34/11; [2011] VSC 480

SUPREME COURT OF VICTORIA

TRA GLOBAL PTY LTD v KEBAKOSKA

Osborn J

12, 27 September 2011

CIVIL PROCEEDINGS – RESTITUTION – REDUNDANCY PAYMENT MADE TO EMPLOYEE BY MISTAKE – WHETHER VOLUNTARY IN THE RELEVANT SENSE – WHETHER CHANGE OF POSITION IN RESPECT OF APPLICATION FOR UNEMPLOYMENT BENEFITS AND REFUSAL OF SUCH APPLICATION CONSEQUENT UPON THE REDUNDANCY PAYMENT – LOSS OF OPPORTUNITY CONSTITUTING CHANGE OF POSITION – WHETHER ESTOPPEL BY REPRESENTATION REMAINS POTENTIAL DEFENCE TO CLAIM FOR MONEY HAD AND RECEIVED IN CONSEQUENCE OF MISTAKE – NO OVERARCHING DOCTRINE OF ESTOPPEL – ESTOPPEL BY REPRESENTATION PERSISTS AS A POTENTIAL DEFENCE – WHETHER OPEN TO CONCLUDE ESTOPPEL DEFENCE MADE OUT – APPEAL DISMISSED.

K. who had been employed by TRA for a number of years was made redundant and advised that she was entitled to a redundancy payment. After the redundancy payment was made, K. applied for unemployment benefits but was refused by Centrelink having regard to the amount of the redundancy payment. Over a period of time whilst she was unemployed, K. spent the redundancy money on living expenses. K. later sued her former employer for contractual bonus entitlements and the company counterclaimed seeking restitution of the redundancy payment on the basis that it was made as the result of a mistake as to the employee's entitlements. The Magistrate held that the redundancy payment was made by mistake but that the employee had a partial defence to the counterclaim by reason of a change of position and a complete defence of estoppel by representation. Upon appeal—

HELD: Appeal dismissed.

1. It was open to the Magistrate to conclude that the redundancy payment was made by mistake. The evidence did not support the conclusion that it was voluntary in the sense for which the employee contends.

2. Although the fact of payment by mistake gave the company a *prima facie* claim for restitution of the redundancy payment, the employee changed her position in reliance upon receipt of the payment. More particularly, the employee disclosed receipt of the payment in an application for unemployment benefits and in consequence was denied payment of such benefits during a period of unemployment which followed the termination of her employment by the company. In turn, she spent the redundancy money on living expenses during a period of unemployment. The Magistrate's conclusions with respect to these matters were correct in law.

3. The Magistrate was correct to conclude that estoppel by representation remains, in appropriate circumstances, an alternative potential defence to a claim for restitution of moneys paid by mistake.

4. It was open to the Magistrate to conclude that the defence of estoppel was a complete bar to the counterclaim and not merely a defence with respect to a sum equivalent to the unemployment benefits lost in consequence of the company's representation as to the employee's redundancy entitlement.

5. It was open to the Magistrate to conclude that the defence of estoppel by representation was made out on the facts.

OSBORN J:

1. The appellant ('the company') is the former employer of the respondent ('the employee'). At the time of termination of her employment, the company advised the employee that she was entitled to a redundancy payment equivalent to 12 weeks' pay and in consequence paid to her the sum of $27,318.48.

2. Subsequently, the employee sued the company for contractual bonus entitlements. The company counterclaimed seeking restitution of the redundancy payment on the basis that it was made as the result of a mistake as to the employee's entitlements.

3. In a careful and considered judgment, Lauritsen M upheld the claim and dismissed the counterclaim.

4. The company now appeals the decision in respect of the counterclaim on questions of law pursuant to s109 of the *Magistrates' Court Act* 1989.

5. The Magistrate held that the redundancy payment was made by mistake, but that the employee had a partial defence to the counterclaim by reason of change of position and a complete defence of estoppel by representation.

6. The company submits that the Magistrate erred in upholding the employee's defences to the counterclaim. It is submitted, first, that it was not open to the Magistrate to conclude that the employee had a partial defence to the restitution claim by reason of change of position. Secondly, it submits that the Magistrate erred in concluding that the defence of estoppel was open as a matter of law in respect of the claim, either at all, or alternatively in respect of the whole of the claim.

