

## Mistaken Payments and the Change of Position Defence: Rare Cases and Elegance

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### Introduction

This lecture involves one aspect of the recovery of mistaken payments. About three years ago mistaken payments gained prominence in New Zealand following a bank error enabling a customer to access 10 million dollars.<sup>1</sup> The news reports concentrated on the amount involved and the hunt for the so-called “runaway millionaires”. The coverage extended to mistaken payments generally but largely overlooked was the law’s imposition of personal liability upon the recipient of a mistaken payment. In some situations the payer may have a property claim<sup>2</sup> but in this lecture I am considering the recipient’s personal liability to repay.

Few would question that our runaway millionaires should repay the bank. But this may not always be the case. Assume I make a claim with my insurance company. The claim is paid and I spend the money – the Scott family has an overseas holiday, when we were going to stay

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\* Professor, Faculty of Law, University of Otago. The text of this article is my Inaugural Professorial Lecture delivered at the University of Otago, 7 August 2012 (footnotes added). At the commencement of the Lecture I expressed my gratitude and indebtedness to the many people who have assisted me in my career, in particular for the assistance and guidance of the late Richard Sutton, a former Professor and Dean of this Faculty. I encountered Richard as a first-year law student. He introduced me to an exciting new world. A few years into my undergraduate legal education Richard delivered the FW Guest Memorial Lecture (published as: “Unjust Enrichment” (1982) 5 Otago LR 187). At this lecture Richard spoke about the emerging principle of unjust enrichment. I was hooked! Despite being an advocate of unjust enrichment, Richard was distrustful of theories that purport to explain all; for him the law was more complicated, in that the application of a legal doctrine in a particular situation is often the product of a number of competing principles. Guided by Richard, I became fascinated by the interaction of the principle of unjust enrichment with other legal principles and concerns. Without Richard’s influence I would not have been in a position to deliver this lecture. Special mention must also be given to my wife, Lee-Anne, and my son, Tim, for their love and understanding, especially when I am preoccupied with work.

<sup>1</sup> During April 2009, a customer of a New Zealand bank applied for an overdraft. Because of a clerical error the overdraft limit was mistakenly entered as \$10,000,000. The customer and his partner accessed some of these funds and left New Zealand. The customer’s partner returned voluntarily to New Zealand and the customer was arrested overseas and extradited back to New Zealand. Both were convicted of a number of criminal charges.

<sup>2</sup> *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 699 (HL).

at home! I acted in good faith when I lodged the claim and spent the money. The insurance company now informs me that the claim was not covered by my policy, that their payment was a mistake, and that they want repayment.

Should my good faith and the fact that I no longer have the payment excuse me from liability? Hopefully you would say “yes”. If so, your intuition may be right. The law recognises that a good faith recipient of a mistaken payment, who has spent the money on something they would not otherwise done, may have a defence – we call this the change of position defence.

To make my example more relevant to the point that I am developing in my lecture, assume that while I acted in good faith throughout, I had been careless in making my claim – if I had read the insurance policy more carefully I would have seen the exclusion clause! These facts raise two more questions. First: Is my carelessness a relevant consideration for the defence? And if so, what about the insurance company’s carelessness?

To use legal jargon, such questions are discussed under the heading of “relative fault”, or just “fault”. The word “fault” is misleading as it may suggest wrongdoing, but in this context fault refers to responsibility for actions and I will be associating it with carelessness or negligence.

The orthodox common law view is that the payer’s carelessness is not relevant and, assuming the recipient acts in good faith, so too is any carelessness on their part.<sup>3</sup> By common law I mean the non-statutory law of England, New Zealand and some other Commonwealth countries. In contrast, the orthodox US view is that the parties’ carelessness is a relevant consideration for the defence.

New Zealand has a statutory change of position defence and our courts have held that the parties’ actions are relevant. Our courts have also held that a common law change of position defence developed by English courts applies, and that the parties’ actions are also relevant to its application. Our courts’ extension of relative fault (to use the legal jargon) to the common law defence is controversial. The common law defence and the New Zealand cases are the focus of my lecture.

The lecture is divided into four parts. In the first part I offer a brief glimpse into the law governing the recovery of mistaken payments and the common law change of position defence. The material in this part is to assist in understanding the controversy.

The second part involves a consideration of the concept of “relative fault”. In the first of the three sections that comprise this part, I consider the orthodox US position that the parties’ relative fault is a relevant consideration. In the second section I consider the current dominant

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<sup>3</sup> It has been suggested that “respective fault in creating the precondition for the [subsequent] loss [of the payment] may well be relevant”. See Elise Bank and Peter Creighton “The Australian Change of Position Defence” (2002) 30 *UWAL Rev* 208 at 226.

common law theory explaining recovery for unjust enrichment; it states that relative fault is not relevant for a change of position defence. Finally in the third section I introduce you to New Zealand's statutory change of position defence.

The material in the third part focuses upon two controversial New Zealand cases – *Thomas v Houston Corbett & Co*<sup>4</sup> and *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*<sup>5</sup> – in which the courts have had regard to the parties' relative fault.<sup>6</sup> I believe that these cases involve rare fact situations and that courts' reasoning has been misunderstood. In the fourth (and final) part I advance an alternative analysis for these cases and suggest why I believe that their consideration of relative fault is consistent with common law principles.

## I Background

### *The law – mistaken payments: Kelly v Solari*

The case of *Kelly v Solari*<sup>7</sup> establishes a key aspect to the common law response to a mistaken payment. The payer was a life assurance company. It had been careless in checking its records and paid out on a lapsed life policy. The deceased's widow was unaware that the policy had lapsed and received the payment in good faith.

