10/95

SUPREME COURT OF VICTORIA

COMMONWEALTH OF AUSTRALIA v WEBSTER

O'Bryan J

18, 27 July 1995

CIVIL PROCEEDINGS – MONEY PAID UNDER MISTAKE OF FACT – DEFENCES AVAILABLE TO PAYEE – ESTOPPEL – CHANGE OF POSITION – NO REPRESENTATION MADE – WHETHER ESTOPPEL DEFENCE MADE OUT – OVERPAYMENT SPENT ON ORDINARY LIVING EXPENSES – WHETHER CHANGE OF POSITION DEFENCE AVAILABLE.

Due to computer error, W. was overpaid the sum of $15,160 as part of a redundancy agreement. Some 17 months later, W., who had not realised the error, was notified by the CofA of the fact of the overpayment. W. was unable to refund the money and defended the claim on the basis of the defence of estoppel and the defence of change of position. The Magistrate upheld the defences and dismissed the claim. Upon appeal from the dismissal—

HELD: Appeal allowed. Dismissal set aside. Order on the claim together with interest and costs.
1. *Prima facie*, a person to whom money has been paid under mistake of fact is liable to refund it even though it may have been spent. However, the rule may be displaced if the injustice of requiring repayment outweighs the injustice of denying restitution. The defence does not apply where the overpayment has been spent on ordinary living expenses.

2. If the payee's position has been altered by acting on a representation by the payer that the payment was truly due and owing, the payer may be estopped from denying the truth of that representation.

3. In W.'s case, no misrepresentation was made that the payment was truly due and owing to him and no breach of a duty owed to W. occurred. Accordingly, the defence based on estoppel should have failed.

4. In relation to the defence of "change of position", W. was unable to point to expenditure which could be ascribed to the overpayment. Further, the inference to be drawn was that W. had spent the overpayment on ordinary living expenses. In those circumstances, the defence should have failed.

O'BRYAN J: [1] This is an appeal from the Magistrates' Court at Melbourne pursuant to s109 of the *Magistrates' Court Act* 1989. The facts found in the Court below are not in issue in this appeal and may be shortly stated. By reason of a redundancy agreement the respondent became entitled to receive from the appellant as an employee of the Australian Quarantine and Inspection Service ("AQIS") the following: $151,160.04 for accrued salary, recreation leave and long service leave, $25,244.08 on account of a termination payment and $130,000 on account of a superannuation payment.

On 10 March 1992 the respondent met one O'Shea a personnel officer with AQIS and was informed that he would receive "forty odd thousand dollars from the department and approximately $130,000 superannuation payout". On 16 March 1992 the respondent received from the appellant $170,404 by electronic transfer into his bank account. On 25 March 1992 the respondent received from the appellant $15,160.04 by electronic transfer into his bank account. This payment duplicated $15,160.04 which had been included in the payment on 16 March and was made due to a computer error. The computer calculated that $19,503.29 was due and payable to the respondent for accrued salary, recreation leave and long service leave and after deducting an amount due for taxation the sum of $15,160.04 was paid to the respondent. In August 1993 the appellant became aware that an overpayment had been made and the respondent was notified accordingly. Prior to being notified of the overpayment the **[2]** respondent did not realize that he had been overpaid as indicated.

The appellant sought to recover from the respondent the moneys paid. In the Magistrates' Court the respondent defended the claim relying upon two grounds of defence namely, "estoppel" as evidenced in *Avon County Council v Howlett* [1983] 1 All ER 1073; (1983) 1 WLR 605 and

"change of position" as evidenced in *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548; [1992] 4 All ER 512; [1991] 3 WLR 10 and *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353; 109 ALR 57; (1992) 24 ATR 125; (1992) 66 ALJR 768; 66 ALLR 768. The learned Magistrate upheld both defences in the Court below and dismissed the claim. The appellant contended in this Court that neither defence was established by the evidence and inferences reasonably open.

