joint judgment noted that such categories depend on the existence of a factor that qualifies or vitiates the claimant's consent.

97. P Birks, *Restitution: The Future* (Sydney: Federation Press, 1992) 42; P Creighton & E Bant, 'Recipient Liability in Western Australia' (2000) 29 *University of Western Australian Law Review* 205, 217.
98. Nicholls, above n 72, 239.
99. P Birks, *Unjust Enrichment* (Oxford: OUP, 2003) 189.
100. Hedley, above n 87, 182.
101. Ibid.
102. *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256.
103. *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; M Bryan, 'Unjust Enrichment and Unconscionability in Australia: A False Dichotomy?' in Neyers, McInnes & Pitel above n 87, 48, 52.
104. Jaffey, above n 87, 141. See also Bryan, above n 87, 327.
105. M Bryan, 'Equity and Restitution' in Patrick Parkinson (ed), *The Principles of Equity* (Sydney: Law Book Co, 2nd edn, 2003) 93, 96; G Jones, *Goff and Jones' Law of Restitution* (London: Sweet & Maxwell, 7th edn, 2007).
106. *Pavey & Matthews v Paul* above n 102, 256–7 (per Deane J). See also *Say-Dee*, above n 1, 156.
107. (1992) 175 CLR 353.

Examples include mistake, duress and illegality.[108] Claims against a recipient of misapplied trust funds do not fall within any of the previously recognised unjust factors.

The Court of Appeal in *Say-Dee* glossed over this requirement, stating that the requirement was satisfied by the fact that the properties had been purchased as a result of Farah's breach of fiduciary duty.[109] This analysis has been described as 'unusual' on the basis that unjust enrichment liability generally arises because the claimant's consent to a transaction has in some way been vitiated.[110] It is for this reason that the High Court doubted that Say-Dee's claim fell within one of the unjust factors.[111]

Some argue that ignorance should be recognised as an unjust factor. Although acknowledging that the courts are yet to recognise ignorance as an unjust factor,[112] Burrows argues that the analogies between ignorance and other recognised factors such as mistake, duress and failure of consideration are so strong that ignorance should be recognised as an unjust factor.[113] For a long time, Birks argued along similar lines, noting that if mistake is recognised as an unjust factor because the plaintiff's intention is impaired then surely ignorance should be recognised as an unjust factor as in such cases the plaintiff's intention is wholly absent.[114] Grantham and Rickett, who clearly would prefer to see such issues left to the realm of property law, contend that the analogy with mistake is false because the effect at law of a mistake and ignorance are different.[115] A mistake does not prevent title passing whereas ignorance does.[116] Furthermore, the High Court's observation in *Say-Dee* that '[n]o case, even in England, has treated ignorance as a reason for restitution'[117] suggests that courts (at least in Australia) may resist the type of incremental development of the law advocated by the likes of Burrows.[118]

108. Ibid 379.
109. *Say-Dee (COA),* above n 11, [222]. See also James Edelman, 'A Principled Approach to Unauthorised Receipt of Trust Property' (2006) 122 *Law Quarterly Review* 174, 177.
110. Strahorn, above n 69, 769.
111. *Say-Dee,* above n 1, 158–9.
112. Burrows, above n 86, 182.
113. Ibid 184.
114. P Birks, *An Introduction to the Law of Restitution* (Oxford: OUP, 1985) 141. Birks subsequently abandoned the idea of 'unjust factors' altogether in favour of the more general ground that there by no explanatory basis for the defendant's enrichment, an approach favoured in civilian systems and in Canada.
115. Grantham & Rickett, above n 85, 17. Grantham and Rickett also assert that to recognise ignorance as an unjust factor would place considerable strains on coherence of unjust enrichment law.
116. Ibid 271. In making this argument, Grantham and Rickett place considerable reliance on Denning J's judgment in *Nelson v Larholt* [1948] 1 KB 339, 342–3.
117. *Say-Dee,* above n 1, 159. Cf Edelman & Bant, above n 28, 273 where an argument is developed that the English cases of *Holiday v Sigil* (1826) 2 C & P 176; 172 ER 81, *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775 and *Barros Mattos Junior v Macdaniels Ltd* [2005] 1 WLR 247 recognised 'ignorance' as an unjust factor. Edelman and Bant also assert (at 274–5) that the unjust factor in *Lipkin Gorman v Karpnale Ltd,* above n 84, was ignorance.
118. Cf Hansen J's suggestion in *Koorootang,* above n 24, 100 that ignorance could constitute an unjust factor.

The second element said to prove problematic for the beneficiary claimant is the 'at the expense of the plaintiff' requirement. This element is said to be essential to an unjust enrichment claim because it provides the link between the defendant and the plaintiff.[119] Smith argues that claims based on receipt of trust property must be title-based rather than based on unjust enrichment.[120] In support of his argument, Smith notes that advocates of the unjust enrichment approach often ignore an essential fact, namely the existence of the trust.[121] In turn, he has argued that a recipient of misapplied trust funds cannot be unjustly enriched at the expense of the claimant because the recipient receives a different title to the misapplied property than that held by the beneficiary claimant.[122]

Birks has argued that 'wealth should be protected to precisely the same extent whether it is held at law or in equity behind the curtain of a trust'.[123] Birks believes such an approach is appropriate because, inevitably, the beneficiary claimant would have received the property. Burrows shares this opinion.[124] However, these arguments dismiss as unimportant a distinction which is a fundamental part of our law.[125] As Worthington has noted, there are cardinal differences between equitable and common law rights.[126] This is not to say that Birks' argument should necessarily be rejected. For example, it may be possible to employ principles of tracing to overcome this problem while at the same time maintaining the integrity of the trust. However, this should only be done if there are compelling reasons for preferring the unjust enrichment approach over the traditional claim for knowing receipt.