The case is important because the appeal court held that the payer's carelessness did not preclude recovery from the widow.<sup>8</sup> This has been the law since. We do not know if the widow still had the money, but in the 1840s this was irrelevant. She was liable to repay the value of money received.

In the last quarter or so of the 20th century, common law theorists and courts recognised that the law governing the recovery of mistaken payments is based upon a principle of unjust enrichment.<sup>9</sup> In essence this principle provides that in certain situations the law imposes an obligation upon the recipient of an enrichment to restore the value of the enrichment to the person who conferred it. For the principle to apply the recipient must have been enriched; the enrichment must be at the expense of another; and the enrichment must have occurred in circumstances which the law regards as being "unjust" for the recipient to retain the enrichment. Of course, there is fine print that we need not

<sup>4</sup> *Thomas v Houston Corbett & Co* [1969] NZLR 151 (CA). For an analysis of this case see RJ Sutton "Unjust Enrichment" (1982) 5 Otago LR 187.

<sup>5</sup> *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA).

<sup>6</sup> See also the interesting case of *ASB Securities Ltd v Geurts* [2005] 1 NZLR 484 (HC).

<sup>7</sup> *Kelly v Solari* (1841) 9 M & W 54, 152 ER 24.

<sup>8</sup> At 58–59; 26 (The payer may recover "however careless [he] may have been, in omitting to use due diligence", per Baron Parke).

<sup>9</sup> *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] 1 QB 677 provides an early illustration of the impact of the principle of unjust enrichment of the development of the law.

consider tonight.

*Kelly v Solari* predates the recognition of unjust enrichment but its result is explained by it. The widow was enriched by the payment. This was at the payer's expense. And the payer's mistaken belief that it was contractually liable to make the payment meant that it was legally unjust for the widow to retain it.<sup>10</sup>

Some of you may have misgivings about the imposition of personal liability upon the widow in *Kelly v Solari*, especially if she had spent the payment. But until 1991 the common law imposed personal liability to repay irrespective of whether the recipient retained the payment. This leads us to the recognition by the House of Lords of a common law change of position defence.

### **The common law change of position defence: Lipkin Gorman v Karpnale Ltd**

The facts of *Lipkin Gorman v Karpnale Ltd*<sup>11</sup> need not concern us.<sup>12</sup> The House of Lords recognised the principle of unjust enrichment and held that it required the recognition of a change of position defence. Lord Goff gave the key judgment.

In Lord Goff's view, the law should give the recipient of a mistaken payment a defence when the recipient's position:<sup>13</sup>

is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the [payer recovery].

As indicated by this extract, Lord Goff discusses the defence at a high level of generality, and I should say that he went on to say that he deliberately did this to enable it to develop on a "case by case basis".<sup>14</sup> But he gave some guidance; for example, mere spending of the payment is not enough.<sup>15</sup> Rather, the payment must have encouraged the recipient to do something with their money that they would not otherwise have done. The illustration Lord Goff gave was a donation to a charity that would not otherwise have been made.<sup>16</sup> He also noted that the defence was

<sup>10</sup> Since *Kelly v Solari*, above n 7, the courts have expanded the types of mistake for which relief is available. But the legal principle from *Kelly v Solari* remains good law. The payer's carelessness in making the payment does not preclude recovery.

<sup>11</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

<sup>12</sup> In essence the case involved a claim to recover stolen money that had been gambled at a gaming club. While not involving a mistaken payment, the claim was "founded upon the unjust enrichment of the club" (at 578 per Lord Goff) and in developing the change of position defence Lord Goff drew analogies with mistaken payments.

<sup>13</sup> At 579.

<sup>14</sup> At 580.

<sup>15</sup> At 580.

<sup>16</sup> At 579.

restricted to recipients who had acted in good faith.<sup>17</sup> By this he meant that the defence is not available to a recipient who spends the money knowing of the “facts entitling the [payer] to [recover their payment]”.<sup>18</sup>

Clearly to the extent the defence applies, the payer’s ability to recover their mistaken payment is reduced. So the defence operates to reduce the protection *Kelly v Solari* affords a careless payer against the consequences of their own carelessness.

## II Relative Fault

In *Lipkin Gorman*, Lord Goff said nothing about relative fault. But, as I noted earlier, the orthodox common law view is that it is not relevant. I believe that this remains the position due to the influence of the late Peter Birks.<sup>19</sup> At the time of his death in 2004, Peter was the Regius Professor of Civil Law at the University of Oxford. His work culminated in what has become the dominant common law theory explaining unjust enrichment, its claims and its defences.

You will recall that in *Lipkin Gorman v Karpnale Ltd* Lord Goff referred to injustice in making the recipient repay as a justification for the change of position defence.<sup>20</sup> Some believe that injustice is too general a basis and invites uncertainty.<sup>21</sup> In response, narrower bases, such as protecting the recipient’s autonomy and security of receipt, have been advanced.<sup>22</sup> Birks suggests that the defence is best understood as a “disenrichment” defence (his words), in that it responds simply to the good faith loss of the enrichment.<sup>23</sup>

### *The Birksian “disenrichment” defence*

In the mid-1980s Birks first advanced a theory to explain why and when a court should regard a defendant as being unjustly enriched.<sup>24</sup> As all

<sup>17</sup> At 579.

<sup>18</sup> At 580.

<sup>19</sup> In *Test Claimants in the Franked Investment Income Group Litigation v Commissioner of Inland Revenue* [2012] UKSC 19, [2012] 3 All ER 909 at [17] Lord Hope referred to Birks as “[o]ne of the most distinguished and influential scholars” working in this area.

