This book is the revised, updated and expanded version of my thesis entitled 'The Change of Position Defence' which was accepted in satisfaction of the requirements for the degree of Doctor of Philosophy at the University of Oxford in early 2008. Slightly modified versions of chapters three and four were published in the *Lloyd's Maritime and Commercial Law Quarterly* and the *Restitution Law Review* respectively in 2007. My sincere thanks go to the editors and publishers of those journals for consenting to their inclusion in this book.

Of the great many people who provided their assistance during the completion of the thesis and its conversion into this work, there are a number who require special mention for their extraordinary kindness and support. First and foremost, I have been very fortunate in having the guidance of two outstanding thesis supervisors in Professors Andrew Burrows and Robert Stevens. Their insight and encouragement made a huge difference to the process of writing the thesis. Additionally, I wish to thank Professor Burrows for his kind interest beyond the thesis to the wellbeing of my family, a broader concern that meant a great deal to me during the transition from Australia to Oxford and back again. He also provided invaluable guidance on converting the thesis into a book. My debt of gratitude to him is very great.

Outside the supervision context, my thanks go to Professor James Edelman both for his suggestion of the thesis topic and for his enthusiasm and friendship throughout. Dr Birke Häcker provided much appreciated encouragement, feedback and helpful criticism during the early development of the thesis, particularly in the areas of rescission and proprietary restitution. I also extend warm thanks to my examiners, Mr William Swadling and Professor Graham Virgo, whose perspicacity and interest in the thesis transformed the viva process from a rather formidable prospect into a truly enjoyable experience. Their insights greatly informed the revision process that has resulted in this publication. Finally, during the weeks leading up to submission of the manuscript, I was assisted beyond description by the unstintingly generous efforts of my colleague Professor Michael Bryan in reviewing and commenting on the final drafts of this work.

In addition to the intellectual assistance given by those friends mentioned above, I wish to thank the Clarendon Fund and the Banking and Financial Services Law Association for their significant financial support, without which this venture may well not have proceeded. I would also like to acknowledge the ongoing support shown to me by Wadham College and, in particular, my college supervisor Mr Jeffrey Hackney. His ongoing interest in the welfare both of my research and my family was greatly appreciated.
Preface

Sincere thanks are also due to Mr Richard Hart for his enthusiasm for this project and for his patience in waiting for it to be completed while my family and I resettled in Melbourne. I am very grateful to him and the team at Hart Publishing for their concerted efforts in seeing this manuscript through to publication.

Finally, this book is dedicated to my husband, Geoffrey Bant, who has been the single greatest factor in its successful completion. Words cannot express my appreciation and gratitude for his love, support and distraction. The book is also dedicated to our two young sons, Jesse and Hayden, whose companionship, humour and adventurous spirits have kept the relative importance of my work firmly in perspective.

The law is as stated on 4 February 2009.
# CONTENTS

 Preface v  
 Table of Cases xi  
 Table of Statutes xvii  

## 1. Introduction and Overview 1  
  
 A Introduction 1  
 B The Change of Position Defence 2  
   (1) A Core Case 2  
   (2) The Four Main Areas of Doubt 3  
      (a) The Reliance Issue 4  
      (b) The Fault Issue 4  
      (c) The Ambit of Operation Issue 8  
      (d) The Rationale Issue 9  
 C Underlying Assumptions 9  
   (1) Introduction 9  
   (2) The Nature of Unjust Enrichment 10  
   (3) Restitution and Unjust Enrichment 13  
   (4) A Fusionist Approach 14  
 D Methodology and Overview 15  
   (1) Introduction 15  
   (2) Part One—Foundations 16  
   (3) Part Two—Definition 18  
   (4) Part Three—Ramifications 20  

## Part One: Foundations 23  

## 2. Lessons from Estoppel by Representation 25  
  
 A Introduction 25  
 B Elements of Estoppel by Representation 27  
   (1) Representation 27  
   (2) Reliance 28  
      (a) The Meaning of Reliance 28  
      (b) The Role of Reliance as a Causal Requirement 30  
      (c) The Applicable Test of Causation 31
Contents

(d) Proving Reliance 39
(e) A Residual, Evidential Role for the 'But For' Test. 40
(f) The Normative Significance of Reliance 40
(g) Lessons for the Change of Position Defence 41