Before considering the law in relation to these defences it is appropriate to refer again to the evidence and findings made by the Magistrate. In reasons for decision the learned Magistrate said:

> "The Defendant gave evidence that he had acted as guarantor for $80,000 business loan taken out by his son and that he was called upon to pay out the loan. He said that the need to pay out the loan and his wife's illness were the reasons for accepting the redundancy package. He said that he in fact paid out $80,000 for the loan, paid $10,000 towards a 'Time Share' that he was purchasing, purchased a $7,000 motor car for a friend for which he had not been repaid, made a $300 - $500 gift to another friend to assist him in meeting a mortgage repayment and repaid $5,000 with respect of a further loan taken out by his son. The remainder was spent on day to day living expenses. At the time of the hearing he said that he had some $300 - $400 left in his account. The Defendant described himself as 'not a good financial person'. He said that he had overdrawn his account on several occasions and had 'got into strife'. He gave evidence of having money go left, right and centre and not keeping track of it. At various points throughout his evidence he made **[3]** reference to his wife's illness and that because of his concern for her he didn't care what happened."

Later, in reasons for decision the learned Magistrate said:

> "His evidence that the money had been spent prior to notice of the plaintiff's claim is uncontradicted. According to his evidence the money was substantially used on things other than ordinary living expenses. Apart from the $80,000 loan repayment, which he always intended to pay, he made a $10,000 payment in respect of a 'Timeshare' he was purchasing, paid $7,000 for a motor car for a friend and paid $5,000 with respect to another loan taken out by his son. All of that evidence was uncontradicted. It is not open to the Court to find that the Defendant's credibility is such that his uncontradicted evidence must be rejected."

The respondent made an affidavit in this proceeding in which he supplemented the account of his evidence detailed above. The respondent deposed that he also gave evidence as follows:

> "I also gave evidence which was never contradicted, because of the large amount of money I had in the bank account I believed that I would not qualify for a carer's pension although I was caring for my wife who had multiple sclerosis and accordingly made no application until July 1993 when the balances in the bank accounts were depleted. Rita Benson from the Department of Social Security was called in to give evidence that a person in my position caring for a severely handicapped person would be entitled to claim and receive a carer's pension from the first pay day after lodgment of that application. This evidence was not contradicted in any way or contested." "I gave evidence that I drew cheques on our accounts to pay for various expenses, debts and commitments until the money ran out in July 1993. At that time I applied for, and qualified for, a carer's pension. But for the said overpayment I estimated in the witness box my account would have run out 6 months earlier and I would have applied for the pension in January 1993."

Finally, the respondent deposed that he spent about $30,000 from his bank account on ordinary living expenses for himself and his wife in the relevant period. **[4]** For the purposes of the appeal counsel for the appellant tabulated all the expenditures revealed by the respondent's evidence. These payments were made from his bank account in the relevant period (March 1992 to August 1993).

1.	Payment under a personal guarantee for a business loan	$80,000
2.	Payment towards a "time share"	$10,000
3.	Loan to a friend for a car	$7,000
4.	Another loan to a friend	$400
5.	Repayment of loan of son	$5,000
6.	Purchase of new Holden Barina	$15,400
7.	Repayment of AVCO loan of son	$13,000
8.	Living expenses (for respondent and wife)	$30,000
TOTAL		$159,800

It is now appropriate to examine the law relating to the recovery of money paid under a mistake of fact. Where money is paid under a mistaken belief that there is a present liability to pay *prima facie* the payment is recoverable. *Kelly v Solari* [1841] EngR 1087; [1835-42] All ER 320; (1841) 9 M & W 54; 152 ER 24; (1841) 11 LJEx 10; *Norwich Union Fire Insurance Society Ltd v Wm H Price Ltd* (1934) AC 455. In the present case the appellant made a payment to the respondent on 25 March under a mistake of fact. AQIS believed that $19,503.29, less tax, was due and payable to the respondent and was unaware that payment of the amount due had been made on 16 March. In *Continental Caoutchow and Gutta Percha Co v Kleinwort, Sons and Co* (1904) 9 Com Cas 240; (1904) 90 LT 474 at 476 Collins, MR stated the law thus:

> "It is clear law that *prima facie* the person to whom money has been paid under a mistake of fact is liable to refund it, even though he may have paid it away to third parties in ignorance of the mistake. He has had the benefit of the windfall and must restore it to the true owner." **[5]**

The *prima facie* rule may be displaced where "an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution": *Lipkin Gorman (a firm) v Karpnale Ltd* (1991) 2 AC 548; [1992] 4 All ER 512; [1991] 3 WLR 10. The respondent relied upon a "change of position" defence in the Court below. The scope of this defence and its applicability to the facts found in the present case will be considered later.

