

Rescission, Restitution and Compensation

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I. Introduction

This chapter considers the nature of pecuniary awards and adjustments, including ‘indemnity’ orders, consequent on equitable rescission.¹ Its essential thesis is that notwithstanding that the awards are often couched in terms of ‘compensation’,² they can often be fruitfully analysed as restitutionary in nature or reflecting an implicit application of change of position considerations. This thesis is supported by the approach of courts considering the award of analogous remedies under the Trade Practices Act 1974 (Cth), and its successor the Australian Consumer Law.³ In the statutory context, as in equity, courts apply broad concepts of detriment and compensation in a manner often consistent with a restitutionary analysis. Further, the approach taken to crafting statutory relief is consistent with the view that when awarding relief consequent on rescission, a key aim is to prevent the defendant from being placed in an unjustifiably worse position than she occupied prior to the impugned transaction. This formulation emphasises the very close relationship between the traditional bar of *restitutio in integrum* as formulated in equity and the change of position defence as recently formulated in the High Court of Australia.⁴ The closeness of the association has profound implications both for the future development of the law of equitable rescission and for the cognate statutory jurisdiction.

The chief focus of the chapter is on rescission of contractual arrangements, where the mutual exchanges between the parties often raise difficult issues for courts seeking to unwind transactions. However, it should not be forgotten that the same principles of rescission apply with respect to gifts. Although comparatively rare, courts addressing rescission of gifts also engage in complex adjustments to ensure parties are restored in substance to their former

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¹ Rescission at common law is notoriously strict, requiring precise *restitutio in integrum* and admitting no consequential or facilitative adjustments between the parties: see *Erlanger v The New Sombrero Phosphate Company* (1878) 3 App Cas 1218 (HL) 1278–79 (Lord Blackburn) and *Alati v Kruger* (1955) 94 CLR 216, 224 (Dixon CJ, Webb, Kitto and Taylor JJ). It is therefore outside the scope of this chapter. Further, the nature of awards made pursuant to s 2 of the Misrepresentation Act 1976 (UK) and its derivatives will be the subject of a further, independent paper.

² See, eg, *JAD International Pty Ltd v International Trucks Australia Ltd* (1994) 50 FCR 378, 392 (Keely, Hill and Drummond JJ).

³ The ACL is contained in schedule 2 of the Competition and Consumer Act 2010 (Cth).

⁴ *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 307 ALR 512, 539 [84]–[85] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 559 [157] (Gageler J).

positions.⁵ As we will see further below, these cases confirm the close relationship between rescission in cases of contract and gift and the remedy of restitution in simple transfer cases.

The chapter begins by introducing the debate about the relationship between rescission and compensation, in particular whether and when compensatory awards for concurrent torts may be made cumulative to orders for rescission. The chapter then considers when and how pecuniary awards and adjustments made solely consequent on rescission may be characterised as restitutionary, rather than compensatory in nature. It then addresses the insights that can be gained on this issue from the statutory context. The chapter concludes by identifying some ramifications of the analysis not only for the concept of *restitutio in integrum* in rescission, but also for the developing and analogous law of change of position.

II. Rescission and Compensation

It has frequently been said that rescission is independent of, and cumulative with, any right the plaintiff may also have to compensation in tort.⁶ On this view, where a defendant has, for example, induced the plaintiff to enter into a contract for the purchase of a business through his fraudulent misrepresentations, the purchaser may avoid the contract and sue to recover her purchase money back from the appellant, with interest, as a consequence of rescission. However, she may also seek compensation for any loss which she may have suffered through carrying on the business in the meantime, on the basis of the tort of deceit.⁷ If that is correct, an initial question is why it is necessary to consider whether the nature of the awards given by courts consequent on rescission is restitutionary or compensatory in nature? If compensation is in any event available, any award that is potentially different from and, in particular, lesser than the compensatory award will simply be subsumed in the latter.

The first reason is that, even where an independent claim in tort is in theory available, a plaintiff may have failed to make an independent and cumulative claim for compensation, seeking only rescission and financial adjustments consequent on rescission. Some cases provide implicit support for the view that a court of equity may order that a defendant indemnify a defrauded plaintiff for all losses, so as to protect him as fully in equity as he could be at common law for deceit, in exercise of its concurrent jurisdiction and of its own volition.⁸ However, it seems that on balance, the weight of authority goes the other way and a

⁵ See, eg, *Quek v Beggs* (1990) 5 BPR 11,761 (NSWSC); *Winefield v Clarke* [2008] NSWSC 882 (29 August 2008) [54] (Barrett J).

⁶ *Newbigging v Adam* (1886) 34 Ch D 582 (CA) 592 (Bowen LJ), affirmed in (1888) 13 App Cas 308; *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187, 192 (Jordan CJ) (NSWSC); *Yorke v Ross Lucas Pty Ltd* (1982) 69 FLR 116; *Archer v Brown* [1985] QB 401; D O'Sullivan, S Elliott and R Zakrewski, *The Law of Rescission* (2nd edn, Oxford, Oxford University Press, 2015) [2.03]–[2.04].

⁷ In *Archer v Brown* [1985] QB 401, Peter Pain J would have awarded exemplary damages for deceit in addition to rescission, had the defendant not already been jailed, an option that highlights the independent nature of the claims.

⁸ *Newbigging v Adam* (1886) 34 Ch D 582 (CA) 592 (Bowen LJ); *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187, 192 (Jordan CJ) (NSWSC). See also *Demetrios v Gikas Dry Cleaning Industries Pty Ltd* (1991) 22 NSWLR 561, 573–74 (Meagher and Handley JJA).

separate claim must be brought by the plaintiff.⁹ This is supported by the clear requirement in cases of rescission involving duress or illegitimate pressure that any claim for compensation must rest on an independently pleaded tort.¹⁰ On this basis, where an independent tort is not pleaded in cases of rescission for fraudulent misrepresentation, the plaintiff's relief is restricted to whatever consequential or ancillary relief inherently flows from his election to rescind. We will consider in more detail below the case of *Brown v Smitt*.¹¹ In that case, the plaintiff sought rescission of a contract of sale for fraudulent misrepresentation and certain consequential relief. In a joint judgment, Knox CJ, Gavan Duffy and Starke JJ emphasised that the plaintiff had not relied upon deceit and could not obtain compensation consequent on rescission for consequential losses he had suffered from running a business on the farm the subject of the sale.¹² In this context, a clear understanding of the nature and bounds of financial relief that is inherent in, or solely attributable to, rescission is essential.

Secondly, notwithstanding the widespread support in the authorities for the availability of cumulative relief arising from common law wrongs, Australian authorities indicate that claims for compensation in equity for breach of fiduciary duty in entering into a contract are precluded where the contract is rescinded.¹³ If that is so,¹⁴ it is difficult to see why compensation for common law wrongs such as deceit are cumulative, as opposed to alternative, to rescission. Consistently with this view Barnett and Harder argue that rescission and compensation are mutually exclusive: a plaintiff cannot both affirm the contract in order to seek compensation for deceit and rescind it.¹⁵ Barnett and Harder draw support for this position from both *Brown v Smitt*¹⁶ and *Alati v Kruger*,¹⁷ which we consider immediately below.

It is certainly correct that claims for compensation for breach of contract cannot be brought where the contract has been rescinded. The contract cannot both be avoided and used as the basis of a claim for compensation that effectively enforces the (rescinded) promise.¹⁸ However, does the same necessarily follow for claims for compensation for torts such as

⁹ See, eg, *Sibley v Grosvenor* (1916) 21 CLR 469, 475 (Dixon CJ); *Redgrave v Hurd* (1881) 20 Ch D 1 (CA) 12 (Jessel MR, Lush LJ concurring at 26).

¹⁰ *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 (HL) 385, cited with approval in *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck)* [No 2] [1992] 2 AC 152 (HL) 166 (Lord Goff). See also *Investec Bank (Channel Islands) Ltd v The Retail Group plc* [2009] EWHC 476 (Ch) [122] (Sales J).

¹¹ *Brown v Smitt* (1924) 34 CLR 160.

¹² *Brown v Smitt* (1924) 34 CLR 160, 166. Followed on this point in *Blackley Investments Pty Ltd v Burnie City Council (No 2)* (2011) 21 Tas R 98 (TASSC).

¹³ *Aequitas Ltd v AEFC* (2001) 19 ACLC 1,006, 1,087 [432] (Austin J) (NSWSC). His Honour drew from the cases in which an account of profit has been denied where a contract was affirmed, rather than rescinded: see *Re Cape Breton Company* (1885) 29 Ch D 795 (CA), upheld in *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652 (HL), and in the High Court of Australia in *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215.

¹⁴ Contra is D O'Sullivan, S Elliott and R Zakrewski, *The Law of Rescission* (2nd edn, Oxford, Oxford University Press, 2015) [2.11]

¹⁵ K Barnett and S Harder, *Remedies in Australian Private Law* (New York, Cambridge University Press, 2014) 399–400.

¹⁶ *Brown v Smitt* (1924) 34 CLR 160.

¹⁷ *Alati v Kruger* (1955) 94 CLR 216.

¹⁸ *Alati v Kruger* (1955) 94 CLR 216, 222 (Dixon CJ, Webb, Kitto and Taylor JJ), quotation cited below at text to n xxx.

deceit? It is of course right that if compensation for deceit cumulative on rescission is awarded, it must take into account the fact of rescission and its inherent remedial consequences. In some aspects, the awards will be incompatible, being based on different premises. As explained by the High Court in *Alati v Kruger*, the normal measure of damages for deceit involving the purchase of a business assumes and affirms the contract of sale.¹⁹ The primary measure of loss in that context is the difference between the price paid and the ‘true’ value of the property, an amount that assumes the plaintiff has retained or sold the asset.²⁰ The compensatory award is premised on the plaintiff retaining the property and seeks to ‘make good’ the loss sustained through the misrepresentation. Where the contract is rescinded, by contrast, the plaintiff disaffirms the contract and recovers her purchase price on returning the purchased asset to the defendant. The financial adjustments and awards consequential on rescission are premised on unwinding the contract and returning the plaintiff to his or her original position. There cannot, moreover, be double recovery, or over-compensation. This means that, assuming an award of damages is available in addition to rescission, that award of damages cannot compensate a plaintiff for any losses for which adjustment has already been made through the process of awards made as part of the process of rescinding the contract.

However, accepting that the natural incidents of rescission must be taken into account in any pecuniary adjustments or awards following rescission, so as to avoid double-recovery, the question remains whether compensation for *consequential loss* (rather than, for example, for the value of the business asset itself) may be awarded in addition to rescission, or whether the two responses are mutually exclusive? In *Alati v Kruger*, the Court’s analysis is rather ambiguous on this point. In their joint judgment, Dixon CJ, Webb, Kitto and Taylor JJ stated:

On the footing which must be accepted, that the contract had been induced by a fraudulent representation made by the appellant to the respondent, the latter had a choice of courses open to him. He might sue for damages for breach of the warranty ... but he could not do this and rescind the contract for misrepresentation. Secondly, he might sue to recover as damages for fraud the difference between the price he had paid and the fair value of the property at the time of the contract, but that again would involve affirming the purchase. Or, thirdly, provided that he was in a position to restore to the appellant substantially that which he had received under the contract, he might avoid the purchase and sue to recover his purchase money back from the appellant, with interest and also with damages for any loss which he may have suffered through carrying on the business in the meantime...²¹

This passage both seems to present the three possible courses as alternatives,²² as Barnett and Harder argue, but also to contemplate that consequential losses may be awarded following rescission with respect to losses incurred in carrying on the business. The latter is difficult to reconcile with the High Court’s earlier decision in *Brown v Smitt*, given that it appears that the plaintiff in *Alati v Kruger* did not plead an independent action in deceit.²³ But, as we will see below, the Court’s final orders in *Alati v Kruger* may also be consistent with a

¹⁹ *Alati v Kruger* (1955) 94 CLR 216, 222 (Dixon CJ, Webb, Kitto and Taylor JJ), see quotation below at text to n xxx.