7. It is said that estoppel is not available as a defence if the defence of change of position is open. Alternatively, it is submitted that if the defence is available it is a partial defence only, extending to the actual financial detriment suffered by the defendant. It is further submitted that the basis of estoppel by representation was not made out on the facts in this case in any event.

8. In turn, the employee contends that the Magistrate should not have concluded that this was a case of mistake at all; rather, the evidence compelled the conclusion that this was a case of a voluntary payment in discharge of an honest claim.

9. For the reasons I set out below, I have concluded:

(a) It was open to the Magistrate to conclude that the redundancy payment was made by mistake. The evidence did not support the conclusion that it was voluntary in the sense for which the employee contends.

(b) Although the fact of payment by mistake gave the company a prima facie claim for restitution of the redundancy payment, the employee changed her position in reliance upon receipt of the payment. More particularly, the employee disclosed receipt of the payment in an application for unemployment benefits and in consequence was denied payment of such benefits during a period of unemployment which followed the termination of her employment by the company. In turn, she spent the redundancy money on living expenses during a period of unemployment. The Magistrate's conclusions with respect to these matters were correct in law.

(c) The Magistrate was correct to conclude that estoppel by representation remains, in appropriate circumstances, an alternative potential defence to a claim for restitution of moneys paid by mistake.

(d) It was open to the Magistrate to conclude that the defence of estoppel was a complete bar to the counterclaim and not merely a defence with respect to a sum equivalent to the unemployment benefits lost in consequence of the company's representation as to the employee's redundancy entitlement.

(e) It was open to the Magistrate to conclude that the defence of estoppel by representation was made out on the facts.

Background

10. The employee had been employed by the company since May 1997. On 12 November 2007, she entered into a new employment agreement and was appointed the company's National Operations Manager on a salary package of $125,350.00 per year (subsequently increased to $129,034.20 per year).

11. On 17 June 2008, the employee met with the CEO of the company, Mr Ian Stacy, and the CEO of the Group of which the company is a division, Mr George Zammit. The employee was informed that she would be made redundant on 1 July 2008.

12. On the same day, Mr Stacy requested 'Naty' from the company's HR department to 'investigate [the employee's] entitlements'. Naty replied to the email, attaching a table that was stated to be the 'federal award minimum standard for redundancy payments'. On 18 June 2008, the employee requested details of her entitlements and redundancy payout from Mr Zammit and Mr Stacy. Mr Stacy replied, indicating that Naty 'has started this for you' and attaching Naty's email with the federal award minimum standards table.

13. On 19 June 2008, the employee emailed Naty and Mr Stacy, again requesting details of her final entitlements. On 20 June 2008, Naty replied stating 'please be assured – accounts have already investigated calculations into the redundancy payable and we've had to check this is aligned to VIC (as it differs to NSW). Mark Langan is in the process of finalising the entitlements and he is away from the office this afternoon'.

14. On 25 June 2008, Mr Langan (who it appears was the company's chief financial officer) emailed the employee stating as follows:

> I have calculated your entitlements up to the 4th of July as follows:
> Annual leave 7.15 weeks
> Long service leave 9.7 weeks
> Federal Award Standard Redundancy 12 weeks

15. The employee replied requesting after tax figures and Mr Langan replied stating 'we have done a draft calculation as follows' and setting out a series of figures totalling $51,151.73, with the redundancy component being $27,314.57.

16. On 2 July 2008, the employee sent an email to Sukender Jain, the 'ultimate owner' of the company. The email took issue with the quantum of the redundancy payment, and stated relevantly:

> A 12 weeks redundancy payment is extremely low, for the number of years worked. As I am now forced to find another position, it could take me 6-12 months to find another position on similar salary, which will force me to make dramatic changes due to my financial commitments. Just the thought of making alternative financial arrangements causes me an incredible amount of stress. After various discussions within the industry, I think 1 month for every year of service is more reasonable. The 12 weeks redundancy on offer is less than the 14 weeks sick leave entitlements that I accumulated. Throughout my 11 years, an incredible amount of long hours were worked. I have always been a loyal and good employee, and never took any sick leave, even when feeling under the weather. The business has benefited from this.