<sup>20</sup> *Lipkin Gorman v Karpnale Ltd*, above n 11, at 579. At 580 Lord Goff also asked whether it would be inequitable to require repayment.

<sup>21</sup> Similar observations have been made about the proposed use of the term “inequitable”. See Gareth Jones “Some Thoughts on Change of Position” in Andrew Burrows and Lord Rodger of Earlsferry (eds) *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, Oxford, 2006) 65 at 79.

<sup>22</sup> For a review of various rationales that have been advanced, see Elise Bant *The Change of Position Defence* (Hart Publishing, Oxford, 2009) at 211–218.

<sup>23</sup> Peter Birks *Unjust Enrichment* (2nd ed, Oxford University Press, Oxford, 2005) at 208–219. See also Andrew Burrows “Change of Position: The View from England” (2003) 36 Loy LA L Rev 803 at 803.

<sup>24</sup> Peter Birks *An Introduction to the Law of Restitution* (revised paperback ed, Clarendon Press, Oxford, 1989).

theories do, it attracted critical analysis. One concern was that the theory attempted to apply unjust enrichment to cases that others believed should be analysed under different legal principles. In response, Birks narrowed the range of situations in which he suggested unjust enrichment applied.<sup>25</sup> This also enabled him to suggest that unjust enrichment operated quite independently of other legal principles.

Birks achieved this by suggesting that *Kelly v Solari* (our mistaken payment case) is a core case for unjust enrichment.<sup>26</sup> For him it illustrates two definitive characteristics of an unjust enrichment claim. These are:

First: the imposition of strict liability upon the recipient irrespective of their good faith;<sup>27</sup> and

Second: the irrelevance of the claimant's carelessness in conferring the enrichment.<sup>28</sup>

According to Birks, claims that did not display these characteristics were not and could not be unjust enrichment claims.

Birks recognised that strict liability may result in "cruel",<sup>29</sup> "almost intolerable"<sup>30</sup> results, to use his words. Against this background, the role of the disenrichment defence was to "dra[w] the sting"<sup>31</sup> of strict liability and the apparent cruelty of *Kelly v Solari*. Birks argued:<sup>32</sup>

Strict ... liability only becomes intolerable after and to the extent of disenrichment – that is, once the enrichment has been used up, so that repayment would leave the recipient with less than he would have had

<sup>25</sup> In essence, Birks advanced a new classificatory scheme for English private law rights, pursuant to which he suggested that legal rights should be classified according to the causative event from which they arise: from "manifestations of consent"; from "unjust enrichments"; from "miscellaneous other events" (which he referred to as not-wrongs); and from "wrongs". Birks also distanced the causative event from the remedy. See generally Peter Birks "Misnomer" in WR Cornish and others (eds) *Restitution: Past, Present and Future – Essays in Honour of Gareth Jones* (Hart Publishing, Oxford, 1998) 1 at 8; Peter Birks "Definition and Division: A Mediation on *Institutes* 3.13" in Peter Birks (ed) *The Classification of Obligations* (Clarendon Press, Oxford, 1997) 1 at 32–33; Peter Birks "Rights, Wrongs and Remedies" (2000) 20 OJLS 1 at 1; and Birks Unjust Enrichment, above n 23, at 20–46.

<sup>26</sup> Birks *Unjust Enrichment*, above n 23, at 3 ("The law of unjust enrichment is the law of all events materially identical to the mistaken payment of a non-existent debt").

<sup>27</sup> At 7. See also Peter Birks "The Role of Fault in the Law of Unjust Enrichment" in GH Jones and WJ Swadling (eds) *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, Oxford, 1999) 235.

<sup>28</sup> Birks *Unjust Enrichment*, above n 23, at 6.

<sup>29</sup> Birks "The Role of Fault in the Law of Unjust Enrichment", above n 27, at 237.

<sup>30</sup> At 242.

<sup>31</sup> At 239.

<sup>32</sup> At 241.

if he had never received the unjust enrichment.

Birks also sought symmetry for his theory. By this I mean that he believed that the characteristics that define an unjust enrichment claim define also an unjust enrichment defence.<sup>33</sup> So since the payer's carelessness was not relevant to the claim, Birks believed it was not relevant to the defence.

Despite the focus on the loss of the enrichment, Birks agreed with Lord Goff that a recipient's bad faith should disqualify them from the defence. Concerned that bad faith could be expanded to encompass careless behaviour, and so undermine the symmetry between claim and defence, Birks stressed that carelessness is not bad faith:<sup>34</sup>

[I]t would appear intolerable to any [recipient] disqualified [from the disenrichment defence] for negligence [carelessness] that the claimant's claim should continue to be unaffected by his negligence.

Birks also argued that any consideration of the recipient's carelessness would bring unpredictability:<sup>35</sup>

If ... a careless but honest recipient were disqualified from the defence of change of position, the law would have to face the question why carelessness on the other side should not also be taken into account. ... [A court] which goes down that path involves itself in an impossibly embarrassing and unpredictable exercise ....

Birks' theory has not gained much traction in the US. There, a consideration of relative fault is an integral part of a change of position defence or, as they call it, the change of circumstances defence.

### *The American Law Institute change of circumstances defence*

First, what is the American Law Institute (ALI)? There are 50 states in the US and their laws differ. The ALI promotes consistency. It is comprised of leading US lawyers, judges, and professors and it publishes "Restatements" as to what its members believe the law should be. Restatements are influential, and not just in the US.