²⁰ *Potts v Miller* (1940) 64 CLR 282; *Toteff v Antonas* (1952) 87 CLR 647; *Gould v Vaggelas* (1985) 157 CLR 215; *HTW Valuers v Astonland Pty Ltd* (2004) 217 CLR 640.

²¹ *Alati v Kruger* (1955) 94 CLR 216, 222 (citations omitted).

²² See also *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 283-284 (the Court).

²³ *Alati v Kruger* (1955) 94 CLR 216, 223 (Dixon CJ, Webb, Kitto and Taylor JJ).

restitutionary analysis, in particular that the plaintiff's detrimental changes of position may be brought into account as part of the process of restoring the parties to the *status quo ante*. On this approach, there is no inconsistency with *Brown v Smitt*, as the adjustment made by the Court was required to ameliorate the plaintiff's liability to make counter-restitution to the defendant of benefits received under the contract, rather than compensate for losses incurred.

As a matter of authority, it seems likely that in Australia²⁴ the matter is settled by the early High Court decision in *Sibley v Grosvenor* in which Dixon CJ addressed the matter head-on:

Some confusion seems to have arisen in argument from not distinguishing between the case of a purchaser who elects to disaffirm a contract for the sale of property which he has been induced to enter into by fraud and the case of a purchaser who elects to affirm it. If he affirms the contract he acquires the property, and must allow for all the advantages which he derives from the acquisition. The measure of damages is his loss on the whole transaction. If, on the other hand, he elects to disaffirm the contract, he acquires nothing, and is entitled to be put in the same position as if he had not made it. ... But, if rescission of the contract will not completely indemnify the purchaser, he is entitled to bring an action of deceit against any person who has knowingly made the false representation on which he acted. This remedy is entirely independent of and additional to the right to rescind.²⁵

On this basis, compensation cumulative to rescission may be obtained by a plaintiff, provided that the tort supporting the claim is separately pleaded. The same position should apply to concurrent claims based on breach of an equitable duty.²⁶

However, it may be observed in closing this discussion that the marriage of compensation and restitution as cumulative remedies does present some challenges in terms of principle and practice. Notwithstanding the position as a matter of authority, it remains unclear how, as a matter of principle, one can be entitled to relief that entails simultaneously affirming and rescinding a contract. Even if that is somehow a coherent position for the law to take, we saw earlier the challenges this presents to calculating any compensatory award. It may be added that if overcompensation of the plaintiff is to be avoided, then it will be necessary to be very clear on the differing purposes of the awards. Compensation for tort seeks to place the plaintiff in the position she would have been had the tort not occurred. By contrast, notwithstanding Dixon CJ's expression of the purpose of rescission, we will see below that the emphasis in rescission tends to be on returning the parties to their former position. One remedial enquiry is hypothetical and potentially broad-ranging, the other historical in nature and potentially much more limited in focus. If that is correct, then as a matter of practice it will be important to map out the scope of pecuniary awards inherent in rescission before considering what consequential losses not covered by these awards might nonetheless be compensated through damages.

²⁴ In England, see for example *Redgrave v Hurd* (1881) 20 Ch D 1 (CA) 12 (Jessel MR, Lush LJ concurring at 26) refusing a defendant's counter-claim for 'damages' for costs incurred in reliance on a misrepresentation, because he had not pleaded knowledge on the part of the plaintiff that the statements were untrue, nor pleaded the allegations themselves in sufficient detail to found an action for deceit.

²⁵ *Sibley v Grosvenor* (1916) 21 CLR 469, 474–75 (Dixon CJ).

²⁶ See D O'Sullivan, S Elliott and R Zakrewski, *The Law of Rescission* (2nd edn, Oxford, Oxford University Press, 2015) [2.10]–[2.11].

The third and probably most significant reason for close analysis of the nature of awards consequent on rescission is that, although rescission is a response to wrongdoing such as fraudulent misrepresentation, unconscionable dealing²⁷ and breach of fiduciary duty,²⁸ rescission is also triggered by events that do not constitute actionable wrongs, such as innocent misrepresentation and duress. Neither innocent misrepresentation²⁹ nor duress gives rise to a right of compensation.³⁰ The same is true of undue influence in equity.³¹ Although there may be a concurrent wrong arising on the particular facts of a case which may support a claim for compensation, where there is none, the plaintiff will again be left to whatever consequential relief flows inherently from rescission. In that context, characterising the nature and extent of that relief is essential.

In conclusion, determining the nature of pecuniary awards or adjustments solely consequent on rescission is an essential first step in clarifying the broader boundaries of recovery for rescinding plaintiffs. In that regard, one judge has suggested that many compensation orders made consequent on rescission are orders ancillary to the primary decree, directed to ensuring that the primary decree achieves its restitutionary purpose.³² On this account, many so-called compensatory orders made pursuant to rescission are properly characterised as restitutionary rather than compensatory in nature. Whether or not that is always correct (and it must be doubted where there is a concurrent claim for compensation for a legal or equitable wrong) the observation reminds us that not all pecuniary awards are compensatory in nature and that, in the context of rescission, the labelling of awards as ‘compensatory’ cannot be determinative of the issue. With that background, it is appropriate to turn to the nature and aim of financial awards and adjustments made solely consequent on rescission.

²⁷ The characterisation of unconscionable dealing as a form of equitable wrongdoing seems unavoidable following the High Court of Australia’s emphasis on the need to show a ‘predatory state of mind’ on the part of defendants: *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 439–40 [161] (the Court).

²⁸ This assumes the conventional position that these constitute equitable wrongs. For a contrary, powerful analysis of the no-conflict and no-profit rules that shows them to be independent of wrongdoing, see L Smith, ‘Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another’ (2014) 130 *Law Quarterly Review* 608, 620–25, 628–30. The potential ramifications of the different views are explored briefly below at n xxx.

²⁹ See, eg, *Newbigging v Adam* (1886) 34 Ch D 582 (CA).

³⁰ *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 (HL) 385, cited with approval in *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck)* [No 2] [1992] 2 AC 152 (HL) 166 (Lord Goff). *Investec Bank (Channel Islands) Ltd v The Retail Group plc* [2009] EWHC 476 (Ch) [122] (Sales J).

³¹ There may be compensation awarded for the equitable wrong of abuse of influence, as in *Mahoney v Purnell* [1996] 3 All ER 61 (QB); *Nattrass v Nattrass* [1999] WASC 77 (25 June 1999); *Smith v Glegg* [2005] 1 Qd R 561. There may also be an account of profits awarded for this form of equitable wrongdoing: *O’Sullivan v Management Agency and Music Ltd* [1985] QB 428 (CA). Otherwise, all authorities limit the remedial response for the not-wrong of undue influence to rescission. For detailed discussion of undue influence, see J Edelman and E Bant, *Unjust Enrichment* (Oxford, Hart Publishing, 2016) ch 10 (forthcoming).

³² *Aequitas Ltd v AEFC* (2001) 19 ACLC 1,006, 1,087 [432] (Austin J) (NSWSC).

III. The Requirement of *Restitutio in Integrum* in Rescission

A. Restitution and Counter-restitution

As the learned authors of *The Law of Rescission* observe, the basic objective of relief upon rescission in equity is to return the parties in substance to their original position.³³ Equity is not overly nice as to the degree of precision required to satisfy this aim. As was explained in *Erlanger v The New Sombrero Phosphate Company*, ‘the practice has always been for a Court of Equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract’.³⁴ Critical to this task is to require both parties to restore to the other any benefits obtained under the impugned transaction: there must be a ‘giving back and a taking back on both sides’.³⁵ Thus the courts commonly require plaintiffs, as a condition of rescinding loan agreements, to make restitution of the principal received from the defendant plus interest.³⁶ Where *restitutio in integrum* in this sense is no longer possible, restitution will be denied.³⁷ However, in many cases, the process of returning the parties to the *status quo ante* is not so clear-cut and requires close attention not only to the benefits that have initially been transferred pursuant to the impugned transaction, but to subsequent actions by the parties.

The starting point for any discussion of monetary awards or adjustments consequent on rescission to achieve *restitutio in integrum* must, in Australia, commence with the High Court decision in *Brown v Smitt*.³⁸ In that case, a purchaser of farming land sought rescission of the contract of sale on the ground of various fraudulent representations made by the vendor. In addition, the purchaser sought return of the purchase price and ‘damages’ including a sum of £854 for the ‘expense incurred by the [purchaser] in repairing, working and improving the farm, loss and depreciation of live-stock, and cost of maintenance and other expenses incurred in connection with the live-stock’.³⁹

As Knox CJ, Gavan Duffy and Starke JJ explained:

The parties being relieved of the contractual obligations, each must give back all that he obtained under the contract. Where the property the subject matter of a contract remains unchanged, no difficulty arises. Where it has been wholly or substantially destroyed by the default of the party seeking rescission, there can be no rescission because there can be no restitution. But where the property has been improved or deteriorated by the act of the purchaser, and yet remains in substance what it was before the contract, equity adjusts the rights of the parties by awarding money compensation to one or

³³ D O’Sullivan, S Elliott and R Zakrewski, *The Law of Rescission* (2nd edn, Oxford, Oxford University Press, 2015) [13.01].

³⁴ *Erlanger v The New Sombrero Phosphate Company* (1878) 3 App Cas 1218 (HL) 1278–79 (Lord Blackburn).

³⁵ *Newbigging v Adam* (1886) 34 Ch D 582 (CA) 595 (Bowen LJ).

³⁶ eg *Maguire v Makaronis* (1988) 188 CLR 449; *Elkofairi v Permanent Trustee Co Ltd* (2002) 11 BPR 20,841 (NSWCA); *Perpetual Trustee Company Limited v Khoshaba* (2005) 14 BPR 26,639 (NSWCA).

³⁷ *Maguire v Makaronis* (1988) 188 CLR 449.

³⁸ *Brown v Smitt* (1924) 34 CLR 160.

³⁹ *Brown v Smitt* (1924) 34 CLR 160, 163.

the other, and so substantially putting each party in the position which he occupied before the contract was made.⁴⁰

Although labelled ‘compensation’, the financial adjustments contemplated by the plurality reflect what would nowadays be recognised as restitutionary considerations. As their Honours noted, in cases of depreciation, a plaintiff will be required to make good any loss in value in relation to an asset that must, following rescission, now be returned to the other party. The effect of that order is to require the plaintiff to make full counter-restitution of the value of the benefit received from the defendant, a point to which we return below. By contrast, if the land has been improved, then there is a possibility that rescission will result in the unjustified enrichment of the defendant. Orders therefore must be made to require the defendant to make restitution of the value of the improvements, to the extent that they would otherwise result in the unjustified enrichment of the defendant.