Before the "change of position" defence became part of English law in *Lipkin Gorman* a payee of money paid under a mistake could only rely on the defence of estoppel: *Avon County Council v Howlett* (1983) 1 WLR 605; 1983 1 All ER 1073. The estoppel defence was founded upon evidence that a representation had been made by the payer to the payee that the payee was entitled to treat the money as his own and that relying upon the representation the payee had acted to his detriment. The respondent also relied upon the "estoppel" defence in the Court below possibly because the Court of Appeal in the *Avon* case held that an estoppel by representation cannot operate *pro tanto*. Thus, if the respondent was only able to prove that he had spent some of the money paid under a mistake, estoppel provided a complete defence to the recovery claim. In *Lipkin Gorman* it was held that a "change of position" defence does operate *pro tanto*.

I shall deal with the "estoppel" defence first. Counsel for the appellant submitted that the corner-stone of the estoppel relied upon requires evidence of a representation **[6]** made by AQIS to the respondent that he was entitled to treat the money as his own. Mr Crennan submitted that no evidence of such a representation could reasonably be found. In Goff and Jones – *The Law of Restitution* 4th ed. at 747 the learned authors say:

> "A mistaken payment is not in itself a representation which gives rise to an estoppel. There must, therefore, normally be some further indication of the defendant's supposed title other than the mere fact of payment."

The authorities cited for this proposition are: *Re Jones Ltd v Waring and Gillow Ltd* (1926) AC 670; [1926] All ER 36; 95 LJKB 913; *Transvaal and Delegoa Bay Investment Co v Atkinson* (1944) 1 All ER 579. I derived little help from these authorities. Atkinson, J in *Transvaal* did observe, however,

> "when the plaintiff has expressly or impliedly represented to the defendant that the money paid was truly due and owing to the defendant, the plaintiff is estopped from denying the truth of that representation, if the defendant has in reliance upon the representation changed his position for the worse by spending the money."

In the *Transvaal Case* a finding was made that the defendant "never acted on nor indeed received any representation by the plaintiff". In *Holt v Markham* (1923) 1 KB 504; [1922] All ER 134 a finding was made that the defendant had been led by the plaintiff's conduct to believe that he might treat a war gratuity paid to him as properly paid and in that belief had altered his position by spending it. Accordingly, the plaintiffs were estopped from alleging that the gratuity was paid under a mistake. Evidence of a representation was very clear in *Holt*. The defendant had responded in writing to a demand for repayment of part of the gratuity on the basis that the defendant was a retired officer on retired pay stating that **[7]** the claim was mistaken as he was not a retired officer. The defendant was not informed until 18 April that the initial demand was

correct and that an overpayment had been made. In the meantime, the defendant concluded his response was satisfactory and had changed his position for the worse. The facts in *Holt* are quite different to the facts in the present case.

In *United Overseas Bank v Jiwani* [1977] 1 All ER 733; (1976) 1 WLR 964 McKenna, J cited with approval the statement of the law in Goff and Jones, *The Law of Restitution* (1966), 491, 492 (4th Ed 747-749) as to three conditions to be satisfied by a defendant defending a claim for repayment of moneys paid under a mistake relying upon estoppel.

> "First, he must show that either the plaintiffs were under a duty to give him accurate information about the state of this account and that in breach of this duty they gave him inaccurate information, or that in some other way there was a misrepresentation made to him about the state of the account for which the plaintiffs are responsible. Secondly he must show that this inaccurate information misled him about the state of the account and caused him to believe that the plaintiffs were his debtors for a larger sum than was the case and to make the transfer to Mr Pirani in that mistaken belief. Thirdly, he must show that because of his mistaken belief he changed his position in a way which would make it inequitable to require him to repay the money." (968)

Estoppel arising out of breach of a duty owed by a plaintiff to a defendant was eventually found by the learned Magistrate when he upheld the defence of estoppel. For the purposes of this appeal I shall not consider whether AQIS owed the respondent a duty in law not to misrepresent the amount of redundancy package money to which he was entitled. The point was not argued. Counsel for the respondent relied upon the *Avon* case and submitted that a duty arose out of the employer/employee relationship.