The US recognition of unjust enrichment pre-dates that of England and New Zealand. Indeed, in 1936 the ALI approved a Restatement analysing and applying this principle.<sup>36</sup> That Restatement advanced the following change of position defence:

§ 142 Change of Circumstances

<sup>33</sup> Peter Birks "Change of Position: The Two Central Questions" (2004) 120 LQR 373 at 378 ("What to do when the enrichment has been used up or otherwise lost is a secondary or incidental problem which has to be seen and solved in the context of that primary mission [the imposition of liability]").

<sup>34</sup> Birks *Unjust Enrichment*, above n 23, at 212.

<sup>35</sup> Birks "The Role of Fault in the Law of Unjust Enrichment", above n 27, at 253. See also Birks *Unjust Enrichment*, above n 23, at 214.

<sup>36</sup> American Law Institute *Restatement of the Law of Restitution: Quasi Contracts and Constructive Trusts* (St Paul, Minnesota, 1936).

- (1) The right of a person to restitution [ie recovery] from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.
- (2) Change of circumstances may be a defense or a partial defense if ... [the recipient] was no more at fault for his receipt, retention or dealing with the subject matter than was the claimant.
- (3) ...

You will note that by using broad concepts upon which to establish the defence subs (1) adopts a similar approach to that of Lord Goff in *Lipkin Gorman*. For the purposes of this lecture the key subsection is subs (2) and its reference to fault.

In 2011 a new Restatement was published<sup>37</sup> – in substance it follows the approach of §142.<sup>38</sup> Tonight I have displayed §142 from the 1936 Restatement, because it predates *Lipkin Gorman* and was referred to by Lord Goff.<sup>39</sup> But I will refer to passages from the 2011 Restatement to show the continuation of underlying policy considerations.

Despite §142's reference to fault, the ALI adopts a similar starting point to *Kelly v Solari* – that the payer's carelessness is irrelevant, at least while the recipient remains enriched:<sup>40</sup>

The claimant [payer] in a mistaken-payment case has often been negligent; the recipient is typically blameless. Liability is initially imposed without reference to this comparison, because (but only so long as) the recipient is not being asked to bear any loss.

So the ALI is saying that the payer's carelessness is irrelevant provided the recipient has not changed their position. You will have noted that the ALI refers to loss. In this context "loss" refers to the amount by which the recipient has factually changed their position. To use Lord Goff's example of a one-off payment to a charity, this payment is a loss of the original enrichment.

The ALI sees unjust enrichment as underlying the imposition of liability and governing the initial operation of the defence.<sup>41</sup>

The liability of an innocent recipient must be net of any loss sustained as a result of the transaction for which the claimant [the payer] seeks

<sup>37</sup> American Law Institute *Restatement of Restitution and Unjust Enrichment* (3rd ed, St Paul, Minnesota, 2011).

<sup>38</sup> In the 2011 Restatement, §65 creates the defence and, in so doing, incorporates various qualifications established by other sections. So, for example, §52 performs a similar function to §142(2) of the 1936 Restatement by providing a mechanism by which the comparative fault of the payer and recipient is evaluated.

<sup>39</sup> *Lipkin Gorman v Karpnale Ltd*, above n 11, at 579.

<sup>40</sup> *Restatement of Restitution and Unjust Enrichment*, above n 37, at §65 cmnt a.

<sup>41</sup> At §65 cmnt h.

restitution, if liability is to be justified in terms of unjust enrichment.

But the ALI theorises that the loss of the enrichment is just one prerequisite for the defence. In addition the loss must be attributed to the actions of the payer:<sup>42</sup>

A detrimental change of position transforms the situation [with its enrichment focus]. Unlike the simple mistaken-payment scenario, the overall transaction now involves an economic loss that one of the parties must bear. The law of restitution [unjust enrichment], like the law of torts, assigns losses on the basis of fault.

As perceived by the ALI, the defence acts to “reallocate [the] loss [of the enrichment] from the [innocent] recipient to the [mistaken payer]”.<sup>43</sup> Since this loss is to be assigned on the basis of fault, the ALI requires a court to assess each parties’ actions. The aim is to identify the party most responsible for the loss. For the defence to be available (with the result that the payer bears the loss) the payer must be more responsible for the loss than the recipient. Typically the recipient will have changed their position in good faith and without any carelessness. In this situation, the ALI reasons that the payer’s carelessness in making the payment means they are responsible for the loss and the defence applies.

The ALI is using a different reasoning process than that used by Birks. But the same result can eventuate. For example, faced with a good faith non-careless recipient who has changed their position, both the ALI and Birks impose the consequences of the loss upon the careless payer. In contrast, the different reasoning process does produce different results when the acts of the good faith recipient are such that they bear greater responsibility for either the payment or the subsequent loss of the enrichment. Here the ALI reasons that the recipient remains strictly liability.

A summary may be useful: the ALI’s defence provides an important contrast with Birks’ disenrichment defence. Birks suggests that the operation of the defence is governed by the principle of unjust enrichment, which in this context is concerned only with good faith disenrichment. In contrast, the ALI recognises that the cause of the disenrichment (or loss) is relevant, with the result that the principle of unjust enrichment interacts with other concerns.

### *The Judicature Act 1908, s 94B*

In 1958, forty years or so before *Lipkin Gorman*, the New Zealand Parliament recognised the need for a change of position defence. The result was an insertion into the Judicature Act 1908 of a new defence – s 94B. I now turn to consider briefly the operation of this defence. For the purposes of this lecture the key phrases in this section are:

Relief ... in respect of any payment made under mistake, ... shall be denied

<sup>42</sup> At §65 cmnt a.

<sup>43</sup> At §65 cmnt h.

wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.