The parallels between the considerations identified by the High Court in *Brown v Smitt* in this respect and the circumstances in which defendants will be found to be ‘enriched’ for the purposes of the law of restitution of unjust enrichment are striking. For example, the plurality explained that defendants are not expected to pay for improvements made by plaintiffs which were matters of ‘taste or personal enjoyment’.⁴¹ The plaintiff could however recover for ‘permanent and lasting improvements ... which increased the sale value of the estate in [the defendant’s] hands’.⁴² This analysis is entirely consistent with the modern approach to claims for restitution of unjust enrichment. It is increasingly recognised in that context that in order to protect defendants’ freedom of choice, plaintiffs cannot foist what they consider to be a benefit on defendants and then claim restitution of the value of the benefit. The defendant is entitled to say that he was not enriched by an unwanted benefit, no matter that the plaintiff considered it valuable. Although the principle often bears the unfortunate label of ‘subjective devaluation’, it is better understood as concerned with the defendant’s right to choose the benefits that he will receive.⁴³ Relevantly for present purposes, where they have not expressly chosen a benefit, defendants will generally only be found to have been enriched where the plaintiff’s expenditure saved them some necessary expense or created improvements that are readily realisable in money. The latter example is precisely the instance of ‘permanent and lasting improvements ... which increased the sale value of the estate in [the defendant’s] hands’ given by the plurality in *Brown v Smitt*.⁴⁴ The plurality further explained that no ‘allowances [are to] be given for improvements made after the party making them knows, or has reasonable notice, of the defect in title. He must then

⁴⁰ *Brown v Smitt* (1924) 34 CLR 160, 164.

⁴¹ *Brown v Smitt* (1924) 34 CLR 160, 165.

⁴² *Brown v Smitt* (1924) 34 CLR 160, 165.

⁴³ *Benedetti v Sawaris* [2013] UKSC 50, [2013] 3 WLR 351, 392 [115] (Lord Reed); *Littlewoods Retail Ltd v Comrs for HM Revenue and Customs* [2014] EWHC 868 (Ch) [363]–[374] (Henderson J); *Test Claimants in the FII Group Litigation v Comrs for HM Revenue and Customs* [2014] EWHC 4302 (Ch) [271] (Henderson J). *cf* *Benedetti v Sawaris* [2013] UKSC 50, [2014] AC 938, 956–57 [15]–[17] (Lord Clarke, Lords Kerr and Wilson concurring), 987 [115] (Lord Reed).

⁴⁴ *Brown v Smitt* (1924) 34 CLR 160, 165. *cf* the minority of Isaacs and Rich JJ, who emphasised that the defendant had not asked for the improvements, which were not necessary to maintain the property, and therefore should not be bound to ‘purchase’ them: at 170.

take the risk'.⁴⁵ Again, precisely the same approach has been taken in recent cases applying the analytical concept of unjust enrichment in the context of rescission and restitution for mistake.⁴⁶

Critically, too, the plurality emphasised the significant distinction between the awards possible consequent on rescission on the one hand, and compensation properly-so-called for torts such as deceit on the other:

[P]utting the parties in the position they were in before the contract, replacing them *in statu quo*, does not involve replacing them in the same position in all respects, but only in respect of the rights and obligations created by the contract which is rescinded. A party, in case of rescission, cannot ask the Court to award him compensation for all collateral losses which he may have sustained by reason of the fact that he entered into the contract, such as losses incurred in carrying on a business (*Newbigging v Adam*; *Whittington v Seale-Hayne*), but only such compensation as will restore the *status quo ante* in relation to the subject matter of the contract. Such losses could, in this case, only be recovered in an action of deceit. That cause of action, if included in the statement of claim, was not relied on below, and in any event it seems to us that it was the contract, and not, in a legal sense, the establishment of the business, which the fraudulent representations induced.⁴⁷

The orders made by the Court required; (1) an account of the purchase price with interest; (2) an account of the costs charges and expenses paid and incurred by the purchaser in consequence of and incidental to the purchase; (3) an account of the sums laid out by the purchaser prior to becoming aware of the fraud in 'necessary repairs and in improvements of a permanent lasting and substantial nature', and an inquiry whether and to what extent the value of the premises had been increased in value by the plaintiff's improvements; and (4) an amount by way of occupation rent to be paid by the plaintiff to the defendant for the use of the land prior to rescission.⁴⁸

The first, third and fourth of the Court's final orders underline the point that the process of restitution in unwinding a contract following rescission is mutual: both the defendant and plaintiff must make restitution of benefits obtained pursuant to the contract. The nature of these awards in relation to the improvements, rent and interest clearly have the effect of requiring each party to return to the other as a consequence of rescission the reasonable value of any benefits obtained as a result of the impugned transaction. In the language of unjust enrichment analysis, the defendant must make restitution and the plaintiff counter-restitution of all benefits obtained as a result of the impugned transfer. In the language of equity, the plaintiff must 'do equity' as a condition of rescission by paying an

⁴⁵ *Brown v Smitt* (1924) 34 CLR 160, 165. See also *MacFarlane v Heritage Corp (Aust) Pty Ltd* [2003] QSC 350 (20 October 2003) [84]–[85] (Chesterman J), affirmed on appeal: see [2004] QCA 183 (28 May 2004) (no orders for expenses incurred by the plaintiffs in maintaining the property over the period when they had use of that property).

⁴⁶ See, eg, *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108, 153 [114] (Lord Walker, delivering the judgment of the Court); *Brennan v Bolt Burdon* [2004] EWCA Civ 1017, [2005] QB 303 (CA) 316 (Maurice Kay LJ), 319 (Bodey LJ); *Queensland Alumina Ltd v Alinta DQP Pty Ltd* [2007] QCA 387 (13 November 2007) [70]–[72] (Holmes JA); *Re Magarey Farlam Lawyers Trust Accounts [No 3]* (2007) 96 SASR 337, 387–88 (DeBelle J); *Lahoud v Lahoud* [2010] NSWSC 1297; *Salib v Gakas* [2010] NSWSC 505 (10 November 2010) [333] (Ward J).

⁴⁷ *Brown v Smitt* (1924) 34 CLR 160, 165–66 (citations omitted).

⁴⁸ *Brown v Smitt* (1924) 34 CLR 160, 173–74.

occupation rent on the premises⁴⁹ and the defendant likewise must make restitution of all benefits received. Whatever the label, the process of reasoning is precisely the same.⁵⁰ This same approach has been taken to the award of monetary allowances and adjustments consequent on rescission in innumerable cases since.⁵¹

The reason why a plaintiff must restore any benefits obtained under the impugned transaction as a condition of rescission has long been understood as resting in the prevention of unjust enrichment. As Lord Wright said in *Spence v Crawford*:

Though the defendant has been fraudulent, he must not be robbed nor must the plaintiff be unjustly enriched, as he would be if he both got back what he had parted with and kept what he received in return.⁵²

On this analysis, rescission as a process conceals mutual cross-claims for restitution: one made by the plaintiff against the defendant on the grounds of induced mistake (innocent and fraudulent misrepresentation), undue influence, duress or breach of fiduciary duty, the other by the defendant against the plaintiff. The latter is best understood as resting on failure of consideration: once rescission occurs, the basis on which the defendant transferred any benefits under the impugned transaction wholly fails. This is so in every case of rescission, whatever the nature of the primary claim (that is, whether the plaintiff's claim of rescission is based on fraudulent or innocent misrepresentation, duress, undue influence or breach of fiduciary duty). In this respect, these sorts of adjustments have much in common with the process courts regularly undertake in awarding allowances for the skill and effort of breaching fiduciaries, where it has been observed that 'the liability of the fiduciary should not be transformed into a vehicle for the unjust enrichment of the plaintiff'.⁵³

If this analysis is correct, then the nature of the second order made in *Brown v Smitt* merits further consideration. This enquiry is not obviously restitutionary: the expenses paid by the purchaser in consequence of the contract were not related to improving the property, nor does expenditure incurred by the plaintiff necessarily equate to a benefit to the defendant.⁵⁴ The answer may lie in taking seriously the proposition that rescission involves mutual claims for restitution. On this approach, the second order made in *Brown v Smitt* may be best understood as directed to the plaintiff's detrimental changes of position made as a result of entering into the contract. This is not a compensatory enquiry but a particular manifestation of the defence of change of position.

B. Detrimental Changes of Position

⁴⁹ *Maguire v Makaronis* (1997) 188 CLR 449.

⁵⁰ *Plan B Trustees Ltd v Parker* [2013] WASC 216 (30 May 2013) [89]–[91] (Edelman J).

⁵¹ eg *Alati v Kruger* (1955) 94 CLR 216; *McAllister v Richmond Brewing Co (NSW) Pty Ltd* (1942) 42 SR (NSW) 187, 192 (Jordan CJ) (NSWSC); *JAD International Pty Ltd v International Trucks Australia Limited* (1994) 50 FCR 378.

⁵² *Spence v Crawford* [1939] 3 All ER 271 (HL) 288–89.

⁵³ eg *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 561 (the Court).

⁵⁴ See also *JAD International Pty Ltd v International Trucks Australia Limited* (1994) 50 FCR 378, 391 (Keely, Hill and Drummond JJ).

Rescission case law is replete with examples of financial adjustments and allowances that work as functional equivalents of the change of position defence. In the context of gifts, a number of cases have adjusted or contemplated adjusting defendants' restitutionary liability in the light of their subsequent changes of position. Thus in *Quek v Beggs*, a pastor and his wife irreversibly changed their position in various ways in good faith reliance on receipt of gifts that were subsequently set aside for undue influence.⁵⁵ For example, they had taken out a mortgage over one of the given properties and used the money raised to improve the property of a third party. The defendants later discharged the mortgage with the sale proceeds of another of the given properties. Justice McLelland held that it would be inequitable to make the defendants account for the sums used in improving the property, as they would be unable to be returned to their former position.

A similar approach in the contractual context led the High Court of Australia to conclude in *AH MacDonald & Co Pty Ltd v Wells* that the plaintiff was not entitled to rescind the contract for innocent misrepresentation.⁵⁶ In that case, the defendant had 'unalterably changed his position' in reliance on the transaction by entering into an agreement with a third party.⁵⁷

Conversely, changes of position made by a plaintiff in good faith and in reliance on the contract have in some cases been taken into account to reduce the plaintiff's counter-restitutionary liability. The second order made in *Brown v Smitt*, whereby costs, charges and expenses paid and incurred by the purchaser as a result of the contract were brought into the account, is one such example. In *Alati v Kruger*, the Court similarly made allowances in favour of the plaintiff in respect of conveyancing and stamp duty costs incurred by the plaintiff in relation to the transaction.⁵⁸

The same parallels between the requirement of *restitutio in integrum* and change of position are visible in relation to what could be termed independent or spontaneous changes of position, for example where a benefit received by a defendant subject to a transaction later sought to be set aside is devalued or destroyed. Where the asset has been destroyed, rescission is in general denied completely, affording the defendant a complete defence. However, as noted earlier,⁵⁹ in cases of depreciation, a plaintiff or defendant will be required to make good the value of any loss in value in relation to an asset that must, following rescission, now be returned to the other party. As Lord Blackburn stated in *Erlanger v The New Sombrero Phosphate Company*:

It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived for the use of the property, or if the property, though

⁵⁵ *Quek v Beggs* (1990) 5 BPR 11,766. See also *Allcard v Skinner* (1887) 36 Ch D 145 (CA); *Cheese v Thomas* [1994] 1 WLR 129 (CA); *Hartigan v International Society for Krishna Consciousness Incorporated* [2002] NSWSC 810 (6 September 2002).