Finally, the fact that the unjust enrichment approach effectively shifts the burden of proof (by requiring the defendant to prevent prima facie strict liability by proving the applicability of the change of position defence) needs to be considered. This is because it raises the possibility that allowing a claim in unjust enrichment to be brought alongside a claim for knowing receipt will, in practice, nullify the claim for knowing receipt. As the High Court asked in *Say-Dee,* 'what plaintiff

119. Moore, above n 68, 590.
120. Smith, above n 69, 429.
121. Worthington, above n 6, describes this as an essential flaw in the argument that an unjust enrichment claim can be made against a recipient of misapplied trust funds.
122. It is important to remember that Smith's argument does not apply to recipient liability generally: Bryan, above n 87, 339–40. Bryan notes that Smith himself acknowledges this (at 341). This is because some fiduciary relationships, such as the relationship between a fiduciary agent and her principal, are not premised on a separation of legal title from equitable title. In *Port of Brisbane Corporation v ANZ Securities Limited (No 2)* [2003] 2 QD R 661, McPherson JA acknowledges the possibility that this argument could defeat a claim in unjust enrichment: at 670.
123. Birks, above n 59, 214. Birks supports this argument by noting that the creation of equitable interests is becoming more common in the commercial world.
124. Burrows, above n 86, 190.
125. Before discarding the important and long standing distinction between legal and equitable interests we should ensure that the response offered by the restitutionary action is preferable to that offered by the equitable doctrine of knowing receipt. This issue is the focus of the final part of this paper.
126. Worthington, above n 6, 185.

would wish to take on the burden of showing that the defendant had notice [an element of the knowing receipt claim] ... if, by reliance on the [unjust enrichment claim], that burden could be escaped and a contrary and even more onerous burden placed on the defendant?'[127] Furthermore, concerns have been expressed about the appropriateness of placing the burden of proof on the recipient.[128] Some argue that, as between the beneficiary and the recipient, the benefit of the doubt should lie with the former,[129] presumably on the basis that the burden of proof can quite often be determinative.[130] Others argue that shifting the burden of proof can be viewed as a virtue of the unjust enrichment approach as it relieves the evidential burdens placed on the victim of misappropriation and places it on the recipient, who is likely to be better able to prove her own state of mind than the claimant.[131] Based on comments made in *Say-Dee,* it seems that the High Court does not accept that the placing of the burden of proof on the recipient is a virtue of the unjust enrichment approach.[132]

(b) Arguments in support of recognition of such a cause of action

The Court of Appeal in *Say-Dee* cited the writings of Lord Nicholls in support of the argument that a cause of action based in unjust enrichment provides a better tailored response to 'the underlying mischief of misplaced property'.[133] This argument appears to be based on a belief that undeserving recipients may escape liability under an action for knowing receipt and that the defences that apply to unjust enrichment claims adequately protect recipients from unfair demands from a defrauded beneficiary. Furthermore, the unjust enrichment approach is able to reverse what would otherwise be an unjust enrichment in a manner preferable to the all-or-nothing approach of knowing receipt.

The argument for strict liability is also said to rest on authority.[134] Particular reliance has been placed on the decision of *Re Diplock*[135] in which strict liability was imposed on the recipient of wrongful payments made by an executor. As the claim in *Diplock* was not brought by trust beneficiaries, it is inaccurate to say that *Diplock* shows that a trust beneficiary can recover against the recipient of misapplied property on a strict basis.[136] However, establishing that *Diplock* is not authority for the proposition that an unjust enrichment claim can be made against a recipient of misapplied trust funds does not establish that the law should not

127. *Say-Dee,* above n 1, 157–8.
128. Dietrich & Ridge, above n 24, 82–3.
129. Ibid 83.
130. P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) *Univeristy of Western Australian Law Review* 1, 72.
131. Kiri, above n 4, 614.
132. A similar view was expressed by Nourse LJ in *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2000] 4 All ER 221, 236.
133 *Say-Dee (COA),* above n 11, [221], citing Nicholls, above n 72, 238.
134. Smith, above n 69, 437.
135. *Ministry of Health v Simpson* [1951] AC 521.
136. Smith, above n 69, 437.

be developed in that direction.[137] Lord Nicholls has argued extra-judicially that there is no basis on which to limit the availability of the strict liability action to misapplied estate property.[138] Professor Birks and Lord Nicholls have also argued that the *Diplock* rationale is equally applicable inter vivos[139] and Burrows has argued that the 'best way for the law to develop would be for [*Diplock*] to lose its fringe identity and to become the lead player obviating the need for knowing receipt'.[140] Worthington counters such arguments by noting that different principles should apply to trusts and estates and that in balancing the rights of the beneficiary and the recipient, it is important to bear in mind that the beneficiary has made a choice to vest legal interest in the trustee.[141]

Professor Martin has argued that '[t]he older cases on innocent volunteers have not been framed in terms of restitution or unjust enrichment, but that is the analysis of the present and the future'.[142] There appears to be some truth to Martin's prediction. Tobias JA in *Say-Dee* cited a series of cases he believed demonstrated the increased acceptance of the unjust enrichment approach in Australian law. His Honour referred to comments made by Harper J in *NIML Ltd v Man Financial Australian Ltd*[143] and Bryson J in *National Australia Bank Ltd v Rusu*[144] which suggested that a claim in 'knowing receipt' required the claimant to prove either that the recipient had constructive knowledge or that the claimant was unjustly enriched. Tobias JA also referred to a similar statement of Atkinson J in *Tara Shire Council v Garner*.[145] Thus, it seems that there is some support for the proposition that recipient liability can be imposed by way of a strict liability action.

3. Should a claim in unjust enrichment lie against the recipient of misapplied assets?

The above discussion suggests that although there are some obstacles in the way of imposing strict liability on recipients of misapplied trust funds by way of an action in unjust enrichment, the law could be changed so as to recognise such

137. Mason, above n 70, 367; Martin, above n 5, 22.
138. Nicholls, above n 72, 240–1.
139. P Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] *New Zealand Law Review* 623, 651. Birks has also argued that it is difficult to reconcile the harsh treatment of the hospital in *Re Diplock* with the leniency shown to the Duke in *Re Montagu's Settlement Trusts: Duke of Manchester v National Westminster Bank Ltd* [1987] Ch 264.
140. Burrows, above n 86, 204.
141. Worthington, above n 6, 185. The Earl of Halsbury made comments to this effect in *Lloyd v Grace, Smith & Co* [1912] AC 716, 727. See also *Mercedes Benz (NSW) Pty Ltd v ANZ and National Mutual Royal Savings Bank Ltd* (unreported, NSW Sup Ct, 5 May 1992).
142. Martin, above n 5, 21.
143. Above n 47, [53].
144. Above n 47.
145. Above n 47, 576. Atkinson J noted that a possible basis for the lack of a dishonesty requirement under the first limb of *Barnes v Addy* could be that it is a restitution-based principle. However, her Honour did not seem to contemplate the possibility that the knowledge requirement should be abandoned.

an action. On balance, it appears that the arguments against recognising such an action are slightly stronger. Although ignorance could be recognised as a new unjust factor by a process of reasoning familiar to the courts, Birks' suggested solution to the problem raised by the 'at the expense of the plaintiff' requirement, which involves ignoring the longstanding distinction between legal and equitable interests, would involve making a fundamental change to our law. Before taking such a drastic step, it is important to put the historical and conceptual arguments to one side and determine whether there is any merit to the view that the action for unjust enrichment is better able to balance the rights of claimants and recipients. The final part of this paper focuses on precisely this question.