[8] In the *Avon* case the Court of Appeal upheld a defence of estoppel in relation to an overpayment of wages made by an employer to an employee consistently over a period of two years. The Court found that the employer had represented to the employee that he was entitled to treat the money paid regularly as wages as his own. In reliance on that representation the employee had spent the money which he would not otherwise have done and the overpayment was not due to any fault on the employee's part.

The facts in the present case are very different to the facts in the cases to which reference has been made. It is beyond argument that no express representation was made to the respondent by AQIS that the payment made on 25 March was truly due and owing to him. In my opinion no implied representation was made to the respondent by AQIS that the payment made on 25 March was truly due and owing to him. Unlike the position in *Holt* no communication occurred between AQIS and the respondent after 16 March when the first payment was made and August 1993 when overpayment was discovered. No indication was given to the respondent by AQIS as to the reason for the second payment and the respondent never sought an explanation from AQIS. Indeed, the evidence of the respondent strongly suggested that he never became aware that a second payment had been deposited into his account before AQIS advised him of the overpayment such was his concern about his wife's illness and indifference to the state of his financial affairs.

The learned Magistrate determined that a representation was made by AQIS by applying a passage in the judgment of Slade LJ in the *Avon* case. At 1086 his **[9]** Lordship said: "... the plaintiffs, as the defendant's employers, in my opinion clearly owed him a duty not to misrepresent the amount of the pay to which he was entitled from time to time". The learned Magistrate concluded:

> "Applying similar reasoning to this case, AQIS owed the defendant a duty not to misrepresent the amount of redundancy package money to which he was entitled. By making a direct payment to the defendant's bank account AQIS did represent that the defendant was entitled to treat the money as his own."

In my opinion the learned Magistrate erred in reaching this conclusion. In the *Avon* case it was common ground that the plaintiff (employer) made representations to the defendant (employee) which led him to believe that he was entitled to treat the entirety of the overpaid moneys as his own. This was conceded at the trial by the plaintiffs. (See Slade LJ at 1085, last paragraph.) The passage relied upon by the learned Magistrate was preceded by his Lordship accepting the proposition "that a plea of estoppel can afford a good defence to a claim for restitution *only if the*

plaintiff owed a duty to the defendant to speak or act in a particular way". His Lordship then said:

> "However, this point causes no difficulty for the defendant in the present case since the plaintiff's, (etc as above)".

A finding was made by the learned Magistrate that O'Shea, on behalf of AQIS told the respondent on 10 March he would receive "forty odd thousand dollars from the Department and approximately $130,000 superannuation payout" and on 16 March the defendant received $170,404.11. No misrepresentation of fact was made orally by O'Shea and no breach of a duty owed to the defendant occurred. The payment on 16 March was consistent with the representation made **[10]** orally. The further payment on 25 March was not preceded by a representation of any kind. The second payment standing alone is not itself a representation: see Goff and Jones at 747. There was no express or implied representation made to the respondent that the second payment was truly due and owing to him. Had the respondent queried the payment, as happened in *Holt's* case, and had the respondent been advised that the payment was correct or by conduct or silence led to believe that he may regard the second payment as properly paid the result would be different. In my opinion, the respondent who carried the burden of proof did not prove that a representation of fact was made which led him to believe that he was entitled to treat the second payment as his own. In these circumstances it is unnecessary to consider the third condition for estoppel: see *Jiwani* at 968; Goff and Jones, 748. The defence based upon estoppel must fail because the defendant never received any representation by AQIS and never acted on any representation.

Turning now to the defence of "change of position", two recent authorities must be considered. In *Lipkin Gorman* the House of Lords held that English law recognised that a claim to restitution based on the unjust enrichment of the defendant may be met by a defence that the defendant had changed his position in good faith. The principal speech on this defence was delivered by Lord Goff at Chieveley. After considering the defence of estoppel in restitution cases his Lordship concluded "that, in many cases, estoppel is not an appropriate concept to deal with the problem" (579). The problem referred to by his Lordship is one of identifying the **[11]** legal principle upon which the recovery of money in restitution cases should be denied.