17. Mr Jain did not reply, but forwarded the email to Mr Stacy, Mr Langan and Mr Zammit. Mr Stacy stated that he and Mr Langan would prepare a response. Mr Zammit responded to Mr Stacy's email and made a series of comments in relation to the employee's email:

> We will do what is the letter of the law and no more.
> One month for every year of service is ridiculous and I have never seen this in my 34 years in the industry.
> 3 [months] notice period?... that is why she is getting redundancy pay of nearly $28K.
> Sick leave???? That is why she is taking it now.
> The LTI will require a careful answer.
> The reality here is that Vesna is finding out that the market is offering around 45 to 50K PA, for the work and skills she has.
> It will take a lot longer than 6 to 12 months to find....as she says a similar paying job.
> I don't wish to sound totally heartless on this but Vesna has enjoyed a significant level of annual salary, well above her market rate for quite a while and it is not sustainable for what she does and always did, for the business.

18. Mr Stacy and Mr Langan then prepared a response to the employee's email. The text of the response was agreed to by Mr Zammit. The response was sent on 4 July and provided:

> Decisions regarding redundancy are not made lightly and we endeavour to be as fair and compassionate as we can in the circumstances. The decision was made on the basis of the changed circumstances of the business following the acquisition and integration of TRA. We are mindful of your length of service and your contribution to the business and your performance and would like

> to assist you in finding alternate employment through our internal network and would obviously provide any necessary references.
> The payments set out in the email from Mark are consistent with the Federal Award Standard requirements for redundancy and were calculated consistent with this award and your statutory entitlements.
> ...
>
> We consider the calculations in Mark's advice to be correct and adequate in the circumstances and we intend to make payment tomorrow being July 4 the agreed date for your redundancy.

19. The events that followed the 4 July email are set out in the Magistrate's decision:

> On 7 July 2008, the defendant paid the plaintiff $51,158.61. This comprised moneys for two weeks pay until 4 July 2008, annual and long service leave of $42,906.65 less tax of $19,069.49 and redundancy (described as "Termination Lump Sum D") of $27,318.48. The last was equal to twelve weeks pay. The defendant calculated the redundancy payment by reference to the "Federal Award Standard requirements".
>
> Following the end of her employment, the plaintiff was out of work for eight months. She actively sought re-employment. She applied for about forty positions before obtaining employment in February 2009. About a month after her termination, she applied to Centrelink for unemployment benefits but was refused because of her receipt of the redundancy and other payments. Since she had no other source of income she used the payment (including the redundancy component) to live on. By the time of regaining re-employment, she had spent most of the entire sum. The issue of mistaken payment was raised in the defendant's counterclaim for the first time on 29 June 2009.

Voluntariness

20. It is convenient first to refer to the ground raised in the employee's notice of contention that the payment was not made by mistake in the relevant sense, but was made voluntarily in satisfaction of an honest claim.

21. When the matter came before the Magistrate, the employee did not initially take issue with the mistaken nature of the payment. In the course of the hearing however the employee was granted leave to reopen her case and call Mr Stacy in order to attempt to establish that the basis of the payment was voluntary.

22. Mr Stacy gave evidence that Mr Langdon would have brought him the calculated redundancy entitlements of the employee and he would have authorised the payment. He also stated that the reasons for making the redundancy payment were those contained in the 4 July email.

23. In cross-examination Mr Stacy gave evidence:

> Why did you regard yourself as being required to make that payment in light of the fact that you redunded her position? --- She was entitled to it under the Clerks Award.
> You took the view, did you, that Ms Kebakoska was entitled to a redundancy payment under the Clerks Award? --- Correct.
> Would you have made a payment to Ms Kebakoska if you formed the view that she wasn't entitled to a benefit under the Clerks Award? --- No.
> Was there any intention to make that payment to Ms Kebakoska as a gift? --- No.
> Was there any intention to make the payment to Ms Kebakoska for compassionate reasons irrespective of what you perceived to be her legal entitlement? --- No.
> Was there any intention by the company to pay Ms Kebakoska anything more than what it regarded itself as legally required to do? --- No, and in fact I've said we do what is required and no more.