WHO WOULD FACE LIABILITY IF A CLAIM IN UNJUST ENRICHMENT WERE ALLOWED AGAINST RECIPIENTS OF MISAPPLIED ASSETS?

A common objection to the imposition of recipient liability by way of an unjust enrichment claim is that because liability is not triggered by knowledge, the claim imposes strict liability on the recipient. However, it is important to bear in mind that strict liability does not mean invariable liability as there are many defences available to the defendant. As Birks has argued, a defendant who is found liable in an action for unjust enrichment does not truly have strict liability imposed upon her because her inability to avail herself of one of the defences supposes some degree of fault.[146] This observation has led some to argue that the outcome in most cases decided on the basis of the traditional understanding of the 'knowing receipt' action would have been the same if a claim of unjust enrichment had been brought.[147] For example, Harpum is of the opinion that 'the requirement of fault has, in a crude and oblique way, achieved an approximation to a defence of change of position'.[148] Some judges have also treated a finding that the defendant did not knowingly receive assets as establishing that the defendant acted in good faith for the purposes of the change of position defence.[149] However, Smith has argued that '[a]lthough there may be no difference in the classroom between fault-based liability and strict liability with defences, there is a great difference in the courtroom'.[150] Unfortunately, Smith does not elaborate. Instead, he simply refers to Birks' observation that the burden of proof can quite often be determinative.[151]

146. P Birks, 'Misdirected Funds' (1989) 105 *Law Quarterly Review* 352, 353. See also Harpum, above n 96, 24.
147. Moore, above n 68, 596.
148. Harpum, above n 96, 20. At 21, Harpum acknowledges that the knowledge requirement in the action for knowing receipt is not exactly conterminous with a defence of change of position. For example, there is no enquiry as to why the volunteer made dispositions of trust property before she was fixed with notice of the trust.
149. See eg *Gertsch v Atsas* [1999] NSWSC 898, [67], [127].
150. Smith, above n 69, 434.
151. See Birks, above n 130, 72.

This part of the paper begins by examining the manner in which the courts determine whether a defendant knowingly receives misapplied assets. The relevance of the defendant's knowledge to the availability of the defence of change of position is then considered, with a view to ascertaining whether there is any truth to the argument that unjust enrichment liability would 'largely mirror equity's fault-based liability'.[152]

1. Standard of fault required to make out a claim in 'knowing receipt'

The cases are far from unanimous as to the level of knowledge the recipient must be shown to have in order for a claim of knowing receipt to succeed.[153] Grantham and Rickett have stated that doctrinal confusion about the standard of knowledge required means that it is not possible to reconcile the various authorities.[154] In fact, Worthington's observation that there are cases to support every imaginable position appears to most accurately summarise the existing case law.[155] Lord Nicholls believes that the inconsistency in approach can be explained by the widely ranging circumstances in which knowing receipt claims are made, the range of conduct challenged by knowing receipt claims, the desirability of promoting speedy transactions in business and the fact that the recipient may or may not still be in possession of the misapplied property.[156]

Before discussing the authorities, it is important to define three broad fault standards commonly used by the courts. The narrowest of these standards is the actual knowledge standard. Under this standard, the recipient has knowledge that she has received misapplied trust funds if she actually knew this to be the case or if she would have so known if she had not shut her eyes to the obvious or wilfully and recklessly failed to make enquiries that an honest and reasonable person would have made. The next standard is the constructive knowledge standard. This standard includes actual knowledge and knowledge of circumstances that would indicate the facts to an honest and reasonable person. It captures a subjectively honest recipient whose failure to recognise impropriety is egregious. Finally, there is the constructive notice standard, which includes constructive knowledge and knowledge of circumstances which would put an honest and reasonable person on inquiry. This class of fault is analogous to mere negligence.

152. Dietrich & Ridge acknowledge that this is a simplified account: above n 24, 63.
153. Grantham & Rickett, above n 85, 288.
154. Ibid, 287.
155. Worthington, above n 6, 181; Nicholls, above n 72, 241; *Say-Dee (COA)*, above n 11, [209].
156. Nicholls, *ibid* 242.

(a) English authorities

The early English authorities required actual knowledge. In *Re Blundell*,[157] Stirling J rejected the notion that a mere suspicion or intimation that something is wrong in the administration of the trust would be sufficient to satisfy the knowledge requirement.[158] In *Re Eyre-Williams*[159] Romer J also required the claimant to show that the recipient acted with a want of probity (which his Honour held required the recipient to have actual knowledge).[160]

However, in the middle of the 20th century the constructive notice standard found favour.[161] In *Nelson v Larholt*[162] Denning J applied the constructive notice standard and imposed liability on a recipient bookmaker on the basis that he was put on enquiry by the forged cheque provided to him by a fraudulent executor.[163] By the late 1970s, the courts began adopting the constructive knowledge standard. For example, in *Belmont Finance Corp v Williams Furniture*[164] the Court of Appeal believed that it was appropriate to impose liability on the basis that the recipient had knowledge of all the facts which made the transaction a breach of trust, even though the recipient has a genuine belief in the propriety of the transaction. A very similar approach was adopted again by the Court of Appeal in *Rolled Steel Products (Holdings) v British Steel Corporation.*[165]

There was yet another change in judicial approach in the mid-1980s. Megarry VC's judgment in *Re Montagu*[166] emphasised that the essential question in a knowing receipt claim is whether the conscience of the recipient was sufficiently affected to justify the imposition of a constructive trust.[167] This saw a consequent return to the want of probity approach. Megarry VC thought that his approach was more consistent with the current tendency in equity to put less emphasis on detailed rules (such as the rules about knowledge) and more weight on the principles underlying those rules.[168] Megarry VC expressed considerable doubts as to whether it was appropriate to apply the 'cold calculus'[169] of the property law notion of notice in the context of a claim for knowing receipt, noting that in the event that a constructive trust could not be imposed on the basis of knowing receipt, a proprietary based