⁵⁶ *AH MacDonald & Co Pty Ltd v Wells* (1931) 45 CLR 506, 512–13 (Rich, Starke and Dixon JJ).

⁵⁷ *AH MacDonald & Co Pty Ltd v Wells* (1931) 45 CLR 506, 513 (Rich, Starke and Dixon JJ).

⁵⁸ *Alati v Kruger* (1955) 94 CLR 216, 229–30, described as 'damages in respect of the conveyancing costs and stamp duty incurred by the plaintiff in relation to the said contract'.

⁵⁹ Above n xxx (*Brown v Smitt*).

not destroyed, has been in the interval deteriorated, without making compensation for that deterioration.⁶⁰

This order for ‘compensation’ has the effect of ensuring that full restitution and counter-restitution take place. It may in that light seem entirely contrary to the influence of any change of position considerations. However, the general position is subject to exceptions that operate, again, much like a change of position defence. For example, a defendant will not be held liable to make an adjusting payment for inherent depreciation not due to the fault of the defendant. The point rarely arises in practice: as Lord Wright commented in *Spence v Crawford*, the ‘plaintiff who seeks to set aside the contract will generally be reasonable in the standard of restitution which he requires’.⁶¹ However, again consistently with change of position, where a received asset naturally deteriorates but the defendant has been fraudulent, the court will order the defendant to pay ‘compensation to make good the change of position’.⁶² In these circumstances, the defendant’s liability to make full restitution to the plaintiff is undiminished, consistently with denial of a change of position defence. Turning to changes of position made by the plaintiff, it is well established that a plaintiff will not be required to make an adjusting payment where the deterioration of an asset received from the defendant occurred without fault of the plaintiff, such as where the deterioration was inherent in the nature of the asset or was the result of independent market forces.⁶³ Again, such orders serve as functional equivalents of the change of position defence. The protection afforded to parties to rescission in such cases of non-reliance based changes of position is striking, given the long-standing debates in simple transfer cases over whether the change of position defence should apply to such changes.⁶⁴

The same defensive principle is visible in cases of rescission involving restitution and counter-restitution of the use value of benefits. In general, parties will be required to make restitution of the full market value of the opportunity of using a benefit. Thus the plaintiff in *Alati v Kruger* was required to pay rent for the period of occupation of the premises and the defendant had to pay interest on the receipt of the purchase price.⁶⁵ Sometimes, however, a

⁶⁰ *Erlanger v The New Sombrero Phosphate Company* (1878) 3 App Cas 1218, 1278.

⁶¹ *Spence v Crawford* [1939] 3 All ER 271 (HL) 289.

⁶² *Spence v Crawford* [1939] 3 All ER 271 (HL) 289 (Lord Wright).

⁶³ *Alati v Kruger* (1955) 94 CLR 216, 225 (Dixon CJ, Webb, Kitto and Taylor JJ); *Cheese v Thomas* [1994] 1 WLR 129 (CA) 135 (Sir Donald Nicholls VC); *Armstrong v Jackson* [1917] 2 KB 822; *Balfour & Clark v Hollandia Ravensthorpe NL* (1978) 18 SASR 240, 258 (Hogarth J); *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, 370 (Mason P, Priestley JA agreeing).

⁶⁴ In England, the authorities clearly support its application: *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) 580–81 (Lord Goff); *Scottish Equitable plc v Derby* [2001] EWCA Civ 369, [2001] 3 All ER 818, 827 (Robert Walker LJ), 831 (Keane and Simon Browne LJJ concurring); *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC); *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47, [2004] 1 WLR 2775; *Test Claimants in the FII Group Litigation v Comrs for HM Revenue and Customs* [2008] EWHC 2893 (Ch) [325] (Henderson J); *Bloomsbury International Ltd v Sea Fish Industry Authority* [2009] EWHC 1721 (QB), [2010] 1 CMLR 12, 379–82 [134]–[137] (Hamblen J); *Test Claimants in the FII Group Litigation v Comrs for HM Revenue and Customs* [2014] EWHC 4302 (Ch) [343]–[347] (Henderson J). In Australia, the position remains open but is increasingly doubted: *Citigroup Pty Ltd v National Australia Bank Limited* (2012) 82 NSWLR 391, 405 [64] (Barrett JA) but cf 394 [6] (Bathurst CJ, Allsop P, Meagher JA), seemingly leaving the question open; and *Australian Financial Leasing Services Pty Limited v Hills Industries Limited* (2014) 307 ALR 512, 538 [81] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 554 [142] (Gageler J), discussed below at xxx.

⁶⁵ *Alati v Kruger* (1955) 94 CLR 216, 229–30.

party will not actually have used the asset obtained and in those circumstances restitution is often restricted to the lesser value actually obtained.⁶⁶ The result is akin to a change of position defence: the party is effectively pleading that, in reliance on her receipt, she chose not to use the asset to its full potential.⁶⁷ By contrast, where the party has been fraudulent, full restitution of the market value of the use of the asset is required,⁶⁸ again consistent with a denial of the defence.

While the adjustments consequent on rescission often echo change of position, the cases are not always clear or consistent — even internally. An example is *Spence v Crawford*, where a fraudulent defendant was held not to be entitled ‘in bar of restitution’ to rely on his change of position in altering the share holdings in the company in reliance on the impugned share transfer.⁶⁹ Lord Thankerton left open the question whether a defendant guilty only of innocent misrepresentation would be entitled to plead the change of position.⁷⁰ This is consistent with the foregoing analysis. However, the court did allow the defendant to plead in limitation of his liability the fact that he had sold certain stock at a loss as required under the impugned contract. Lord Wright expressed his concern that the result was incoherent, however found that it was unnecessary to decide the matter because the parties had agreed a form of order (which supported Lord Thankerton’s order) in the event that rescission proved possible.⁷¹

C. The Nature of ‘Indemnity Orders’: Compensation or Restitution?

The previous sections have shown that consequential orders following rescission may use the language of compensation but often reflect restitutionary or change of position considerations. A similar need to delve below the surface labels of court orders is apparent in cases where courts in equity order the defendant to ‘indemnify’ the plaintiff in relation to some loss or liability under a rescinded contract. The language of indemnity suggests a solely compensatory function but, as the following discussion shows, indemnity orders are also made to effect restitution and counter-restitution. A good example is *Newbigging v Adam*.⁷² In that case a plaintiff sought to rescind a contract by which he had become a partner in a failing business. The ground of rescission was that the contract had been induced as a result of the defendants’ innocent misrepresentations as to the financial state of the business. In accordance with the contract, Newbigging paid more than £9,000 by way of contribution to the capital base of the business and £324 by way of discharge of certain liabilities of the partnership. When the business failed, Newbigging sought (among other things) orders that the defendants be required to indemnify him against all claims and demands, debts or

⁶⁶ See, eg, *Coastal Estates Pty Ltd v Melvende* [1965] VR 433, 440–41 (Sholl J).

⁶⁷ *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561, 617 [151] (Lord Scott); *Test Claimants in the FII Group Litigation v Comrs for HM Revenue and Customs* [2014] EWHC 4302 (Ch)

⁶⁸ D O’Sullivan, S Elliott and R Zakrewski, *The Law of Rescission* (2nd edn, Oxford, Oxford University Press, 2015) [17.09]. See also *Howell v Howell* (1837) 2 My & Cr 478, 40 ER 722; *Adam v Sworder* (1863) 2 De GJ & S 44, 46 ER 291.

⁶⁹ *Spence v Crawford* [1939] 3 All ER 271 (HL) 291 (Lord Thankerton, Lords Atkin and Russell concurring).

⁷⁰ *Spence v Crawford* [1939] 3 All ER 271 (HL) 282–83.

⁷¹ *Spence v Crawford* [1939] 3 All ER 271 (HL) 290.

⁷² *Newbigging v Adam* (1886) 34 Ch D 582 (CA), affirmed in (1888) 13 App Cas 308.

liabilities arising from or in respect of the partnership and that he be repaid the amount of his capital contribution plus interest. The trial judge made orders in favour of the plaintiff. On appeal, the awards were in essence upheld, but for slightly different reasons. The necessity for return (restitution) of the capital contribution and interest in favour of the plaintiff was not disputed. The focus of the appeal was rather on the nature of the indemnity ordered and whether it was in effect, as argued by the defendants, an order for compensation. This would be inappropriate as the case was one of innocent, rather than fraudulent misrepresentation.

It was accepted that, in a case involving fraudulent misrepresentation, equity could exercise its concurrent jurisdiction in cases of fraud to give complete indemnity to the victim 'so as to protect him as fully in equity as he could have been protected in law' in an action for deceit.⁷³ In this category of case (fraudulent, rather than innocent misrepresentation), the indemnity effects the equivalent of common law compensation. It was therefore critical for the Court of Appeal to distinguish this (compensatory) form of indemnity from the indemnity awarded for innocent misrepresentation, where compensation is not an appropriate or available remedy. Although the precise reasoning of each judge differed, they were unanimous in the view that in the case of innocent misrepresentation, the indemnity award is measured differently, and has a different purpose to, the indemnity that could be awarded in cases of fraudulent misrepresentation.

Cotton LJ distinguished the indemnity in the instant case from an order for compensation on the grounds that the former was less extensive. He posited a scenario in which the plaintiff had given up a valuable commission in reliance on entering into the partnership contract.⁷⁴ While compensation for the lost commission could be claimed in an action for deceit, it would not be included within an indemnity awarded following rescission of the contract for innocent misrepresentation. In his Lordship's view, the latter indemnity only covered obligations for which the plaintiff had contracted under the contract, for example, a contractual obligation to pay third parties, or a contractual obligation to assume the liabilities of the defendant. However, he also put the position rather more broadly: 'In my opinion it cannot be said that [the plaintiff] is put back into his old position unless he is relieved from the consequences and obligations which are the result of the contract which is set aside'.⁷⁵ This formulation would extend to any losses causally connected to the fact of entering into the contract, rather than being restricted to losses arising from obligations imposed under the contract. In a brief concurring judgment, Fry LJ approved the broader approach taken by Cotton LJ and added that a plaintiff is entitled to an indemnity in respect of 'all obligations entered into under the contract when those obligations are within the necessary or reasonable expectation of both of the contracting parties at the time of contract'.⁷⁶

⁷³ *Newbigging v Adam* (1886) 34 Ch D 582 (CA) 592 (Bowen LJ).

⁷⁴ *Newbigging v Adam* (1886) 34 Ch D 582 (CA) 589.