24. The learned Magistrate dealt as follows with the question of voluntariness in his reasons:

> It is plain that the defendant made the redundancy payment under the mistaken belief that it was obliged to do so under the law. It is unclear whether it had any definite source of law in mind except that which gave rise to the table attached in Naty's 17 June email. The defendant did not pay 'voluntarily' in the sense discussed in *David Securities*. Both parties assumed that the plaintiff was entitled to a redundancy payment. The plaintiff thought she was entitled to more due to the length and nature of her employment. The defendant paid scant attention to her arguments and was only prepared to pay what it thought it was obliged to do. It did so. This is not a case of accord and satisfaction or compromise. It was really a case of 'take it or leave it'. The defendant was unprepared

to discuss the matter. It said it would pay a certain amount and did so.

The defendant had a mistaken belief as to its obligation to pay. The plaintiff placed great weight on the text of Stacy's 4 July email as evidencing voluntariness. Its submission ignored the context in which it was written. Stacy drafted this email in response to Zammit's 2 July email, which opens with the strident assertion – 'We will do what the letter of the law [requires] and no more'.[1] In those circumstances, the defendant has a prima facie entitlement to repayment of the redundancy moneys by the plaintiff.

25. This view of the facts was plainly open to the Magistrate. It was open to conclude that the payment was not a payment made voluntarily in satisfaction of an honest claim. In *David Securities Pty Ltd v Commonwealth Bank of Australia*,[2] the majority judgment stated:

... The payment is voluntary or there is an election if the plaintiff chooses to make the payment even though he or she believes the particular law or contractual provision requiring the payment is, or may be, invalid, or is not concerned to query whether the payment is legally required; he or she is prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment.[3]

26. In *Hookway v Racing Victoria Limited & Anor*,[4] Ormiston JA articulated five categories of voluntary payment:

One may start with compromises and other bargains by way of settlement. Secondly, one may take from the quotation set out earlier[5] from *David Securities* the other payments 'in satisfaction of an honest claim' dividing that second class into the various kinds of payments described earlier as voluntary being:
(a) payments where the payer believes a particular law or contractual obligations is invalid but chooses to pay;

(b) payments where the payer believes that the law or obligation *may be* invalid but chooses to pay;

(c) payments where the payer pays but is not concerned to query whether the payment is required at law;

(d) payments where the payer is prepared to *assume* the validity of the obligation and therefore pays; and

(e) payments where the payer in making payment is prepared to do so 'irrespective of the validity or invalidity of the obligation' and chooses not to contest the claim for payment.

The classification clearly concentrates on the mind and intention of the person making payment, which, according to the majority, though not according to Brennan J, is the critical enquiry...

[T]he five categories to which I have referred each involve some conscious decision on the part of the payer to make payment regardless of the legal obligation. It would follow that, if such a payment is made in ignorance of the legal position and in circumstances where it has not been shown that some such conscious decision has been made, then the party subsequently discovering that the payment was made under a mistake of law may, at least since the decision in *David Securities*, sue to recover the sum paid.[6]

27. His Honour further said:

[A]part from cases of discharge for good consideration (para (b) in *Barclays Bank*), in order to satisfy the term 'voluntary' there must otherwise be a conscious choice to make a payment notwithstanding any possible defects in the claim. To this end there must be an assumption as to the validity of the obligation, notwithstanding that ultimately it may turn out that there is no obligation in law. Until it was made clear in *David Securities* that ignorance of law may properly be a basis for restitution, then it was not difficult to identify for these purposes the circumstances in which payers were treated as having been prepared to make payment regardless of their liability. But when total ignorance is included, then it is not surprising that the courts should require something more, namely, a conscious decision to make payment regardless of possible invalidity or want of liability. In my opinion, as worked out by the majority in *David Securities*, it was not intended that a person, who makes a payment in ignorance of a basis of invalidity for denying liability, can thereby be treated, without more, as having intended voluntarily to pay the sum regardless of what might be shown to have been a mistake of law. It was intended only to restrict claims by those who consciously decided

to pay regardless of what might arise in the future, as well as those who were otherwise bound by accord and satisfaction or any other compromise, or by submission to judgment, each of which will amount to satisfaction of the payee's claim. These may be said, in general terms, to be paid in satisfaction of honest claims.[7]