157. (1889) 40 Ch D 370.
158. Ibid 382.
159. [1923] 2 Ch 533.
160. Ibid 539.
161. This trend appears to have begun with *Reckitt v Barnett, Pembroke and Slater* [1929] AC 176.
162. Above n 116.
163. Ibid 343.
164. [1979] Ch 250.
165. [1986] Ch 246. See also *International Sales and Agencies Ltd v Marcus* (1982) 3 All ER 551.
166. Above n 139.
167. Ibid 277.
168. Ibid 278.
169. Ibid 273.

claim could still be made (provided, of course, the misapplied assets, or their traceable proceeds, were still in the hands of the recipient).[170]

The approach adopted in *Re Montagu* was not immediately welcomed with open arms. For example, Millet J in *Agip (Africa) Ltd v Jackson*[171] questioned the approach adopted by Megarry VC and at one point stated that actual or constructive knowledge would suffice,[172] although his Lordship has since resiled from this position (albeit extra-judicially).[173] In *Eagle Trust Securities v SBC Securities*,[174] Vinelott J accepted that actual knowledge was required and noted the frequent judicial warnings about the danger of extending concepts of constructive notice beyond the bounds of property transactions.[175]

Several years later the test was refined once more, although in a manner consistent with the approach adopted in *Re Montagu*. In *Bank of Credit & Commerce International (Overseas) Ltd v Akindele*[176] the Court of Appeal noted that although decisions such as *Rolled Steel* and *Belmont Finance* could be viewed as providing strong support for the view that constructive knowledge would suffice, it was of interest that liability in both of those cases did not depend on a finding of constructive knowledge (because in both cases the recipient was held to have possessed actual knowledge).[177] Nourse LJ supported Megarry VC's focus on the principles underlying knowing receipt liability and ultimately found that the recipient must have a state of knowledge that makes it unconscionable for her to retain the benefit of the receipt. Burrows has suggested that the implication is that the test allows for the state of knowledge required to vary according to the context, although he has grave concerns about the test's ability to operate as a sensible and certain benchmark.[178] It is submitted that this test will generally require the plaintiff to establish that the defendant had actual knowledge. Negligence or failure to make reasonable enquiries is unlikely to be viewed by the courts as unconscionable behaviour.

(b) Australian authorities

As noted in *Koorootang*, there is a 'surprising dearth of authority in Australia' regarding knowing receipt.[179] Stephen J's judgment in the knowing assistance case

170. Ibid 272.
171. [1990] Ch 265
172. Ibid 291, Millet J stated that a recipient is liable if her receives misappropriated trust funds with actual or constructive notice of the breach of trust. See also *Houghton v Fayers* [2000] 1 BCLC 511, 516.
173. Millet, above n 73, 85.
174. [1993] 1 WLR 484.
175. Ibid 506.
176. Above n 132.
177. Ibid 232.
178. Burrows, above n 86, 201.
179. *Koorootang*, above n 24, 94.

of *Consul Development Pty Limited v DPC Estates Pty Limited*[180] provides a useful starting point. In that case the High Court held that a claim for knowing assistance will not succeed unless the claimant is able to establish that the defendant acted dishonestly. Stephen J then stated that it was not clear to him why the knowledge requirement should be different under the two limbs of *Barnes v Addy*.[181] This suggests that Stephen J would require the claimant in a knowing recipient case to prove actual knowledge. However, as knowing receipt was not at issue in this case, it would be unwise to rely too heavily on Stephen J's comments.

In *Koorootang,* Hansen J spent considerable time considering the nature of the knowledge requirement in a knowing receipt claim. Because of the lack of Australian authority, Hansen J considered the English authorities discussed above. In particular, he noted that *Belmont Finance* and *Rolled Steel* suggest that actual knowledge is not a necessary element of recipient liability.[182] Hansen J distinguished *Re Montagu* on the basis that the case before him involved a transaction that excites investigation as to the title of the asset.[183]

Hansen J then discussed the few Australian decisions that have been handed down, most of which have followed the approach adopted in *Belmont Finance*.[184] Ultimately, Hansen J adopted the constructive knowledge standard.[185] The approach in *Koorootang* was adopted by Anderson J in *Hancock Family Memorial Foundation v Porteous*.[186] In *Lurgi (Australia) Pty Ltd v Gratz*[187] Byrne J (who like Hansen J saw merit in the argument that recipient liability is based on a claim of unjust enrichment) was of the opinion that it may be appropriate to adopt an even broader knowledge test (presumably constructive notice).[188] Atkinson J in *Tara Shire Council*[189] applied the constructive knowledge test[190] as did Foster JA in *Gertsch v Atsas*.[191]

As most Australian cases on the topic have consistently followed the constructive knowledge test employed by Hansen J in *Koorootang*, it is tempting to assert that Australian law has settled on constructive knowledge as the appropriate threshold of liability in knowing receipt cases. However, as the issue is yet to be resolved by the High Court, any such statement would be premature.

180. (1975) 132 CLR 373.
181. Ibid 410.
182. *Koorootang,* above n 24, 83.
183. Ibid 88.
184. See eg *Ninety Five Pty Ltd v Banque Nationale de Paris* [1988] WAR 132, 173–4; *Linter Group Ltd (in liq) v Goldberg* (1992) 7 ACSR 580.
185. *Koorootang,* above n 24, 105.
186. (1999) 151 FLR 191.
187. [2000] VSC 278.
188. His Honour adopted the constructive knowledge test in the context of knowing assistance, and stated that a broader knowledge requirement may apply in knowing assistance claims : ibid [75].
189. Above n 47.
190. Ibid 580.
191. Above n 149, [42].

(c) The need to understand the rationale of the knowing receipt claim

The appropriate scope of the knowledge standard should ultimately be determined by considering the rationale of the knowing receipt claim.[192] For example, those who believe a claim in knowing receipt rests on the vindication of the plaintiff's equitable property rights are generally quite comfortable with imposing liability on a recipient who only has constructive knowledge.[193] If, on the other hand, the action is viewed as a wrong or based in conscience, employing the standard of constructive knowledge seems quite inappropriate.[194] A failure to be vigilant and make enquiries cannot properly be viewed as a wrong on the part of the recipient or against the recipient's conscience. Finally, if the action is regarded simply as a response to unjust enrichment, the state of the defendant's knowledge is not relevant to determining whether the defendant is prima facie liable.