⁷⁵ *Newbigging v Adam* (1886) 34 Ch D 582 (CA) 589.

⁷⁶ *Newbigging v Adam* (1886) 34 Ch D 582 (CA) 596. For criticism of this analysis on the ground that it confuses indemnity and compensation, see *Whittington v Seale-Hayne* (1900) 82 LT 49.

By contrast, Bowen LJ emphasised that an indemnity in cases of innocent misrepresentation could not extend to any loss simply arising out of, or causally connected to, the contract. That would allow compensation in circumstances where it was not justified. Rather, the plaintiff in such cases is entitled to be replaced in his position only so far as regards the rights and obligations which have been created by the contract. Critical to the enquiry is identification of the benefits that each party has given and received under the contract:

Now those advantages [received by a party] may be of two kinds. He may get an advantage in the shape of an actual benefit, as when he receives money; he may also get an advantage if the party with whom he contracts assumes some burthen in consideration of the contract. In such a case it seems to me that complete rescission would not be effected unless the misrepresenting party not only hands back the benefits which he has himself received—but also re-assumes the burthen which under the contract the injured person has taken upon himself. ... There ought, as it appears to me, to be a giving back and a taking back on both sides, including the giving back and taking back of the obligations which the contract has created, as well as the giving back of the advantages.⁷⁷

While Bowen LJ was in the minority in this case, his is generally regarded as the leading judgment.⁷⁸

What is the nature of the indemnity as characterised by Bowen LJ? It has already been explained that the Court had rejected the allegation that the award was compensatory in nature. It could be considered that some of the relief granted reflects change of position considerations: the plaintiff for example had changed his position in reliance on the misrepresentation by discharging some £324 worth of the partnership liabilities. However, the better view is that the main focus of the indemnity award in this instance was to effect restitution and counter-restitution of benefits received under the contract. Here, the plaintiff had assumed liability for the debts of and claims against the partnership and, indeed, had discharged some of those liabilities. This relieved the defendants of a considerable legal burden.

There can be little doubt that being relieved from an obligation, or having a liability discharged, constitutes a real and actionable benefit in the broader law of restitution of unjust enrichment. Common examples involving this sort of benefit are found in the law of contribution and subrogation (although characterisation of the latter as arising within the law of unjust enrichment is contentious in Australia).⁷⁹ A good, more recent example of a discharge of liability being recognised as a form of enrichment comes from the area of undue influence. In *Winefield v Clarke*, representatives of a mother (who lacked capacity) sued her daughter to recover an interest in the family home.⁸⁰ Originally, the mother was the sole registered proprietor. She transferred the property to herself and her daughter as joint tenants. Barrett J emphasised that the daughter was to 'be commended for the way in which she

⁷⁷ *Newbigging v Adam* (1886) 34 Ch D 582 (CA) 594–95.

⁷⁸ See *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 284–86 (the Court); *JAD International Pty Ltd v International Trucks Australia Limited* (1994) 50 FCR 378, 392 (Keely, Hill and Drummond JJ).

⁷⁹ cf *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) and *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269.

⁸⁰ *Winefield v Clarke* [2008] NSWSC 882 (29 August 2008). See also the complex adjustments considered in *Bridgewater v Leahy* (1998) 194 CLR 457.

looked after her mother'⁸¹ but held that, as the mother's primary caregiver, a presumption of undue influence arose that had not been rebutted on the facts. In calling for further submissions on the issue of the relevant orders to be made, Barrett J noted:

[T]he defendant paid (apparently from her own pocket) the mortgage debt of about \$6,500 secured on the property in May 2004, being a debt of the plaintiff. Although there is no cross claim in that connection, the just result may be that the defendant should be recognised as having a charge or lien upon the property for that sum, but on a basis that ensures that the charge cannot be enforced except out of the proceeds of a voluntary sale of the property by the plaintiff or her legal personal representative.⁸²

That is, Barrett J contemplated that the mother's representatives would be required to make restitution of the value of the benefit (ie the discharge of the mother's debt) received from the daughter.

Viewed against this broader legal landscape, the nature of the indemnity awarded in *Newbigging v Adam* looks decidedly restitutionary, albeit in the rather unusual or 'stretched' sense that, rather than being required to make restitution of value of the benefit (as was contemplated in *Winefield v Clarke*), the benefit enjoyed by the defendants of being relieved of liability was reversed by requiring them to re-assume that burden.

In coming to his decision, Bowen LJ placed some reliance upon *Rawlins v Wickham*.⁸³ In that case, Knight Bruce and Turner LJJ affirmed a decree of Stuart V-C whereby (i) a partnership deed was set aside for fraudulent misrepresentation, (ii) the defendant partners were obliged to repay the premium paid by the plaintiff, (iii) the plaintiff was indemnified against all outstanding partnership debts and (iv) an account was ordered of all sums paid by the plaintiff in respect of the partnership debts (with interest from the day of payment) but with a credit of all profits drawn by the plaintiff (with interest). Again, this mix of awards can be well understood from a restitutionary perspective.

A similar case is *Whittington v Seale-Hayne*, where the plaintiff sought rescission of a lease on the ground of innocent misrepresentation and various consequential orders.⁸⁴ Farwell J made orders ancillary to rescission for the defendant to indemnify the plaintiff with respect to the rents, rates and repairs paid for by the plaintiff in relation to the property. These payments could legitimately be characterised either as discharging what would otherwise have been the defendant's obligations, or as being necessary to preserve the asset and its future lease value. However characterised, the orders were necessary to ensure that the rescission of the lease did not result in the unjust enrichment of the defendant. By contrast, Farwell J refused to extend the indemnity to other expenditures, such as modifications made by the plaintiff to the property for the purposes of his poultry business, which he considered would inappropriately extend the award to compensation. This is consistent with the approach taken in *Brown v Smitt*, discussed earlier. Such expenditures, which are tailored to the plaintiff's personal needs and preferences, do not obviously save the defendant any

⁸¹ *Winefield v Clarke* [2008] NSWSC 882 (29 August 2008) [43].

⁸² *Winefield v Clarke* [2008] NSWSC 882 (29 August 2008) [54].

⁸³ *Rawlins v Wickham* (1858) 1 Giff 355, 65 ER 954; affd (1858) 3 De G & J 304, 44 ER 1285.

⁸⁴ *Whittington v Seale-Hayne* (1900) 82 LT 49, 51 (Farwell J).

necessary expenditure, nor result in any increase in the market value of the land. In those circumstances, the defendant will not be left unjustly enriched following rescission in the event that no ancillary adjustments or indemnity is awarded in favour of the plaintiff in relation to those expenditures.⁸⁵

In concluding the discussion in this section, it can be seen that the financial orders and adjustments consequent on rescission often appear to be restitutionary in nature, or to incorporate what in recent times have come to be recognised as change of position considerations. This is not surprising: if rescission does indeed involve a process of bilateral or mutual restitution, we would expect to see these kinds of orders and considerations in play. However, the position taken in the cases is not always clear or consistent: the use of the common orders of ‘indemnity’, for example, to cover both wholly compensatory relief for torts such as deceit,⁸⁶ as well as restitutionary orders as part of the inherent process of rescission, tends to obscure the true nature of the plaintiff’s relief.

Given this opacity, it is useful to consider how the equitable case law has been interpreted and has influenced the crafting of similar orders under the Trade Practices Act 1974 (Cth) (now the Australian Consumer Law), an enquiry to which we now turn.

IV. Rescission-like Orders Under the TPA/ACL

As Mason P observed in *Akron Securities Ltd v Iliffe*, s 87 of the Trade Practices Act 1974 (Cth) (TPA) (see now ss 237, 238 and 243 of the Australian Consumer Law (ACL)) offers a veritable ‘smorgasbord’ of remedies where a person ‘has suffered, or is likely to suffer, loss or damage by conduct of another person that was engaged in ... contravention’ of provisions including the prohibition of misleading or deceptive conduct contained in s 52 TPA (now s 18 ACL).⁸⁷ Section 243 of the ACL, which replicates the earlier provision under s 87, provides a non-exhaustive list of the kinds of orders that may be made:

243 Kinds of orders that may be made

Without limiting section 237(1), 238(1) or 239(1), the orders that a court may make under any of those sections against a person (the *respondent*) include all or any of the following:

- (a) an order declaring the whole or any part of a contract made between the respondent and a person (the *injured person*) who suffered, or is likely to suffer, the loss or damage referred to in that section, or of a collateral arrangement relating to such a contract:
 - (i) to be void; and
 - (ii) if the court thinks fit—to have been void ab initio or void at all times on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (b) an order:
 - (i) varying such a contract or arrangement in such manner as is specified in the order; and

⁸⁵ Whether such expenditures should, however, be brought into the account via a defence of change of position is considered below at xxx.

⁸⁶ As in *Newbigging v Adam* (1886) 34 Ch D 582 (CA) 592–93 (Bowen LJ).

⁸⁷ *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, 366.

- (ii) if the court thinks fit—declaring the contract or arrangement to have had effect as so varied on and after such date as is specified in the order (which may be a date that is before the date on which the order is made);
- (c) an order refusing to enforce any or all of the provisions of such a contract or arrangement;
- (d) an order directing the respondent to refund money or return property to the injured person;
- (e) except if the order is to be made under section 239(1)—an order directing the respondent to pay the injured person the amount of the loss or damage;
- (f) an order directing the respondent, at his or her own expense, to repair, or provide parts for, goods that had been supplied by the respondent to the injured person;
- (g) an order directing the respondent, at his or her own expense, to supply specified services to the injured person;
- (h) an order, in relation to an instrument creating or transferring an interest in land, directing the respondent to execute an instrument that:
 - (i) varies, or has the effect of varying, the first mentioned instrument; or
 - (ii) terminates or otherwise affects, or has the effect of terminating or otherwise affecting, the operation or effect of the first mentioned instrument.

It will be noted that none of the orders listed adopt the language of rescission. Nor do they refer to other related concepts such as counter-restitution or the requirement of *restitutio in integrum*. Further, s 237(2) of the ACL provides that any order made under s 243 ‘must be an order that the court considers will: (a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or (b) prevent or reduce the loss or damage’. That is, the remedial aim of the provisions appears compensatory, not restitutionary.

Nonetheless, courts have repeatedly held that the statute empowers them to award rescission-like remedies, in particular pursuant to a combination of s 243(a), (c) and (d). In this context, the equitable remedy of rescission has been considered to constitute a powerful albeit not binding guide to the relevant considerations that should inform the making of analogous orders under the provision. The position is encapsulated in *Marks v GIO Australia Holdings Ltd* by Gummow J, who described s 87 as creating ‘new remedies which have an affinity to the equitable remedies of rescission and rectification’.⁸⁸ Thus ‘[t]he principles regulating the administration of equitable remedies afford guidance for, but do not dictate, the exercise of the statutory discretion conferred by s 87’.⁸⁹

However, our purpose here is to see what insights into the nature of the awards and adjustments made in effecting equitable rescission are offered by consideration of the statutory context. Of critical significance is the way in which courts have married the restitutionary nature of rescission with the ostensibly compensatory purpose of the statutory scheme. In the context of the ‘remedial smorgasbord’ set out in s 243 ACL (as opposed to the compensatory orders available under s 82 TPA, or s 236 ACL) courts have emphasised the broad conception of detriment at which the statutory provisions are aimed.