28. In the present case, the Magistrate was not bound to conclude that there was a conscious decision on the part of the company to make payment regardless of its legal obligation. The evidence neither compelled nor justified the conclusion that the company 'assumed the validity of the obligation' in the relevant sense. There is no evidence of conscious acceptance of an 'assumption' as such. There was clear evidence of a decision to pay the employee her entitlement and nothing more coupled with a mistake as to that entitlement. Accordingly, I reject the employee's contention that the payment was voluntary in the relevant sense.

Change of position

29. The Magistrate summarised the law with respect to change of position as follows:[8]

Change of position is a defence to a restitutionary claim. It is dealt with in chapter 24 of *Restitution Law in Australia*.[9] At [2415], the authors state that mere expenditure will not constitute a change of position. However, they assert that the ultimate test is whether the defendant would have acted differently if she had not mistakenly believed that she was richer than she was, that because of her mistake, she had altered her position.[10] At [2416], it is stated that money spent solely in reliance on the payment, from which the defendant no longer retains a benefit, constitutes a good defence. At [2417], the authors assert that the defence is not available where the defendant has simply spent the money received on ordinary living expenses. In *Lipkin Gorman v Karpnale Ltd*,[11] Lord Goff stated the principle and commented upon the position of ordinary expenditure:

> '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.'

In *David Securities*, the plurality said:[12]

'If we accept the principle that payments made under a mistake of law should be *prima facie* recoverable, in the same way as payments made under mistake of fact, 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 ... However, 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 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.'

30. The Magistrate went on to conclude on the facts as follows:

The plaintiff sought unemployment benefits. As required by law, she disclosed her receipt of the redundancy payment. Her application for unemployment benefits was rejected because she had received the redundancy payment. Since she remained unemployed, with no other source of income, she used the redundancy and the other moneys to live on. Absent the redundancy payment, the plaintiff would have received an unemployment benefit. There is no evidence of the amount she would have received over the period of her unemployment.

Although the plaintiff used her redundancy payment for ordinary living expenses, she was deprived of another source of income because the defendant made a mistake. As Lord Goff said in the *Lipkin Gorman* case – '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'.

It appears that the change of position defence is accepted in the common law world. As with any doctrine devised in the common law, the parameters of the principle develop from case to case. As yet, they are not fully defined. The rejection of expenditure on ordinary living expenses was necessary to retain content in the prima facie entitlement. Almost everyone receiving a mistaken payment will spend it and, usually, on living ordinary living expenses. However, the beauty of this doctrine is its flexibility in order to do justice to the parties. An automatic rejection of such expenditure does not necessarily achieve a just outcome.

> This is one of those cases where the plaintiff should succeed in her change of position defence even though the moneys were used for ordinary living expenses. Her position changed in two ways – by the use of the moneys; and by the denial of a benefit. In my opinion, under the change of position defence, she should succeed but only to the extent of her detriment. The extent of her detriment is the unemployment benefit denied to her. If it were not for my upholding the estoppel argument, I would have invited the parties to lead evidence about the value of that benefit.[13]

31. In my view, the evidence clearly established a change of position on the part of the employee. That change was relevantly comprised of three interrelated elements:

> (a) the disclosure of the redundancy payments to Centrelink;
>
> (b) the consequential denial of unemployment benefits to the employee; and
>
> (c) the expenditure of redundancy payments on living expenses in these circumstances.