Although older cases suggest that equitable liability in knowing receipt is imposed on the basis that the defendant was complicit in wrongdoing,[195] modern decisions tend to take the view that equity imposes liability for knowing receipt where the recipient cannot conscientiously retain those funds. This point was made very clearly in *Re Montagu*.[196] As noted above, Megarry VC was also of the opinion that the knowledge enquiry, while useful, is primarily an aid used to determine whether or not the recipient's conscience was sufficiently affected so as to justify the imposition of a constructive trust.[197] Similar observations have been made in other cases. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,[198] Lord Browne-Wilkinson stressed that personal liability in equity was dependent upon the conscience of the defendant being affected.[199] Megarry VC's comments were also adopted by Nourse LJ in *Akindele*.[200] This conceptualisation of the action in knowing receipt is also evidenced in Australian cases. In *Darkinjung Pty Ltd v Darkinjung Local Aboriginal Land Council*,[201] Barrett J noted that 'equity is concerned in a "knowing receipt" case with the state of the recipient's conscience'.[202] Megarry VC's comments were also referred to in *NIML Ltd v Man Financial Australia Ltd*.[203] Furthermore, despite holding that

192. Nicholls, above n 72, 236; Mason, above n 70, 365. See also *Koorootang* above n 24, 100.
193. See eg Grantham & Rickett, above n 85, 285, 288; Mason, above n 70, 365.
194. Grantham & Rickett, ibid 285.
195. Worthington, above n 6, 181. Cf *Soar v Ashwell* [1893] 2 QB 390, 396.
196. *Re Montagu*, above n 139, 285.
197. Ibid 279.
198. [1996] AC 669.
199. Ibid 987.
200. Above n 132, 235. See also *Johnathan v Tilley* (unreported, UKCA, 30 Jun 1995).
201. [2006] NSWSC 1217.
202. Ibid [43]. Barrett J strangely linked this to a discussion of whether the claimant was able to establish that the claim fell within one of the unjust factors. This provides a good example of the confusion, even amongst the judiciary, about the distinction between the various forms of personal recipient liability.
203. Above n 47, [61].

constructive knowledge would suffice, Hansen J in *Koorootang*[204] described the traditional form of the knowing receipt action as the 'conscience approach'.[205]

The courts of equity also appear to have been mindful that imposing liability for knowing receipt on those without actual knowledge could have the effect of paralysing trade.[206] This concern, coupled with the modern understanding of the knowing receipt action as resting on the conscience of the defendant, provides a very strong argument for limiting the imposition of liability to those recipients who had actual knowledge that they were receiving misapplied trust funds. There is also support for the requirement of actual knowledge in the academic community.[207] Worthington has argued that 'third party "knowing recipient" must be just that – knowing', especially when you consider that if the action is successful the recipient will be made personally liable as a constructive trustee.[208] Grantham and Rickett argue that actual knowledge is the appropriate standard for knowing receipt liability and Evans has noted that the imposition of a constructive trust is a 'grave step', suggesting that actual knowledge should be required.[209]

The above discussion demonstrates that liability is only imposed on the recipient to the extent that her conscience is affected. As one's conscience is normally only affected by actual knowledge,[210] the action of knowing receipt should only be made out if the plaintiff can establish that the recipient had actual knowledge that the assets she received were misapplied trust funds. Requiring actual knowledge is also consistent with *Barnes v Addy* itself. In that case James LJ expressed the opinion that imposing liability on honest but injudicious persons goes to the very verge of justice. It seems, therefore, that the standard set by the English courts in recent cases is appropriate. Australia should therefore move from the constructive knowledge standard of fault to the actual knowledge standard of fault.

2. Role of fault in determining the availability of the defence of change of position

(a) Change of position defence

This section focuses attention on the relevance of the recipient's state of knowledge to determining whether the recipient can rely on the defence of change of position.[211] Unlike the action for knowing receipt, where knowledge is

204. Above n 24.
205. Ibid 100.
206. See eg *Manchester Trust v Furness* [1895] 2 QB 529; cited in *Eagle Trust Securities,* above n 174.
207. See, eg, Harpum, above n 96, 19.
208. Worthington, above n 6, 189.
209. M Evans, *Outline of Equity and Trusts* (Sydney: Butterworths, 3rd edn, 1996) 328
210. *Satnam Investments Ltd v Dunlop Heywood & Co Ltd* [1999] 3 All ER 652; *Dubai Aluminum Co Ltd v Hany Mohammed Salaam* [1999] 1 Lloyds Rep 415.
211. This defence is the focus of analysis as it is the most significant restitutionary defence: D O'Brien, 'Change of Position: The Past, the Present and the Future' (1995) 25 *Queensland Law Society Journal* 511, 511.

a threshold requirement that must be established to make out the cause of action, the defendant's knowledge is relevant to the prospects of succeeding in an unjust enrichment claim in a less direct fashion. The state of the defendant's knowledge of the breach of trust or fiduciary duty that led to the receipt of misapplied assets is relevant to determining whether the defendant who has changed her position on faith of the receipt has done so in good faith.

(b) Change of position – the relevant standard of fault

The standard of fault that will disqualify the defendant from relying on the change of position defence has narrowed over time. The early cases followed the broader, constructive notice approach originally advocated by Birks. Under such an approach the defence would not be available to a defendant who would have discovered the defect in her entitlement if she had made reasonable enquiries.[212] The joint judgment in *ANZ v Westpac*[213] expressed the view that the defendant must have changed her position without *notice* of mistake or irregularity, although exactly what constituted notice for these purposes was not explained.[214] In *Mercedes Benz v ANZ & National Mutual Royal Savings Bank Ltd*,[215] Palmer J adopted a broad standard of fault when considering the availability of the change of position defence (relying on the reference to notice in *ANZ v Westpac*).[216] His Honour was of the opinion that a defendant will be found not to have acted in good faith if she had actual knowledge of all the facts constituting the breach of fiduciary duty or if she had knowledge of such facts as to put her on enquiry.[217] A similar approach was adopted in the early English decisions.[218]