The relationship between rescission and loss under the Act was explored in *Demagogue Pty Ltd v Ramensky*.⁹⁰ As Black CJ explained, ‘the loss or damage contemplated

⁸⁸ *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 535. See also *Tenji v Henneberry & Associates Pty Ltd* (2000) 98 FCR 324, 329–30 [12] (French J).

⁸⁹ *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494, 535 (Gummow J) (citations omitted).

⁹⁰ *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

by s 87(1A) is not limited to loss or damage in the s 82 sense but was intended to include the detriment suffered by being bound to a contract unconscionably induced'.⁹¹ Gummow J agreed that the language of the statute taken as a whole 'emphasises that the phrase "the loss or damage", at least in s 87, may be concerned with more than pecuniary recovery as understood in the law of damages in tort' and may extend to entry into contractual obligations as a result of misleading or deceptive conduct.⁹² His Honour later drew further support for that view from the equitable doctrine of rescission:

It may well be that in a given case the contract is not financially disadvantageous to the complainant. But, at least in Australia, if a contract is rescinded in equity for some vitiating factor in its formation, it is not sufficient for the defendant to show that the transaction to which the complainant was improperly induced to assent, after all, contained terms which, viewed objectively, were not manifestly disadvantageous so that, the complainant should freely have accepted them. ... It would be an odd result if s 87 and s 4K were to be read in a contrary sense by giving too narrow a meaning to the phrase 'loss or damage'.⁹³

In a short concurring judgment, Cooper J considered that 'loss or damage' in s 87 'means no more than the disadvantage which is suffered by a person as the result of the act or default of another in the circumstances provided for in the section'.⁹⁴ On this approach, the conception of loss under s 87 TPA (now s 237 ACL) is much broader than the traditional characterisations of losses the subject of compensation orders in tort and, indeed, those covered by the compensatory provisions in s 82 TPA (now s 236 ACL). His Honour emphasised that relief granted under s 87 to compensate or prevent that broadly-conceived loss or damage must meet the purpose of the provisions and may require the award of gain-based relief:

That object mirrors the approach of equity in the case of equitable fraud or unconscionability. The granting of equitable relief in those circumstances is not 'to extend sympathetic benevolence to a victim of undeserved misfortune' but 'one which denies to those who have acted unconscientiously the fruits of their wrongdoing'.⁹⁵

This broad, policy-driven conception of 'loss or damage' under the statute is evident in the orders made by courts effecting the statutory equivalent of rescission. In *Munchies Management Pty Ltd v Belperio*, the Full Court of the Federal Court unanimously drew on the equitable case law concerning rescission to craft orders under s 87 TPA (s 243 ACL) following a finding that the respondents had purchased a business due to the misleading or deceptive conduct of the appellants and its agent, Mr Munro.⁹⁶ In that case, the respondents sought rescission of the purchase agreements in a timely manner but by the time the matter came to court, the third party landlord had repossessed the business premises and the business had substantially declined. In particular, much of the plant and equipment for the business had been forcibly sold on the re-entry of the landlord, to satisfy the outstanding rent that had not been paid by the respondents following their purported rescission. These assets therefore

⁹¹ *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 33.

⁹² *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 43.

⁹³ *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 43–44.

⁹⁴ *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 47 (citations omitted).

⁹⁵ *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 48 (citations omitted), quoting *Blomley v Ryan* (1956) 99 CLR 362, 429.

⁹⁶ *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274.

could not be returned. The parties, and indeed judge, at first instance had assumed that rescission was unavailable in the circumstances. The Federal Court disagreed, citing *Alati v Kruger*. The Court followed the lead taken in cases such as *Newbigging v Adam* and *Alati v Kruger* to find that rescission was still available notwithstanding the various changes of position affecting the ability of the respondents to restore the business to the appellants. While the case is replete with the language of loss and compensation, we again see the same pattern of restitutionary reasoning present in the cases considered earlier concerning rescission in equity. Thus, the Court refused to require the respondents to ‘make good’ the deterioration in the value of the business, so as to effect full counter-restitution to the appellants:

A deterioration in the value of the business occasioned by the landlord's eviction of the purchasers and any fall in value of the plant that may have resulted from disposal of that plant and equipment by forced sale are not matters for which the purchasers may be held responsible, and the extent of that loss must fall upon the respondents. This is not a case in which the purchasers should be required to allow compensation in respect of that deterioration.⁹⁷

This echoes the change of position considerations discussed earlier in the context of *Brown v Smitt*. The Court went on to stipulate as conditions of declaring the contract void under the Act that the appellant make restitution of the purchase price subject to allowances including sums for the use of the plant by the respondents prior to rescission. The Court also awarded sums in favour of the purchasers for; (1) legal costs and associated costs paid on settlement of the sale of the business, (2) demolition cost incurred on the vendor's behalf, (3) net trading losses for a defined period, and (4) interest on the purchase price. In the course of its reasons, the Court noted:

The orders for accounting and payment of money made in those cases as part of the process of rescission *ab initio* may be seen as recovery literally of the amount of loss or damage within the meaning of s 82, giving ‘recover’ the sense of *regaining through restitution a position lost* by the conduct complained of. ... In any event, orders such as those in *Alati v Kruger* ... may properly be considered as reducing the loss or damage suffered within the sense of s 87 of the Act.⁹⁸

In *Akron Securities Ltd v Iliffe*, investors entered into a horse breeding venture in reliance on certain misleading statements of an employee of Akron.⁹⁹ At first instance, the trial judge declared the transaction void *ab initio* and ordered Akron to repay all sums received from the investors thus far in the scheme, offset by any distributions made by Akron to the investors pursuant to the scheme. On appeal, Akron argued that, conformably with the equitable remedy of rescission, this order should have been made conditional on the investors making counter restitution of the loan principal received from Akron and which had been used by the investors to fund their participation in the scheme. Mason P (Priestley JA concurring) noted that although ‘[t]he principles surrounding the remedy of rescission for innocent misrepresentation are clearly available to give guidance in the exercise of the

⁹⁷ *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 289 (citations omitted).

⁹⁸ *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 287–88 (emphasis added); cited with approval in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31, 45 (Gummow J) and *Metz Holdings Pty Ltd v Simmac Pty Ltd [No 2]* [2011] FCA 981 (25 August 2011) [865] (Barker J). See also *Karmot Auto Spares Pty Ltd v Dominelli Ford (Hurstville) Pty Ltd* (1992) 35 FCR 560, 573 (Heery J).

⁹⁹ *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353.

statutory discretion’, they could not control the exercise of the court’s remedial discretion under the Act.¹⁰⁰ Ultimately, Mason P considered that a rescission-like remedy was not appropriate on the facts of the case, in particular because it could not take into account the taxation benefits which the investors had enjoyed (as intended) under the scheme. Presumably this was on the basis that they were causally-related benefits that could not be ‘reversed’ or undone in favour of the government. However, pertinently for current purposes, his Honour explained that if rescission had been appropriate, counter-restitution of the loan principal by the investors would not have been required, because, in substance, this had gone directly to Akron and the scheme manager for the purposes of the scheme, rather than having been enjoyed personally by the investors. In those circumstances, to impose a requirement of counter-restitution would add to the loss or damage suffered by the investors, contrary to the remedial purpose of s 87. In other words, to require the investors to make counter-restitution as a condition of rescission would place them in a worse position than they occupied prior to entry into the contract. Meagher JA, although dissenting in the final result, agreed with this analysis of the requirement of counter-restitution on the facts of the case.

In concluding this section, it can be seen that when applying rescission-like remedies in the statutory context, courts have adopted a broad conception of detriment that considers whether the plaintiff would suffer detriment in the absence of, or indeed as a result of, the award. The focus of the enquiry, as for equitable rescission, seems to be whether it is possible to return the parties to the *status quo ante* and, in particular, whether relief can be fashioned in a way that ensures that the plaintiff is left in no worse position as a result of the misleading or deceptive conduct.

The approach taken to the award of remedies akin to rescission under the statute strongly echoes the recent discussion by the High Court of Australia as to the purpose of the change of position defence in claims for restitution of mistaken payments.¹⁰¹ It provides a further guide to the potential ramifications and issues of the restitutionary analysis presented in this essay, to which we now turn.

V. Ramifications

The previous sections have explored the restitutionary considerations that commonly inform consequential relief in equity and under statute consequent on avoidance of the impugned transaction. The discussion of the statutory awards in particular shows that courts commonly employ the language or ‘detriment’ or ‘loss’ to describe the harm that their restitutionary orders seek to prevent. This might seem counter-intuitive. However, a sideways glance at the most recent development of the law relating to the change of position defence suggests that this approach is consistent with the overall development of a coherent law of restitution.

In *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd (AFSL v Hills Industries)* the appellant, AFSL (a financier) was induced by a fraudster (S) to make

¹⁰⁰ *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, 367.

¹⁰¹ Discussed below at xxx.

payments to a number of businesses, including the respondents Hills and Bosch, for the purchase of what transpired to be non-existent equipment.¹⁰² S advised Hills and Bosch that the payments were for the discharge of debts owed to them by his companies (the ‘company debts’). In reliance on their receipts, Hills and Bosch applied the payments in discharge of the company debts, continued to trade with the companies and gave up the opportunity to pursue remedies in enforcement proceedings against them or their directors. Both recipients also gave up the opportunity of taking other steps to improve their position, such as by seeking security from third parties.

When AFSL sought recovery of the payments on the ground of mistake, Hills and Bosch pleaded their changes of position by way of defence. In finding for the respondents, Hayne, Crennan, Kiefel, Bell and Keane JJ jointly explained that the law of estoppel is concerned to avoid the detriment that would be suffered by the defendant if the claimant were to resile from the assumption on which he changed his position. So too, they said, change of position serves to protect a defendant from ‘the detriment which would flow from a party’s change of position’¹⁰³ ‘if the [claimant] were to be permitted to recover payments as mistakenly made where they have been applied by the [defendant]’.¹⁰⁴ Also drawing strongly from the equitable doctrine of estoppel, Gageler J similarly identified as an important condition attracting the defence that ‘by reason of having so acted or refrained from acting, the defendant would be placed in a worse position if ordered to make restitution of the payment than if the defendant had not received the payment at all’.¹⁰⁵

Although their Honours were drawing insights from the law of estoppel, we have seen that these characterisations of the aim of the defence strongly echo the principle of ‘*restitutio in integrum*’ found in the equitable doctrine of rescission.¹⁰⁶ We should not find these parallels surprising: we have seen that rescission commonly involves restitutionary and counter-restitutionary awards made in response to (but not limited to) vitiating factors such as (induced) mistake, duress, undue influence and failure of consideration. Given that these are commonly understood as forming the core examples of claims in unjust enrichment, to which change of position is a key defence, it makes sense that change of position considerations should inform both claims of rescission and restitution.

If we take this seriously, however, then a number of very important issues arise. The first is that it requires us to re-consider the ways in which courts have limited, and sought to justify the limitations placed on, awards and adjustments consequent on rescission. It will be recalled that in *Newbigging v Adam*, Cotton LJ sought to distinguish indemnity orders consequent on rescission from compensation for deceit through a hypothetical example. His Lordship instanced a case where a plaintiff had given up a valuable commission in reliance on the impugned contract. Although, he said, this might count for the purposes of a claim for

¹⁰² *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 307 ALR 512 (HCA).