Section 94B shares similarities with the other conceptions of the defence, so, for example, the recipient must act in good faith. But there are differences. A key difference is that in *Thomas v Houston Corbett & Co*,<sup>44</sup> the Court of Appeal concluded that s 94B “entitle[s the court] to look at the equities from the point of view of both sides [the payer and the recipient]”;<sup>45</sup> to “balanc[e] the[se equities]”;<sup>46</sup> and then to apportion “responsibility” for the alteration in position.<sup>47</sup> In this summary I am using the words of the judges.

So s 94B is similar to the ALI’s defence in recognising the importance of relative fault. But unlike the ALI, s 94B uses relative fault as a mechanism to apportion the loss between payer and recipient.

### III New Zealand’s Controversial Cases

#### Thomas v Houston Corbett & Co

Dr Thomas is a young surgeon. He has £400 to invest. He sees a Mr Cook – a law clerk employed by Houston Corbett. Thomas may have thought that that he was investing his money through Houston Corbett but the trial court found that he lent his money to Cook. Cook is a rogue (and as we shall see, a skilful one).

A few months later, Thomas seeks repayment. Cook alters the trust account records to indicate that Thomas is entitled to about £1,381. A trust account cheque for this amount is drawn in Thomas’s favour and deposited into his bank account. Cook sees Thomas; tells him of the payment; tells him that £541 of it represents repayment of the loan plus interest; and that the balance – some £840 – belongs to other clients of the firm. So Thomas knows that he is not entitled to £840 of the payment. At Cook’s request, Thomas gives him his cheque for £840, believing that Cook will use it to pay those who are entitled to it. Cook pockets the cheque.

Houston Corbett & Co discovers its mistake and seeks recovery. Thomas acknowledges liability to repay the £541 he retained, but argues that s 94B applies with respect to the £840 he on-paid to Cook.

The Court of Appeal concluded that Thomas was “unsophisticated”;<sup>48</sup>

<sup>44</sup> *Thomas v Houston Corbett & Co*, above n 4.

<sup>45</sup> At 164 per North P. See also at 170 per Turner J (to “examin[e] ... the competing equities of the parties”).

<sup>46</sup> At 165 per North P.

<sup>47</sup> At 178 per McGregor J. See also at 165 per North P and at 171 per Turner J.

<sup>48</sup> At 165 per North P.

that he had been “unduly trusting”;<sup>49</sup> perhaps “undoubtedly foolish”<sup>50</sup> in his dealings with Cook. But it also considered that Houston Corbett bore more responsibility. Cook was a “trusted” employee,<sup>51</sup> held out to others as being “honest and trustworthy”.<sup>52</sup> Additionally, Houston Corbett was in a better position to judge Cook’s character and, given his access to client funds, there is some suggestion that it should have investigated his mode of living.<sup>53</sup> In any event Houston Corbett had given Cook access to the trust account records.<sup>54</sup>

Remember that Thomas was seeking to apply the defence for the £840 he had on-paid to Cook. The Court of Appeal concluded that Thomas would be relieved of liability for two-thirds of this sum.<sup>55</sup>

### **National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd**

This is the second of New Zealand’s controversial cases and, as we will soon see, the more controversial of the two. *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*<sup>56</sup> involves a mistaken payment by a bank. I will refer to Waitaki as the recipient, but the actual recipient was another company subsequently acquired by Waitaki.

The mid-1980s saw the relaxation of controls on overseas currency transactions. Many organisations, Waitaki included, started trading foreign currencies. In June 1986, Waitaki purchased USD 500,000 from the Bank. But the Bank debited Waitaki’s US dollar account, rather than crediting it. Waitaki complained and the Bank corrected the entry, but it took some time to correct its own account with Lloyds Bank in the US, from which it had sourced the US dollars.

Because of this delay, the Bank comes to believe that it still holds USD 500,000 for Waitaki. For about three months the Bank tries to pay Waitaki, but Waitaki denies the money is theirs. In about October 1986 Waitaki

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<sup>49</sup> At 170 per Turner J.

<sup>50</sup> At 178 per McGregor J.

<sup>51</sup> At 170 per Turner J.

<sup>52</sup> At 177 per McGregor J.

<sup>53</sup> At 165 per North P.

<sup>54</sup> At 177 per McGregor J.

<sup>55</sup> Because the Court of Appeal apportioned the £840 loss between Houston Corbett and Thomas, this result differs from the predicted result applying both the Birksian and the ALI tests – that Thomas should have a defence for the full £840. Commenting upon the case, Birks believed that Thomas acted in good faith when he paid Cook the £840. So, according to Birks, Thomas should have had a defence for that amount. See Birks *Unjust Enrichment*, above n 23, at 216. Similar reasoning would apply to the *Lipkin Gorman* defence. In contrast the ALI would reach this result on the basis that Houston Corbett & Co bore greater fault.

<sup>56</sup> *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*, above n 5. The judgment of the High Court contains a detailed analysis of the facts. See *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1997] 1 NZLR 724 (HC).

relents but it keeps the payment separate, placing it on term deposit with a finance company.

In late 1987 the Bank discovers its mistake but delays seeking repayment until June 1988. And it was not until January 1990 that the Bank had fully reconciled its records. Meanwhile the deposit matures, and is reinvested. Originally the finance company gave government stock as security but this changed to be a mortgage over a commercial property. In June 1989 the finance company is placed into liquidation, and the new security is discovered to be worthless.