Despite the adoption of his view by the judiciary, Birks subsequently changed his view and accepted Goff and Jones' contention that only dishonesty on the part of the recipient defendant would demonstrate a lack of good faith.[219] The courts soon followed suit. In *Dextra Bank & Trust Co Ltd v Bank of Jamaica*,[220] Lord Goff converted his extra-judicial opinion into law by holding that a negligent

212. P Birks, 'Change of Position: The Nature of the Defence and its Relationship to other Restitutionary Defences' in M McInnes (ed), *Restitution: Developments in Unjust Enrichment* (Sydney: Law Book Co, 1996) 49, 58.
213. (1987) 164 CLR 662.
214. Ibid 682.
215. Above n 141
216. Ibid 48.
217. Ibid. The Court of Appeal upheld Palmer J's approach, relying on the reference to 'notice' in *ANZ v Westpac: Mercedes-Benz (NSW) Pty Ltd v National Mutual Royal Savings Bank Ltd* (Unreported, NSW COA, Priestley, Clarke & Sheller JJA, 1 April 1996) 12–13.
218. See eg *South Tyneside Metropolitan Borough Council v Svenska International plc* [1995] 1 All ER 545, 569.
219. P Birks, 'Notice and the Onus in O'Brien' (1998) 12 *Tolley's Trust Law International* 2, 9-10; Lord Goff & G Jones, *The Law of Restitution* (London: Sweet & Maxwell, 4th edn, 1993) 745. See also R Chambers, 'Change of Position on the Faith of the Receipt' [1996] *Restitution Law Review* 103, 108.
220. [2002] 1 All ER (Comm) 193.

but honest defendant should be able to raise the defence.[221] In *Port of Brisbane Corporation v ANZ Securities Limited*,[222] the Queensland Court of Appeal held that failure to act reasonably or with due care does not diminish a finding of good faith.[223] McPherson JA supported his conclusion that a person would be found to have acted in good faith unless they had actual knowledge of the breach of trust or fiduciary duty[224] by noting that the doctrine of constructive notice does not traditionally apply at common law.[225]

Disallowing only those with actual knowledge from relying on the defence of change of position is consistent with the policy underlying the action in unjust enrichment. The defence aims to ensure that the defendant does not suffer injustice if called upon to repay the amount received.[226] As it is well established that the level of care exhibited by the plaintiff is irrelevant to the plaintiff's prima facie right of recovery,[227] it would be unjust to deny the defence to the defendant on the basis of her carelessness. This point was made in *Dextra Bank*.[228] Furthermore, making the defence available to all but those with actual knowledge is consistent with the recent reshaping of the doctrine of unjust enrichment in Australia through the equitable language of conscience.[229]

(c) The same knowledge requirement for knowing receipt and change of position defence

The above discussion leads to the conclusion that whether a claim is brought against a recipient by way of the action of knowing receipt or the action of unjust enrichment, it is unlikely to succeed against a recipient who has changed her position unless the recipient had actual knowledge that the assets received were misapplied property. Although Australia currently adopts the constructive knowledge standard of fault in the context of the claim of knowing receipt, this will hopefully be rectified when the courts are faced with a case that requires them to engage in a close examination of the basis of the claim for knowing receipt.

221. Ibid [45]. Lord Goff delivered a joint judgment with Lord Bingham.
222. Above n 122.
223. Ibid, 674. Reasonableness was not a requirement imposed by the High Court in *David Securities*. Cf E Bant & P Creighton, 'The Australian Change of Position Defence' (2002) 30 *The University of Western Australia Law Review* 208, 219, who argue that even where the defendant believes, in good faith, that it was entitled to receive the benefit, the defence will be denied where the belief was unreasonable.
224. McPherson JA uses the term actual knowledge in the same way that it was used in Part II of this paper. His Honour states that '[g]ood faith is all that is needed, subject of course to cases at the extreme where a person deliberately shuts his eyes to matters that he realises will invest him with actual knowledge of fraud or impropriety': ibid 675.
225. Ibid, 675; quoting *Oxley v James* (1938) 38 SR (NSW) 362, 375.
226. *Lipkin Gorman*, above n 84, 579. See also *ANZ v Westpac*, above n 213, 673; *David Securities*, above n 107, 385.
227. *Kelly v Solari* (1841) 9 M&W 54.
228. Above n 220, [42].
229. JW Neyers, 'Understanding Unjust Enrichment: An Introduction' in Neyers, McInnes & Pitel, above n 87, 1, 2; D O'Brien, 'Changing Position Conscientiously' (2003) 77 *Australian Law Journal* 530, 533.

3. Who is not protected by the change of position defence?

(a) Balancing the interests of recipient and rightful owner

Drawing on comments made by Millet LJ in *Boscawen v Bajwa*,[230] Martin makes the very valid point that when considering the appropriate basis on which to impose liability on a recipient of misapplied trust funds, we must ensure that our desire to protect the recipient from unfair claims does not cause an even greater injustice to the rightful owner.[231] Many commentators are of the opinion that the claim in unjust enrichment, subject to defences, balances the interests of the recipient and the rightful owner better than the knowing receipt action. For the reasons discussed in this part of the paper, this cannot be because the defendant's fault is relevant to these two forms of action in different ways. Thus, determining how the level of protection offered to the recipient varies under the actions of knowing receipt and unjust enrichment requires an examination of circumstances other than the defendant's knowledge that may preclude the operation of the defence of change of position.

This section of the paper considers the operation of the change of position defence in more detail with a view to determining the circumstances in which a recipient may be unable to rely on the defence (and would therefore be liable in an action for unjust enrichment) even though she would not be liable in an action for knowing receipt.

(b) Two competing versions of the defence

As Chambers has noted, the question of whether the defendant has changed her position is not as simple as one might think.[232] Furthermore, as Lord Goff noted in *Lipkin Gorman*,[233] the change of position defence is only likely to be available on comparatively rare occasions.[234] Broadly speaking, there are two reasons for this. First, to the extent that the defendant has in no way changed her position as a result of receiving the misapplied funds, the defence will not be available. Second, the change in the defendant's circumstances must be causally linked to the original enrichment.[235]

As Burrows has noted, there are two forms the defence could take and still be said to require causality between the change of position and the original enrichment.[236] The first, which is the narrower of the two, requires that the defendant establish that she has changed her position to her detriment in reliance on the receipt. The

230. [1996] 1 WLR 328, 341.
231. Martin, above n 5.
232. Chambers, above n 219, 105.
233. Above n 84.
234. Ibid 580.
235. *Scottish Equitable v Derby* [2001] 3 All ER 818, [31]. See also O'Brien, above n 211, 525.
236. Burrows, above n 86, 513.

second, wider version of the defence does not require the defendant to prove detrimental reliance. Rather, the defendant will come within the defence if, consequent on the benefit, her position has so changed that it would be inequitable to order restitution.