¹⁰³ *AFSL v Hills Industries* (2014) 307 ALR 512, 539 [85].

¹⁰⁴ *AFSL v Hills Industries* (2014) 307 ALR 512, 539 [84].

¹⁰⁵ *AFSL v Hills Industries* (2014) 307 ALR 512, 559 [157]. On the counterfactual formulation, see comment above at n xxx.

¹⁰⁶ See also D O’Sullivan, S Elliott and R Zakrewski, *The Law of Rescission* (2nd edn, Oxford, Oxford University Press, 2015) [18.07]–[18.08].

compensation for deceit, it would not count for the purposes of the indemnity award consequent of rescission. But following the earlier analysis we might well ask, ‘Why not?’ Provided that the opportunity was substantial and not purely speculative, why should it not be taken into account to reduce the plaintiff’s counter-restitutionary liability? The giving up of valuable opportunity is very well-established as a relevant change of position for the purposes of simple restitution cases.¹⁰⁷ Indeed, one of the accepted changes of position made by the respondents in *AFSL v Hills Industries* was that, in reliance on their receipt of the mistaken payments, they had foregone valuable opportunities to recover the company debts. The same question might be asked of at least some of the detrimental changes of position suffered by the plaintiffs in *Brown v Smitt* and *Whittington v Seale Hayne*, such as the expenditures incurred and losses suffered in running businesses in reliance on the contract.¹⁰⁸ Why did these detrimental changes of position suffered in reliance on their receipt not operate to reduce their counter-restitutionary liability?

We have seen that one reason why courts have been so careful to restrict the considerations that may be taken into the account following rescission is to ensure that the awards (particularly in cases involving not-wrongs, such as innocent misrepresentation) do not become compensatory in nature and, in particular, do not impose on the defendant unwarranted liability for the plaintiff’s consequential losses. However, from a restitutionary perspective, this legitimate concern can be re-focused. On the approach taken in this chapter, the true question in these cases is the proper extent of the plaintiff’s liability to make counter-restitution to the defendant, not whether the defendant is liable to compensate the plaintiff for her consequential losses. On this approach, a plaintiff’s liability to make counter-restitution to a defendant will always be ‘capped’ at the value of the original enrichment received from the defendant. This is because the greatest effect that the plaintiff’s consequential changes of position made in reliance on her receipt of contractual benefits can have is to reduce the plaintiff’s counter-restitutionary liability to zero. In other words, the worst possible outcome for a defendant following rescission is not that she will be required to compensate the plaintiff for extended consequential losses, but that the defendant must make full restitution to the plaintiff and receive no counter-restitution from the plaintiff. To that extent, and to that extent only, a defendant may be required to shoulder losses arising from her participation in

¹⁰⁷ See *City of Sydney v Burns Philp Trustee Co Ltd (in liq)* (Unreported, Supreme Court of New South Wales, Rogers CJ, 13 November 1992) (change constituted by council’s failure to obtain a private valuation of commercial property); *Gilsan (International) Ltd v Optus Networks Pty Ltd* [2004] NSWSC 1077 (27 November 2004) [260] (McDougall J: change included failure to withhold amounts by way of provisions or reserve to protect its position in the event of claim for recovery of overpayments), approved on this point on appeal in *Optus Networks Pty Ltd v Gilsan (International) Ltd* [2006] NSWCA 171 (5 July 2006) [79] (Hodgson JA, Beasley and McColl JA concurring); *Eastbourne Borough Council v Foster* (QB, 20 December 2000) (change included failure to look for work elsewhere, failure to consider suing his legal advisors and failure to bargain for redundancy package), appealed on another point in *Eastbourne Borough Council v Foster* [2001] EWCA Civ 1091; *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147, 181 [156] (Allsop P: relevant changes included giving up or not pursuing recovery of debts) (Bathurst CJ at 149 [1] and Meagher JA at 195 [215] agreeing on this point), see also 195 [216] (Meagher JA) (NSWCA). The example given in *Sempre Metals Ltd v Inland Revenue Comrs* [2007] UKHL 34, [2008] 1 AC 561, 650–51 [233] (Lord Mance) of a defendant hiding a mistaken payment under her bed, and thus omitting to invest the money so as to obtain commercial rates of interest for its use, also would constitute a good example of this category of change.

¹⁰⁸ Another example is *Maguire v Makaronis* (1988) 188 CLR 449, where recognition of valid change of position arguments would have resulted in a wholly different outcome for the defrauded plaintiffs.

the transaction. But the defendant is not required to pay compensation to the plaintiff. And the restitutionary liability of good faith defendants will also be limited in respect of changes of position caused by acting in reliance on benefits received from the plaintiff. The balancing of restitutionary and counter-restitutionary interests in this way is both principled and proportionate and importantly does not trespass into compensatory considerations.

This approach also suggests a new way of reconciling and re-drawing the limitations on the scope of indemnity awards identified in *Newbigging v Adam*. We saw previously that Cotton LJ and Bowen LJ differed in their conceptions of the detrimental changes of position covered by an indemnity award. Both sought to limit them by reference to the contractual framework, but Cotton LJ's formulation was broader, extending to relief from the 'consequences and obligations which are the result of the contract which is set aside'.¹⁰⁹ These formulations were developed in the context of clarifying how the award of indemnity differed from an order for compensation for deceit. In light of the foregoing analysis, they can be usefully refined by reference to the Court's overall remedial aim. If the defendant must be 'no worse off' as a result of rescission, the question must be 'no worse off relative to what'? We saw earlier that the rescission case law tends to characterise the relevant end-point as the historical position that the defendant occupied prior to the impugned transaction. The case law in that light arguably seeks to ring-fence the relevant enquiry to contractual obligations and, in that way, to focus the enquiry on returning the parties to their former position *vis-à-vis* the contract. In other words, the 'former' position to which the parties must be returned is the position as it related to the contract.

This approach rightly excludes, for example, purely coincidental changes of position that have occurred to the parties, not attributable to the contract, which might otherwise be considered to prevent the parties from being restored to their former position. Again, insight may be drawn from the change of position case law where it is orthodoxy that in order for the defence to apply, the defendant's detrimental change of position must have been brought about by, or be referable to, the impugned transaction.¹¹⁰ The prime example is *Scottish Equitable plc v Derby*, in which the Court regretfully explained that the fact that the defendant pensioner would suffer undeniable and even crushing hardship if required to make restitution of a mistaken payment was irrelevant, because the mistaken payment had played no role in bringing about his misfortunes.¹¹¹ However, while it is clear that the 'no worse off' enquiry in rescission similarly cannot be at large, and must exclude purely coincidental harms, it is less obvious that detrimental changes of position arising from an impugned contract should not be incorporated. To the contrary, consistency with the approach taken to

¹⁰⁹ *Newbigging v Adam* (1886) 34 Ch D 582 (CA) 589. See above at xxx.

¹¹⁰ *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd* [2004] VSC 400 (15 October 2004) [42]–[43] (Kaye J); *Scottish Equitable plc v Derby* [2001] EWCA Civ 369, [2001] 3 All ER 818, 827 (Robert Walker LJ); *Philip Collins Ltd v Davis* [2000] 3 All ER 808 (Ch) 827 (Jonathan Parker J: the change must be 'referable' to the receipt) cited with approval in *Commerzbank Ag v Price-Jones* [2003] EWCA Civ 1663 [58]–[59] (Munby J); *Heperu Pty Ltd v Belle* (2009) 76 NSWLR 230, 261 [133] (Allsop P, Campbell JA and Handley AJA concurring); *Bloomsbury International Ltd v Sea Fish Industry Authority* [2009] EWHC 1721 (QB), [2010] 1 CMLR 12, 382 [137] (Hamblen J). See also *Colliers CRE plc v Pandya* [2009] EWHC 211 (QB) [72] (Judge Richard Seymour QC), in which the parties had accepted 'a causal link between the receipt of the benefit ... and the change of position' as a 'fundamental' requirement of the defence.

¹¹¹ *Scottish Equitable plc v Derby* [2001] EWCA Civ 369, [2001] 3 All ER 818.

changes of position in the context of simple mistaken payment cases strongly suggests that reliance-based changes of position should certainly operate to reduce the plaintiff's counter-restitutionary liability. This provides significant support for Cotton LJ's broader formulation of the scope of detriment covered by indemnity orders consequent on rescission.

Relatedly, this discussion highlights the importance of precision in identifying the 'end point' of rescission. We saw earlier that an alternative (albeit rarer) characterisation of the rescission enquiry is that it seeks to place the parties in the position they would have occupied had the transaction never occurred. This is subtly different from returning parties to their former position. The counterfactual formulation is also sometimes found in the approach to rescission-like relief taken under the consumer protection regime.¹¹² This formulation should, however, be treated with great caution. It strongly resembles the approach taken to compensation for deceit and would likely lead to a much broader enquiry (and hence relief) than its more historical counterpart. We have seen that amongst all the confusion and uncertainty associated with the nature of relief consequent on rescission, the one thing on which all courts agree is that it is and must remain distinct from any independent claim that may be available for compensation arising from a tort.

Re-focussing the enquiry on the proper limits of restitution, rather than compensation, also allows us to avoid some of the dubious distinctions drawn between the award of compensation for deceit and indemnity awards. For example, in *Whittington v Seale-Hayne* (discussed earlier) the Court emphasised that an indemnity award would not extend to damages payable to an employee of the plaintiff, who had suffered loss (in the form of the illness of himself and his eight children) as a result of the plaintiff entering into the contract.¹¹³ It is however not at all clear that this sort of loss would be regarded as sufficiently 'direct' for the purposes of a claim for compensation for deceit, as the Court assumed. Conversely, a number of cases have emphasised that an indemnity award will not cover losses incurred as a result of the plaintiff's unreasonable business decisions; for example continuing with the business when it should have been sold to reduce losses or borrowing money from a third party that the plaintiff could not repay.¹¹⁴ Courts citing these examples normally do so to point out the relatively limited operation of indemnity orders, compared to claims for compensation for deceit. However, these sorts of losses would be excluded even in claims of deceit by application of its particular remoteness rules,¹¹⁵ just as surely as they might be excluded pursuant to an 'indemnity' award.

Rather than seeking to draw such artificial and in some cases misleading distinctions between compensation and indemnity orders, the better approach is to reorientate the indemnity enquiry so that it directly addresses the change of position considerations implicit in these cases. On this approach, irreversible changes of position made in good faith, such as running a business at a loss in reliance on receipt of contractual benefits, may count to reduce a plaintiff's counter-restitutionary liability (so performing the functional equivalent of the

¹¹² But see *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 287–88 (the Court).

¹¹³ *Whittington v Seale-Hayne* (1900) 82 LT 49.

¹¹⁴ *Munchies Management Pty Ltd v Belperio* (1988) 58 FCR 274, 710 (the Court).