(3) The 'Reasonableness' Requirement 43
(a) The Defendant’s Reliance must be Reasonable 43
(b) The Standard of Reasonableness and its Relationship to Good Faith 45
(c) The Function of the Reasonableness Requirement 45
(d) Lessons for the Change of Position Defence 47

(4) Detriment 48
(a) The Meaning of Detriment 48
(b) The Time for Assessing the Detrimental Change of Position 48
(c) Detrimental Changes of Position include Omissions and Non-pecuniary Changes 50
(d) The Change of Position must be Irreversible 51
(e) Lessons for the Change of Position Defence 53

C Bars to the Defence 53
(1) Defendant at Fault in Inducing the Representation 54
(2) Defendant in Breach of Duty 59
(3) Illegality 62

D Conclusion 62

3. Lessons from the Defence of Payment Over by an Agent 65

A Introduction 65
B The Requirement of Payment Over 67
C Notice 75
D Bars to the Defence 79
E Conclusion 87

4. Lessons from Rescission 89

A Introduction 89
B Restitutio in Integrum 89
(1) Rescission and the Requirement of Restitutio in Integrum 89
(2) The Requirement of Counter-restitution 93
(a) Rationale 93
(b) Elements and Operation 94
(c) Application of the Two Claims Approach to Rescission Cases 102
(3) The Defendant’s Changes of Position 103

viii


### Contents

| (a) Change by Exchange                                      | 103 |
| (b) Independent Changes in the Received Benefit            | 107 |
| (c) Defendant-instigated Changes of Position               | 108 |
| (4) The Claimant’s Changes of Position                     | 114 |
| (a) Independent Changes in the Received Benefit            | 114 |
| (b) Claimant-instigated Changes of Position                | 115 |
| (c) An Irreconcilable Tension?                             | 117 |
| C Conclusion                                              | 118 |
| (1) Rationale                                             | 118 |
| (2) Elements                                               | 119 |
| (3) Ambit of Operation                                     | 121 |

#### Part Two: Definition

5. Primary Elements 125

| A Introduction                                             | 125 |
| B Elements                                                 | 126 |
| (1) A Detrimental Change of Position                       | 126 |
| (a) Detriment as ‘Disenrichment’                           | 126 |
| (b) Detriment as ‘Irreversibility’                         | 130 |
| (c) The Irreversibility Approach is to be Preferred        | 134 |
| (d) Proving the Irreversible Change of Position            | 138 |
| (2) Causation                                              | 143 |
| (a) Introduction                                           | 143 |
| (b) But-for Causation in Cases of Independent Changes of Position | 145 |
| (c) Good Faith in Cases of Independent Changes of Position | 146 |
| (d) Reliance in Cases of Defendant-instigated Changes of Position | 147 |
| (e) Reliance must be Reasonable                            | 151 |
| (f) Anticipatory Changes of Position                       | 155 |
| (g) Proving Causation                                      | 157 |
| (3) The Impact of Third Parties                            | 160 |
| C Conclusion                                               | 162 |

6. Fault as a Bar to the Defence 165

| A Introduction                                             | 165 |
| B Wrongdoers                                               | 166 |
| C Duress and Undue Influence                               | 172 |
Contents

D The Innocent Inducer 177
E Illegality and Legal Stultification 184
F Fault in the Defendant’s Change of Position 187
G Conclusion 191

7. Ambit of Operation 193
A Introduction 193
B Application to Claims in Unjust Enrichment 193
   (1) Mistake 193
   (2) Duress and Undue Influence 195
   (3) Failure of Consideration 197
   (4) No Intention to Benefit 198
   (5) Policy-motivated Unjust Factors 203
   (6) Cases of Proprietary Restitution 204
C Application to Claims outside Unjust Enrichment 209
D Conclusion 210

8. Rationale 211
A Introduction 211
B Disenrichment 211
C Autonomy 212
D Security of Receipt 214
E A Harm-based Rationale 215
F A Mixed Rationale of Protection and Prophylaxis 217
G Conclusion 218

9. Conclusion 219

Part Three: Ramifications 221

10. Ramifications 223
A Introduction 223
B Estoppel by Representation 224
C Payment Over and Ministerial Receipt 230
D Restitutio in Integrum 234
E Good Consideration 237
F Bona Fide Purchase 239
G Statutory Change of Position Defences 243
H Conclusion 254

Index 257