The English Courts have accepted the wider version of the defence.[237] In *Lipkin Gorman*, Lord Goff said that the defence of change of position would apply 'where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full'.[238] Furthermore, Lord Goff and Lord Bridge both stressed the importance of not laying down principles that would inhibit the ability of the defence to develop on a case by case basis.[239] The wider version of the defence has since been expressly accepted,[240] on the basis that the defence of change of position operates to ensure that a defendant is never left in a worse position than she would have been in had she never received the misapplied assets. In contrast, the reference to the need for the defendant to show that she has acted to her detriment 'on the faith of the receipt' in the joint judgment in *David Securities* suggests that the narrower, reliance-based version of the defence has been adopted in Australia.[241]

(c) Recipient without actual knowledge who has the assets in her possession and who has not otherwise changed her position

If personal recipient liability is imposed by way of an action in knowing receipt, a recipient who received the assets without actual knowledge will be able to retain those assets even if they are still in her possession. However, she would be required to return the assets to their rightful owner, despite her lack of knowledge of the plaintiff's interest in them, if an unjust enrichment claim could be made against her.

Many see this as the main virtue of the unjust enrichment approach. Birks and Nikunj Kiri have both argued that, as a matter of policy, a donee (even an innocent one) who has in no way changed her position should, as against the victim of a misapplication of trust property, be required to return the property to its rightful owner.[242] After all, the defendant is simply being compelled to give up something that was never hers in the first place.[243]

237. O'Brien, above n 211, 523.
238. *Lipkin Gorman*, above n 84, 579.
239. Ibid 580 and 558 respectively.
240. *Scottish Equitable v Derby*, above n 235, [31].
241. A very similar version of the defence was accepted as part of Australian law in *Mercedes Benz (NSW) v ANZ and National Mutual Royal Savings Bank*, above n 141, a decision that pre-dated *David Securities* by a few months. See also O'Brien, above n 211, 523.
242. Kiri, above n 4, 614.
243. Birks, above n 97, 42.

At first glance, this argument seems very compelling. However, it is important to remember that if the defendant has the assets (or their traceable proceeds) in her possession, the plaintiff will most likely be able to claim the assets back by making a claim in property law unless the recipient is a bona fide purchaser. Thus, it does not provide very strong support for allowing a claim in unjust enrichment against the recipient of misapplied assets.

(d) Recipient without actual knowledge changes her position in anticipation of the receipt (anticipatory reliance)

The reliance-based version of the change of position defence is unlikely to apply where the defendant has changed her position prior to receiving the assets in question.[244] A prior change in position cannot have been caused by a subsequent receipt.[245] In *South Tyneside Metropolitan Borough Council v Svenska International plc*[246] the defence was not available to the defendant because it had changed its position prior to receiving the misapplied funds. Clarke J reasoned that the defendant had changed its position in reliance on the validity of the transaction that would see the asset transferred to it rather than in reliance on receipt of the asset. However, the distinction between anticipatory and subsequent changes of position has increasingly been rejected.[247] For example, in *Dextra Bank* the Privy Council distinguished *South Tyneside* and recognised anticipatory reliance as a form of change of position on the basis that the defence was broadly stated in *Lipkin* and involved determining whether it would be inequitable to require the defendant to make restitution.[248] The approach adopted in *Dextra Bank* was accepted by the English Court of Appeal in *Commerzbank Ag v Price-Jones*.[249]

It is not clear whether acts of anticipatory reliance fall within the narrow version of the change of position defence recognised by the Australian High Court in *David Securities*. Although some Australian lower courts have accepted that the change of position defence may apply to anticipatory changes of position,[250] it is not clear that this is an accurate reflection of Australian law. For example, in *Port of Brisbane Corporation v ANZ Securities*,[251] McPherson JA stated that the requirement in *David Securities* that the change of position occur *on the faith of the receipt* means that the 'defendant must have acted to its detriment on the faith of (meaning in reliance on) its *having received* the money'.[252] Further Bant and

244. O'Brien, above n 211, 539.
245. Creighton & Bant, above n 97, 216.
246. Above n 218
247. Bant, above n 8, 156.
248. *Dextra Bank,* above n 220, [39].
249. [2003] EWCA Civ 1663, [38], [64].
250. *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* [2008] WASCA 119, [23], [204]. See also *Fitzsimmons v Minister for Liquor, Gaming and Racing (NSW)* [2008] NSWSC 782, [125].
251. Above n 122.
252. Ibid 671 (emphasis added).

Creighton, who argue that it should be irrelevant whether the expenditure precedes or follows the receipt,[253] acknowledge that expenditure based on an expected receipt would not, under current Australian law, fall within the scope of the change of position defence.[254] Until the operation of the defence is widened, a defendant who changes her position in good faith in anticipation of the receipt may very well face liability under the unjust enrichment approach even though she would escape liability for knowing receipt.

(e) Recipient without actual knowledge who changes her position because of the receipt and another factor

Quite often, the defendant's decision to deal with the assets received in a particular way will be the result of a combination of the receipt itself and other information available to the recipient. In such circumstances, the actions for knowing receipt and unjust enrichment may produce different results. Provided the recipient did not have actual knowledge of the true nature of the funds, she will not be liable in an action for knowing receipt. However, she may face liability for unjust enrichment if the court takes the view that the cause of her change in position can be attributed to an event other than the receipt of the assets unjustly received. Establishing that the change of position would not have occurred but for the receipt will not necessarily make the change of position defence available.