¹¹⁵ *HTW Valuers v Astonlond* (2004) 217 CLR 640.

change of position defence) in the way discussed earlier. However, those detrimental changes of position will not support an independent order for compensation against the defendant. Further, re-orientating the enquiry to change of position considerations provides a principled reason why plaintiffs may be denied allowances in diminution of their counter-restitutionary liability if they become aware of the vitiating conduct of the defendant and nonetheless continue to run the business. Where a plaintiff is aware of the circumstances supporting rescission, any change of position must be objectively justified by the circumstances of their receipt in order to qualify as good faith reliance.¹¹⁶ Where a plaintiff acts as caretaker of a business following rescission, pending coming before the court to obtain consequential relief, and the business suffers further losses, the plaintiff's behaviour in continuing to run the business is consistent with ongoing good faith reliance. In these circumstances, as we saw earlier in the case of *Munchies Management Pty Ltd v Belperio*, the plaintiff's change of position should operate to diminish their restitutionary liability. By contrast, where a plaintiff becomes aware of vitiating conduct of the defendant, any decision irreversibly to change their position in a way inconsistent with that knowledge (such as by taking on new liabilities or seeking to expand or alter their business operation) is no longer made in good faith reliance.¹¹⁷ In those circumstances, any further changes of position are made at their own risk.

A further ramification of the foregoing analysis 'feeds back' into a key debate currently surrounding the defence of change of position. In *David Securities Pty Ltd v Commonwealth Bank of Australia*, the High Court of Australia identified as the core requirement of the defence the fact that 'the defendant has acted to his or her detriment on the faith of the receipt'.¹¹⁸ Given that *David Securities* concerned a reliance-based change of position, this identification of reliance as a core requirement was entirely proper. It was unnecessary to consider the position of independent changes of position, such as where a received benefit devaluates or is destroyed by some act independent of the defendant. On this view, the decision should not constitute an insurmountable barrier to the principled application of the defence to independent changes of position. However, in *Citigroup Pty Ltd v National Australia Bank Ltd* Barrett JA considered that it was not open the New South Wales Court of Appeal to adopt a wider version of the defence that took into account non-reliance changes, in light of the High Court's pronouncement.¹¹⁹ On this view, and if reliance is always required, independent changes of position must fall outside the ambit of the defence.¹²⁰ This conclusion is further supported by dicta in *AFSL v Hills Industries*,

¹¹⁶ *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* (2009) 76 NSWLR 195, 224 [139] (Allsop P and Campbell JA, Handley AJA concurring) (emphasis added).

¹¹⁷ *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd* (1998) 39 FCR 546.

¹¹⁸ *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) (emphasis in original omitted).

¹¹⁹ *Citigroup Pty Ltd v National Australia Bank Ltd* (2012) 82 NSWLR 394, 405 [64] (Barrett JA) (but cf Bathurst CJ, Allsop P, Meagher JA at 394 [6], seemingly leaving the question open).

¹²⁰ See also *Streiner v Bank Leumi (UK) plc* (QB, 31 October 1985); *Euroactividade AG v Moeller* (CA, 1 February 1995); *Credit-Suisse (Monaco) SA v Attar* [2004] EWHC 374 (Comm) [98] (Gross J); C Mitchell, 'Change of Position: The Developing Law' [2005] *Lloyd's Maritime and Commercial Law Quarterly* 168, 178–79.

influenced both by the approach taken in *David Securities* and the core importance of the element of detrimental reliance in the context of equitable estoppel.¹²¹

It seems clear that where the benefit received by a defendant has irreversibly devalued, been destroyed or disappeared, an order for restitution in these circumstances would place the defendant in a 'worse position' than she occupied prior to her original receipt.¹²² It seems therefore that the category of case falls within the general class of circumstances identified by the High Court as calling for protection by the change of position defence. Further, in terms of the defence's 'fit' with broader authority, the analogy drawn between estoppel and change of position which so influenced the High Court's reasoning in *AFSL v Hills Industries* is neither exhaustive nor exclusive of relevant guiding principles applicable to cases of independent changes of position. In particular, as we have seen, the doctrine of equitable rescission offers many examples of non-reliance based changes which have been taken into account by courts in making orders for restitution and counter-restitution following rescission.¹²³ Extension of the change of position defence to such circumstances in cases of simple restitution (not consequent upon rescission) will prevent an otherwise meritorious defendant from being put in a worse position than he occupied prior to his receipt through the order for restitution and will promote coherent treatment of like cases. This seems highly desirable.

Indeed, the operation of change of position considerations in the context of rescission may require reconsideration of the common assumption that the defence of change of position is not available to wrongdoers.¹²⁴ We have seen that *restitutio in integrum* is a general requirement of rescission, applicable as much to rescission arising from breach of fiduciary duty as rescission responding to innocent misrepresentation. In that light,¹²⁵ the defence seems to be a necessary correlation of those remedies, which aim solely to reverse or unwind transactions pursuant to which benefits have been conferred on another party. The defence operates in those contexts to ensure that the restitutionary or counter-restitutionary defendant is not placed unjustifiably in a worse position as a result of rescission or restitution than she occupied prior to her receipt. In this manner, it operates to ensure that rescission and restitution do not operate so as to impose loss on innocent defendants, contrary to their remedial purposes. This role for change of position considerations in the requirement of *restitutio in integrum*, is required seemingly as much in cases of breach of fiduciary duty as cases of innocent misrepresentation (where no wrong is committed). If that is correct, then provided the defence does not operate to undermine or stultify the law's prohibition of the particular wrong, the defence may be available in cases where restitution is sought of benefits

¹²¹ *AFSL v Hills Industries* (2014) 307 ALR 512, 538 [81] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 554–55 [142] (Gageler J).

¹²² *AFSL v Hills Industries* (2014) 307 ALR 512, 537 [77] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 559 [157] (Gageler J).

¹²³ See earlier discussion at xxx.

¹²⁴ *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) 580 (Lord Godd).

¹²⁵ A more radical possibility is that the no-conflict rules are in essence concerned with vitiated consent and, to that extent, align with mistake, duress and other 'unjust factors' within the law of unjust enrichment: above n xxx. On this view, change of position again most strongly aligns with the claim in unjust enrichment, rather than the remedy of restitution, but cf below at xxx.

obtained by ‘innocent’ wrongdoers (such as an innocent trespasser) who has changed her position in good faith in reliance on her receipt. On this view, the defence is not necessarily limited to claims in unjust enrichment and should be conceptualised in the light of the remedies of rescission and restitution.

The final ramification of this analysis is potentially the most far-reaching and can only be touched on here. It has been argued in this chapter that rescission comprises mutual cross-claims for restitution and counter-restitution of benefits conferred under a transaction. This analysis suggests that rescission should far more commonly be made conditional on payment of substantial counter-restitution by the plaintiff of the value of services performed by the defendant, where services were performed on the basis of the transaction now sought to be set aside, than is currently the case. A burgeoning area ripe for this analysis relates to the role and entitlements of good faith care-givers in cases of undue influence. We saw earlier that in *Winefield v Clarke*, Barrett J had independently noted that some adjustment should be made to orders in that case for the fact that the defendant caregiver had discharged her elderly mother’s mortgage over the family home on the basis that the mother had given her an interest in the property.¹²⁶ Barrett J recognised that unless this benefit was taken into account, the plaintiff would be unjustly enriched by an order for restitution of the defendant’s interest. In the language of unjust enrichment, the plaintiff had been saved the necessary expense of discharging the mortgage herself by the defendant’s action and must make counter-restitution of that benefit as a condition of relief. However, what was also noted by Barrett J in that case was that the defendant daughter had acted throughout in the utmost good faith and had provided valuable carer services to the mother, for which she ought to be ‘commended’.¹²⁷ But one might ask why those valuable carer services were not the proper subject of an order for counter-restitution for their reasonable market value? One basis¹²⁸ on which the daughter provided the services (just as in the case of the discharged mortgage) was that she had been given an interest in the mother’s property. Her services were necessary for the care and comfort of her elderly mother and in that sense enriched the mother just as much, again, as the discharged mortgage. Had the daughter not provided those services, someone else would have had to and there was no sign that the other children (who later pursued the claim against the daughter as the mother’s personal representatives) would have taken up that role. In those circumstances, ordering restitution of the defendant’s interest in the house without taking into account her valuable services unjustly enriched the mother (and, more particularly, the personal representatives who regained the interest in the house and had the windfall benefit of the daughter’s services for free).

This is not an isolated instance but forms just one example of the many cases in which ‘invisible’ domestic services are routinely overlooked by defendant legal advisers and courts

¹²⁶ *Winefield v Clarke* [2008] NSWSC 882 (29 August 2008).

¹²⁷ *Winefield v Clarke* [2008] NSWSC 882 (29 August 2008) [43].

¹²⁸ Others might have included filial duty or mutual love and care between the mother and daughter. It is no bar to a claim for restitution for a total failure of consideration that there was more than one basis of a transaction: see J Edelman and E Bant, *Unjust Enrichment* (Oxford, Hart Publishing, 2016) ch 11 (forthcoming).

alike.¹²⁹ The failure to appreciate and give appropriate relief in respect of domestic services stands in stark contrast to the position of commercial defendants, whose valuable services are routinely taken into account to condition or defeat claims of rescission and restitution.¹³⁰ Once it is appreciated, however, that rescission generally will cause the objective basis for conferral of benefits by a defendant on a plaintiff pursuant to the impugned transaction to fail, there is no principled reason for continuing to ignore defendant's rights to fair counter-restitution of the value of domestic services, where those services have enriched the plaintiff. It might be added that greater appreciation of this point may also go some considerable way to deterring unmeritorious actions by relatives of the elderly or deceased, whose own actions have been characterised by a history of neglect of the plaintiff in whose interests they now purport to act.¹³¹ It is interesting to speculate that in some cases, the value of the counter-claim may well outweigh the value of the benefit initially transferred by the plaintiff to the defendant. In those cases, the plaintiff (or plaintiff representatives) has a choice: to refuse to make counter-restitution, in which case the transaction stands,¹³² or (if the property transferred to the defendant is of special significance, such as may be the case of a family home) to pay the value of the order of counter-restitution to obtain specific restitution of the asset. Neither option is unduly onerous to the plaintiff or her representatives and ensures that neither is left unjustly enriched as a consequence of rescission.

VI. Conclusion

This chapter has sought to identify and explore the restitutionary and change of position considerations often present in financial awards and allowances consequent on rescission. It has demonstrated that the language of compensation and indemnity that often characterise these awards obscures these features and can lead to further confusion and error. By looking at the substance of the awards, however, it becomes possible not only to understand the complex relationship between rescission and compensation, but to align the law of rescission with the neighbouring law of restitution. The result is a more coherent and principled approach to relief in both areas.

¹²⁹ Other prominent examples that fall within this category are *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 (PC), and arguably the seminal High Court of Australia decision in *Johnson v Buttress* (1936) 56 CLR 113.

¹³⁰ eg *Warman International Limited v Dwyer* (1995) 182 CLR 544; *Streeter v Western Areas Exploration Pty Ltd* (2011) 278 ALR 291; *Grimaldi v Chameleon Mining NL [No 2]* (2012) 287 ALR 22.

¹³¹ Again *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127 (PC) and *Johnson v Buttress* (1936) 56 CLR 113 are leading examples, but the examples are legion.

¹³² *Maguire v Makaronis* (1988) 188 CLR 449.