Waitaki argues that it had changed its position. Its argument based on s 94B of the Judicature Act 1908, however, is unsuccessful. By a majority, the members of the Court hold that since Waitaki knew or suspected that the payment was a mistake, the deposit with the finance company was not made in reliance on the validity of the payment.<sup>57</sup> It will be recalled that s 94B requires that the recipient of the payment “has so altered his position in reliance on the validity of the payment that in the opinion of the Court ... it is inequitable to grant relief”.<sup>58</sup>

But all the members of the Court agreed that the defence recognised in *Lipkin Gorman* was part of our law and that Waitaki’s knowledge did not preclude its operation.<sup>59</sup> All three members of the Court also held that the “balancing of the equities” approach identified in *Thomas v Houston Corbett & Co* in the context of s 94B applied to the *Lipkin Gorman* defence.<sup>60</sup> Indeed, Thomas J, echoing the views of the ALI, observed that the change of position defence is about loss allocation, and that the court should have regard to the parties’ “respective responsibility for the loss”.<sup>61</sup>

The Court proceeded to affirm the Trial Court’s finding that both the Bank and Waitaki were responsible for the loss: the Bank 90 per cent; Waitaki 10 per cent.<sup>62</sup>

There is one last case I want to consider briefly – a Privy Council case in which Lord Goff and Lord Bingham implicitly criticised the approach of our courts for apportioning responsibility for the loss.

### **Dextra Bank & Trust Co Ltd v Bank of Jamaica**

Like *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*, *Dextra Bank & Trust Co Ltd v Bank of Jamaica*<sup>63</sup> arose out of the

<sup>57</sup> At 227, 231–232 (compare the dissent of Henry J at 217–218).

<sup>58</sup> Emphasis added.

<sup>59</sup> At 227–228, 232.

<sup>60</sup> At 220–221, 229–230, 232–233.

<sup>61</sup> At 229.

<sup>62</sup> Birks agreed that Waitaki acted in good faith. See Birks *Unjust Enrichment*, above n 23, at 217. The predicted result applying the *Lipkin Gorman* and Birksian tests is that Waitaki would have a full defence. As it happens this is the same predicted result for the ALI test – just because the bank was found to be more at fault.

<sup>63</sup> *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193.

relaxation of foreign exchange controls. But unlike *Waitaki* it involved fraud. The Bank of Jamaica used agents to identify vendors of foreign currency. Some of these agents initiated a scam in which they approached Dextra and, purporting to act on behalf of the Bank, sought a short-term loan of about USD 3,000,000. On acquiring Dextra's cheque which was payable to the Bank of Jamaica, the fraudsters misled the Bank into believing that the transaction was a sale of US dollars for Jamaican dollars. The Bank of Jamaica paid the Jamaican dollars to the fraudsters, who, of course, pocketed the money.

When the scam was discovered, Dextra sought recovery from the Bank of Jamaica. One of its arguments was that it was mistaken as to the nature of the transaction and, for that reason, its payment should be regarded as a mistaken one. Dextra also argued that the Bank of Jamaica should have no change of position defence in respect of its payment to the fraudsters as it (the Bank) was at fault for being taken in by the scam.

Dextra's claim was unsuccessful. For reasons that need not concern us, their Lordships held that Dextra was not legally mistaken when it made the payment. As a result it was unnecessary for them to consider Dextra's fault argument, but they did. First they found that Dextra was more at fault.<sup>64</sup> They also rejected the argument that a court should assess the parties' relative fault (or carelessness):<sup>65</sup>

[M]ost reluctant to recognise the propriety of introducing the concept of relative fault ... and indeed decline to do so. ... [G]ood faith on the part of the recipient [i]s a sufficient requirement ... [M]uch influenced by *Kelly v Solari* ... It seems very strange that ... the [recipient] should find his conduct examined to ascertain whether he had been negligent, and still more so that the [payer's] conduct should likewise be examined for the purposes of assessing the relative fault of the parties.

...

Agree with Birks, "that the New Zealand courts have shown how hopelessly unstable the defence [of change of position] becomes when it is used to reflect relative fault. Certainly, in the case of *Thomas*, the reader has the impression of judges struggling manfully to control and to contain an alien concept."

These passages appear to support two arguments raised by Birks. First, that any consideration of relative fault is contrary to *Kelly v Solari*. And second, the risk of unpredictability. Another argument, of course, is that relative fault is inconsistent with Birksian theory.

So, is the approach of our Court of Appeal in *Thomas v Houston Corbett & Co* and then in *National Bank of New Zealand Ltd v Waitaki International*

<sup>64</sup> At [41] ("the fault of Dextra [in being taken in by the scam] greatly outweighed the fault, if any, of the Bank of Jamaica", per Lord Bingham and Lord Goff).

<sup>65</sup> At [45] per Lord Bingham and Lord Goff.

*Processing (NI) Ltd* inconsistent with common law principles and best forgotten?

#### IV The Way Forward

##### *Consistency with Kelly v Solari*

*Kelly v Solari* is a core case in determining the common law's response to mistaken payments. At the very least it establishes that a recipient of a mistaken payment cannot justify keeping it simply because the payer was careless with their own money.<sup>66</sup> But I am going to argue that it does not establish that carelessness is never relevant.

*Kelly v Solari* was not considered in *Lipkin Gorman*. Prior to *Dextra Bank & Trust Co Ltd v Bank of Jamaica* one might argue that *Lipkin Gorman* implicitly qualifies *Kelly v Solari*. The argument is that the reasoning in *Kelly v Solari* applies only so long as the recipient remains enriched. So once the recipient ceases to be enriched the payer's carelessness in making the payment may become relevant. This is close to the ALI's approach. But *Dextra* appears to confirm that the payer's carelessness in making the payment is not relevant, whether or not the enrichment remains.

Again this does not mean that carelessness is never relevant. I believe that the crucial fact in *Kelly v Solari* is that the payer was careless in making the payment. The facts of the case did not involve a consideration of the payer's acts after the payment. Neither did the facts in *Dextra Bank & Trust Co Ltd v Bank of Jamaica*.