In *State Bank of New South Wales v Swiss Bank Corporation*,[255] the recipient bank received money from the plaintiff bank as a result of a fraudulent transaction initiated by one of the plaintiff's senior employees. The message from the plaintiff bank that accompanied the received funds did not authorise the movement of the funds beyond the recipient bank. However, the recipient bank paid out the money to one of its clients because the client advised the bank that it was expecting to receive funds. Although the recipient bank acted in good faith, the change of position defence was not available because that good faith must be linked to the payee acting on the faith of the receipt (as required by *David Securities*).[256] The disbursement to the client occurred not on the faith of the receipt but on faith of what the recipient bank was told by its client.[257] This meant that the plaintiff was able to claim against the recipient even though the original fraudulent transfer to the defendant was caused by the fraud of one of its senior employees. The fact that

253. Bant and Creighton support their argument by noting that the Privy Council in *Dextra Bank* were prepared to view reliance on an anticipated receipt as occurring on faith of the receipt: Bant & Creighton, above n 223, 231. However, in deciding that anticipatory reliance came within the change of position defence, the Privy Council in *Dextra Bank* relied heavily upon Lord Goff's statement in *Lipkin* that the availability of the defence should be determined by enquiring as to whether it would be inequitable to require the defendant to make repayment.

254. Bant and Creighton, ibid 217.

255. (1995) 39 NSWLR 350.

256. Ibid 355.

257. Bant argues that the finding is better justified on the basis that 'given the circumstances of the payment, the defendant had not acted in reasonable reliance on its receipt': Bant, above n 8, 153.

the defendant, who had acted in good faith, would be worse off as a result of the fraudulent transfer was not enough to bring the change of position defence into play.

The *Swiss Bank* approach is consistent with the narrow version of the defence established in *David Securities*. Thus, under current Australian law a recipient without actual knowledge who changes their position in good faith on the basis of knowledge derived otherwise than from the payer will be liable under the action for unjust enrichment even though they would escape liability for knowing receipt. Dealing with the funds received in good faith does not necessarily protect the recipient from liability.

There is disagreement amongst commentators as to whether the defence of change of position should have been available to the recipient bank in *Swiss Bank*. Chambers has criticised this decision. As it was clear that most of the enrichment had been dissipated by the defendant in good faith, Chambers argues that the defendant should have been able to rely on the change of position defence.[258] This argument can be supported by noting that the recipient bank clearly would not have made a payment to the client in question if it had not received the misapplied funds. However, the outcome in *Swiss Bank* can be defended. After all, the recipient bank exceeded the instructions given to it by the payer and paid out a significant amount of money based largely on the directions of the person who was to receive that money. Thus, an argument can be made that it was the defendant's carelessness and failure to handle the funds in accordance with the instructions that accompanied the receipt, rather than any deficiencies in the operation of the change of position defence, which resulted in the defendant bank being unable to rely on the change of position defence.

(f) Loss of enrichment not brought about by the act of enrichment itself

The reliance-based version of the defence also leaves another class of recipient potentially liable to repay the funds received in circumstances when they would escape liability for knowing receipt. This is best illustrated by way of example. Imagine the recipient places monies she has received in good faith (ie, without actual notice) in her wallet which is later stolen. Given the version of the change of position defence adopted in *Lipkin Gorman*, such loss would bring the change of position defence into operation in England. However, even though the recipient, through no fault of her own, would clearly be in a worse position if she was required to repay the funds to their true owner, she may fail to satisfy the test set out in *David Securities*. This is because the event that brings about the loss is not attributable to reliance on the receipt.

258. Chambers, above n 219, 106–7.

Edelman and Bant believe that the narrow version of the defence recognised in *David Securities* would apply in the stolen wallet example set out in the previous paragraph. They argue that provided the defendant changes her position in reliance on the receipt, the reason why the change becomes irreversible is irrelevant.[259] Foster AJ appears to have accepted this in *Gertsch v Atsas*.[260] Foster AJ held that the purchase of a car that had subsequently been stolen constituted a change of position. However, Foster AJ did not closely engage with the test set forth in *David Securities*. Furthermore, his Honour also appeared to be influenced by the approach adopted in *Lipkin Gorman*, which is broader than that set forth by the High Court in *David Securities*. Thus while there is merit in Edelman and Bant's argument, it is not possible to state categorically that a defendant who has lost the enrichment through no fault of her own will be able to rely on the reliance-based version of the defence of change of position that has been accepted in Australia.[261] In fact, in *Scottish Equitable plc v Derby*[262] Walker LJ suggested that only the wide version of the defence would protect an innocent recipient of a payment which is subsequently stolen from her.[263]

CONCLUSION

The possibility of imposing liability on the recipient of misapplied property by way of a strict liability action in unjust enrichment has attracted a large amount of judicial and academic attention. The debate about the desirability of recognising such an action has tended to focus on conceptual and historical arguments. These arguments demonstrate that in order to recognise the contemplated unjust enrichment action, the law would need to be changed. However, the debate does not directly address the normative question of whether, from a practical viewpoint, it would be desirable to make these changes.

The actions of knowing receipt and unjust enrichment will generate different outcomes in several situations even if the two actions both employ actual knowledge as the relevant standard of fault (which is the case in England and should be the case in Australia). The main advantage of the unjust enrichment approach is that it would allow a claim to be made against a defendant who did not have actual knowledge that she received misapplied property and has not changed her position as a result of receiving the misapplied trust property. However, in other circumstances the unjust enrichment action may impose significant losses on recipients in circumstances which might be viewed as unfair. There are three main areas of concern. First, a recipient who in good faith changes her position

259. Edelman & Bant, above n 28, 326. See also Bant & Creighton, above n 223, 214; Bant, above n 8, 140.
260. Above n 149.
261. Professor Burrows argues that it seems it seems 'grotesque' if the defence of change of position were not available in these circumstances: Burrows, above n 86, 515–6.
262. Above n 235.
263. Ibid 827.

in anticipation of receiving misapplied property is unlikely to be protected by the version of the change of position defence that has been accepted in Australia. Secondly, a recipient who changes her position because of the receipt and other information available to the recipient will not be protected by the change of position defence. Thirdly, the unjust enrichment action may render a recipient liable to a claim in unjust enrichment even if, through no fault of the recipient, the misapplied property is lost in a manner not causally connected to the receipt of the misapplied property. It is submitted that the imposition of liability in these circumstances is inappropriate. This, coupled with the conceptual obstacles that would need to be overcome to recognise the unjust enrichment action and the fact that the main advantage associated with the unjust enrichment approach could, in most instances, be achieved by bringing an action to enforce property rights suggests that until the operation of the change of position defence has been clarified under Australian law, the law should not be changed so as to allow recipient liability to be imposed by way of an unjust enrichment action.