The legal principle was first identified by his Lordship: "that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution" (579). Later, his Lordship added:

> "At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things. I fear that the mistaken assumption that mere expenditure of money may be regarded as amounting to a change of position for present purposes has led in the past to opposition by some to recognition of *a defence which in fact is likely to be available only on comparatively rare occasions*." (580) (Underlining for emphasis.)

Lord Bridge, Lord Griffiths and Lord Ackner agreed in the reasons set out in the speech of Lord Goff. The submission of Mr Crennan in the present case is that the facts in the present case do not show that the respondent spent the overpayment in circumstances that would make it inequitable to require him to repay the whole amount.

The High Court considered the *Lipkin Gorman* decision in *David Securities Pty Ltd v Commonwealth Bank of Australia* [1992] HCA 48; (1992) 175 CLR 353; 109 ALR 57; (1992) 24 ATR 125; (1992) 66 ALJR 768; 66 ALLR 768. The Court held it is a defence to a claim to recover money paid under a mistake that the payee has adversely changed his position in reliance on the payment. In their joint judgment, Mason CJ and Deane, Toohey, **[12]** Gaudron and McHugh, JJ considered the reason for and scope of the defence of "change of position". Their Honours observed: "a defence of change of position is necessary to ensure that enrichment of the recipient of the payment is prevented only in circumstances where it would be unjust" (385). Their Honours also observed:

> "... the defence of change of position is relevant to the enrichment of the defendant precisely because its central element is that the defendant has acted to his or her detriment on the faith of the receipt. In the jurisdictions in which it has been accepted (Canada and the United States), the defence operates in different ways but the common element in all cases is the requirement that the defendant point to expenditure or financial commitment which can be ascribed to the mistaken payment. ... In no jurisdiction, however, can a defendant resort to the defence of change of position where he or she has simply spent the money received on ordinary living expenses."

Clearly, the defence of "change of position" is recognised by the highest authority to be part of the law of Australia with an operation no wider than the speech of Lord Goff in *Lipkin Gorman* permitted. The application of the defence to the facts in the present case must start with the findings of the learned Magistrate.

> "His evidence that the money had been spent prior to notice of the plaintiff's claim is uncontradicted. According to his evidence the money was substantially used on things other than ordinary living expenses. Apart from the $80,000 loan repayment, which he always intended to pay, he made a $10,000 payment in respect of a "Timeshare" he was purchasing, paid $7,000 for a motor car for a friend, met a $300-400 mortgage payment for another friend and paid $5,000 with respect to another loan taken out by his son. All of that evidence was uncontradicted."

The learned Magistrate found that the respondent did adversely change his position in reliance on the payment. **[13]** There was a paucity of evidence placed before the Magistrates' Court as to when any particular payment was made by the respondent in the relevant period or as to the balance in the respondent's bank account on any particular date. Bank statements were not produced by the defendant and no attempt was made by him to show the purpose or purposes for the expenditure of the overpayment. The tabulation of expenditure made by Mr Crennan only accounted for $159,800. The respondent received $170,440 and $15,160 from AQIS in March 1992 but has not accounted for the expenditure of approx $26,000.

Lord Goff stressed "that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things". The inference is overwhelming in the present case that as the money had been spent prior to notice of the appellant's claim the unaccounted for $26,000 was expended "in the ordinary course of things". Certainly, the respondent failed altogether to "point to expenditure or financial commitment which can be ascribed to the mistaken payment". One is driven to find that the respondent "simply spent the money received (i.e. the overpayment) on ordinary living expenses". I am compelled to the conclusion that the defence of "change of position" should not have succeeded in the Court below. The questions of law numbered (a) to (h) should all be answered in the affirmative. **[14]** The order in the Court below will be set aside. Subject to confirmation by counsel as to the figures there will be judgment for the appellant in the Court below for $18,598.05 together with interest and costs. The amount of interest and costs may be agreed between the parties. The appellant is entitled to the costs of the hearing in this Court including reserved costs. An indemnity certificate will be granted to the respondent pursuant to the *Appeal Costs Act.*

APPEARANCES: For the appellant/plaintiff Commonwealth of Australia: Mr M Crennan, counsel. Australian Government Solicitor. For the respondent/defendant Webster: Mr M Lombardi, counsel. Forbes Reichuran & Galaszo, solicitors.