Cases involving post-payment acts of carelessness by the payer will be rare. Typically the payer's only post-payment act is to demand repayment. But I believe that *Thomas v Houston Corbett & Co* can be viewed as a rare case where, after making the payment, the payer does take some additional action that encourages the recipient to change their position.<sup>67</sup>

Remember that Cook practiced his deceptions on a number of occasions. One occasion was when Cook misrepresented to Houston Corbett & Co its liability to Thomas. This resulted in the payment. *Kelly v Solari* tells us that the carelessness of Houston Corbett & Co in making this payment is not relevant. Thomas is strictly liable to repay, subject to defences.

Another situation of deception was when Cook advises Thomas of the payment, and requests the £840 payment. A reason Thomas believes Cook's request is his position in Houston Corbett & Co; he is also encouraged by Houston Corbett holding Cook out as an "honest and

<sup>66</sup> Peter Watts "Restitution" [1999] NZLR 373 at 379–380. "[A]ll that *Kelly v Solari* does is to prevent an enriched [recipient] from saying: 'I am allowed to keep your money because you are plainly rather careless with it'".)

<sup>67</sup> In rare cases, where in response to the recipient's enquiry, the payer confirms the recipient's entitlement to the payment, the payer may be estopped from seeking recovery.

trustworthy" employee.<sup>68</sup> So, independently of its mistaken payment, Houston Corbett & Co enables Cook to make his request more believable. I believe that this justified the court in imposing some responsibility upon Houston Corbett & Co for the loss of this money.

My point is that there is a difference between the payer's carelessness in making the payment (which *Kelly v Solari* states is not relevant) and post-payment acts by the payer, which encourages the recipient to do something with the payment (in respect of which *Kelly v Solari* does not consider, as its facts did not raise this point).

*Thomas v Houston Corbett & Co* also illustrates that the recipient may be careless. Thomas contributed to his own misfortune. He knew the £840 was not his and he was too trusting of Cook when he paid it to him; the Court of Appeal would say carelessly so. So Thomas should bare some responsibility.<sup>69</sup>

Cases of carelessness by a good faith recipient will be rare; perhaps they are limited to the situation where the recipient knows or suspects that they are not entitled to the payment.

In *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*, the High Court found that Waitaki was careless in failing to monitor the adequacy of the replacement security.<sup>70</sup> More problematic is whether the Bank was careless post-payment. A key consideration for the High Court (and noted by Henry J in the Court of Appeal as a "significant factor telling against the bank")<sup>71</sup> was the considerable delay between the mistaken payment, the Bank's discovery of the mistake, and the Bank's confirmation of the mistake. It will be recalled that the finance company failed during this period. It may be that in the eyes of the Court, the delay constituted careless behaviour. But views may differ.

To recap, my point is that *Kelly v Solari* precludes a consideration of the payer's carelessness in making the payment, not post-payment acts.

### ***Consistency with Birksian Theory***

Birksian theory has two fundamental objections to any consideration

<sup>68</sup> *Thomas v Houston Corbett & Co*, above n 4, at 177 per McGregor J.

<sup>69</sup> English courts have that held that the behaviour of a good faith recipient may be a relevant and that this is consistent with *Dextra Bank & Trust Co Ltd v Bank of Jamaica*, above n 63. An illustration of this is *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663, 147 SJLB 1397 at [82] per Munby J. ("[Dextra's condemnation of relative fault] does not mean that the court is required to blind itself to the fact, if fact it be, that someone seeking to make good the defence of change of position has only himself to blame for his predicament, having acted on a view which is not merely erroneous but which, moreover, fails to meet the standard of the reasonable man").

<sup>70</sup> *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* (HC), above n 56, at 733.

<sup>71</sup> *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*, above n 5, at 222.

of relative fault. You will recall that Birks sought symmetry between unjust enrichment claims and defences; so the first objection is that if carelessness is not relevant for the claim, it cannot be relevant for the defence. The second objection is based on the premise that the principle of unjust enrichment is self-contained or exclusive, by which I mean that only concerns recognised within that principle are relevant.

The importance of symmetry and exclusivity for Birksian theory is displayed by Birks' response to *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*. You may be surprised to learn that Birks believed that the Court was correct to evaluate Waitaki's actions.<sup>72</sup> Of course this is contrary to his theory. So Birks argued that the Bank had two independent claims – first, an unjust enrichment claim, subject to defences, for the recovery of the mistaken payment. And second, a claim for a breach of a duty to protect the mistaken payment against loss, a duty that Birks believed should be imposed upon Waitaki because of its knowledge.<sup>73</sup> So, for Birks, Waitaki's actions in depositing the money with the finance company and failing to monitor the security are not relevant for the change of position defence, but are relevant for a duty of care claim.

Does the law have to recognise a new claim against Waitaki? I would suggest “no”, and that by encouraging this Birks is motivated to defend his theory against a case in which the court perceives a more sophisticated view of unjust enrichment and its interaction with other legal principles.<sup>74</sup>

At this point I want to share a warning Lord Goff made in a public lecture. This was the 1983 Maccabean Lecture in Jurisprudence. In his lecture Lord Goff discusses the formulation and development of legal principle. He suggests that a pitfall confronting those who “seek to state legal principles” is “the temptation of elegance”.<sup>75</sup>

[T]he temptation of elegance ... is a temptation which can attract us all, simply because a solution, if elegant, automatically carries a degree of credibility; and yet the law has to reflect life in all its untidy complexity, and we have constantly to be on our guard against stating principles in terms which do not allow for the possibility of qualifications or exceptions as yet unperceived.

Lord Goff proceeded to discuss the “beneficial influence of facts [of

<sup>72</sup> Birks *Unjust Enrichment*, above n 23, at 216–217.

<sup>73</sup> Peter Birks “A Bank's Mistaken Payments: Two Recent Cases and Their Implications” (2000) 6 NZBLQ 155 at 164; Birks *Unjust Enrichment*, above n 23, at 216.

<sup>74</sup> See Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff and Jones: The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell, London, 2011) at 1-09 (recognising that overriding legal principle may justify an the finding of an enrichment yet override the granting of relief).

<sup>75</sup> Lord Goff “The Search for Principle” (Maccabean Lecture in Jurisprudence, 1983) republished in GH Jones and WJ Swadling (eds) *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, Oxford, 1999) 313 at 318.

a case] upon the [development of the] law".<sup>76</sup> He noted how judges' perception of the law is "strongly influenced by the facts of a particular case" and how legal principle adapts to reflect this.<sup>77</sup>

This process can be seen at work with the change of position defence. As I noted earlier, in *Lipkin Gorman* Lord Goff stated that that he was mindful not to "inhibit the development of the defence on a case by case basis".<sup>78</sup> And since then the defence has developed in ways Lord Goff may not have anticipated. For example, in a later case Lord Goff held that the change of position could precede the receipt of the enrichment.<sup>79</sup> Courts have also recognised that the recipient need not initiate the change; it is enough that their position is changed for them, for example by a thief.

Birksian theory is instrumental in developing our understanding of the law, but I suggest that Birks' response to the *Waitaki* case illustrates that the symmetry and exclusivity he sought may be more a manifestation of an elegant theory than a theory reflecting a work-in-progress judge-made response to the influence of rare facts.<sup>80</sup>

Having raised the importance of the case law, I must respond to Lord Goff's criticism of relative fault in the *Dextra* case. I have two responses. First, it will be recalled that their Lordships found that *Dextra* (the payer) had been the more careless party and that this carelessness arose in making the payment. So their Lordships could have been responding to what they saw as a request to overturn *Kelly v Solari*.

Second, even if we take their observations at face value, I agree with Professor Andrew Burrows of Oxford University, that they also assume a symmetry between the claim and the defence that is not convincing:<sup>81</sup>

Strict liability [to repay a mistaken payment] goes hand-in-glove with unjust enrichment. But the issue of change of position rests on the defendant [recipient] having been disenriched and it is hard to see why the same considerations as to fault [which apply to the initial imposition of strict liability] should necessarily apply in relation to that issue [the change of position defence] ....

These observations apply equally to Birksian theory.

Defences take different forms. Some operate as denials, by which I mean that they deny the existence of the claim: ie, I didn't receive the

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<sup>76</sup> At 325.

<sup>77</sup> At 325.

<sup>78</sup> *Lipkin Gorman v Karpnale Ltd*, above n 11, at 580.

<sup>79</sup> *Dextra Bank & Trust Co Ltd v Bank of Jamaica*, above n 63.

<sup>80</sup> Commentators agree that cases such as *Thomas v Houston Corbett & Co* and *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* will be rare. See, for example, Birks "A Bank's Mistaken Payments: Two Recent Cases and Their Implications", above n 73, at 163; Jones, above n 21, at 80; John D McCamus "Rethinking Section 142 of the Restatement of Restitution: Fault, Bad Faith, and Change of Position" (2008) 65 Wash & Lee L Rev 889 at 929.

<sup>81</sup> Burrows, above n 23, at 819.

payment or, as in *Dextra Bank & Trust Co Ltd v Bank of Jamaica*, the payer was not legally mistaken.

Defences can also be affirmative, by which I mean that the claim is acknowledged but a new matter is raised that negates it or deprives it of its normal consequences. For this reason, such defences have to be specially pleaded. In this context an illustration is the good consideration defence recognised by Goff J, as he then was, in a 1980s case.<sup>82</sup> This enables the recipient to concede that the payer acted under a legally relevant mistake, but to deny any obligation to repay on the basis that the recipient was legally owed the money.<sup>83</sup>

The point is that affirmative defences can raise different policy considerations than those that are present in the initial claim. The change of position defence is an affirmative defence. Typically it operates to see if the loss of the enrichment arose by virtue of what the law regards as a change of position; but the ALI and our Court of Appeal in *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* recognise that once the loss of enrichment is legally established, issues of loss allocation may arise.

### **Unpredictability**

The fear is that consideration of relative fault will bring unpredictability. I believe that this fear is exaggerated. Courts evaluate actions on a regular basis. The key factor is that the courts know what actions they are assessing and why.

### **Conclusion**

In my introduction I raised the questions, whether the actions of a mistaken payer and a good faith recipient should ever be evaluated in determining the amount of recipient's liability. *Kelly v Solari* establishes that the payer's carelessness in making the payment is not relevant. I am not questioning this. Hopefully, I have persuaded you that neither *Kelly v Solari* nor Birksian theory precludes a consideration of the payer's post-payment actions, nor, in appropriate cases, the actions of the recipient.

In the vast majority of cases no consideration of the parties' actions will be required, just because there will no qualifying acts. Apart from the payment itself the payer will have undertaken no acts that encourage the recipient to change their position. And the recipient will have believed in good faith that the payment was theirs and acted accordingly. But *Thomas v Houston Corbett & Co* and *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* illustrate rare situations where good faith is too general a test, and an evaluation of the post-payment acts of one or both of the parties may be necessary.

<sup>82</sup> *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd*, above n 9, at 695–696.

<sup>83</sup> At 696.