32. The appellant submits that this is a case where no relevant change of position occurred because the money received was spent on living expenses. In my view, this is not a case where the employee 'simply spent the money received on ordinary living expenses.' The employee disclosed receipt of the redundancy payment when she applied for unemployment benefits and suffered a refusal of her application as a result. The employee changed her position as a result of the mistaken redundancy payment and thereby suffered a direct financial loss. Each of grounds 1 to 3 contained in the notice of appeal fails on the facts:

> 1. The learned Magistrate erred in concluding that the Respondent had established a valid defence of 'change of position' to the Appellant's Counterclaim in restitution, when the change of position found by the learned Magistrate amounted to the expenditure by the Respondent of the Payment on ordinary living expenses.
>
> 2. Further or alternatively to ground 1, the learned Magistrate erred in concluding that the inability of the Respondent to acquire an unemployment benefit was by reason of the receipt of the Payment.
>
> 3. Further or alternatively to ground 2, the learned Magistrate erred in concluding that if the inability of the Respondent to acquire an unemployment benefit was by reason of the Payment, this amounted to a relevant change of position by the Respondent on the faith of the receipt of the Payment.[14]

33. The weight of authority favours the view that simply giving up an opportunity to obtain social security entitlements is a sufficient change of position to enliven the defence, but the present case is *a fortiori* stronger by reason of the course of positive action undertaken in reliance upon the redundancy payment.

34. In *Moore v The National Mutual Life Association of Australasia Limited*,[15] Ball J noted:

> There is a question whether a missed opportunity for gain is a detriment for the purpose of the defence: for discussion, see C Mitchell, 'Change of Position: The Developing Law' [2005] *Lloyd's Maritime and Commercial Law Quarterly* 169 at 176. In Australia, however, that question seems to have been resolved in favour of the view that it can be. For example, in *Gertsch v Atsas*,[16] Foster AJ found that the defendant had changed her position by forsaking an opportunity to earn income and instead taking up a university education: at [98]. Similarly, in *Palmer v Blue Circle Southern Cement*[17] Bell J held that the plaintiff had changed his position by giving up an opportunity to obtain social security entitlements. In that case, a truck driver had received weekly workers' compensation payments on the basis that he was partially incapacitated. Subsequently, the Compensation Court held that the employer had no liability to make those payments over the preceding two year period. The employer then sought to recover the amount of those payments. The evidence indicated that, following termination of the payments, the worker was paid an invalid pension and that, had he not received the workers' compensation payments, he would have been entitled to receive either sickness benefits or an invalid pension. The worker argued that the failure to apply for a pension was a relevant change of position. Bell J accepted that it was. In her Honour's view the failure to claim social security benefits in reliance on the workers' compensation payments was a sufficient change of position 'within the broad statement of principle enunciated in *David Securities* (at [36]).[18]

35. The present case is a stronger case than the *Palmer v Blue Circle Southern Cement*[19] case

because of the actual application by the employee for unemployment benefits and the refusal of those benefits in consequence of the disclosure of the redundancy payment.

36. In *Moore* itself, the plaintiff had received benefits under a 'Total Disability' policy which the insurer subsequently avoided. Ball J found in part that the plaintiff would have applied for Centrelink benefits had he not been in receipt of benefits from the insurer and there was no reason to suppose he would not have received them during the extensive periods he was not at work. The plaintiff was not later entitled to recover past Centrelink benefits.

37. His Honour held that although generally the payment of living expenses is not regarded as a relevant change of position, that principle does not apply:[20]

> where the payments are made for the purpose of enabling the recipient to meet those expenses and the recipient would have taken other steps to meet living expenses or reduce them if those payments had not been made.

38. In the present case, the redundancy payment was purportedly made as compensation for the termination of the employee's services. In turn, the employee would have taken other steps in the form of a different application for unemployment benefits if the payment had not been made.

39. It would be inequitable to require the employee to bear the cost of the expenses which would have been covered by unemployment benefits if the mistake had not been made. To so require would mean that the employee was forced to bear a financial loss which would not have been suffered, but for the company's mistake. Accordingly, ground 4 of the notice of appeal also fails:

> Further or alternatively to grounds 1-3, the learned Magistrate erred in concluding that it would be inequitable to require the Respondent to repay the Payment, in circumstances where:
>
> (a) the defence of change of position was otherwise not made out; and
>
> (b) there was no inequity.[21]

40. The Magistrate correctly stated the law and did not err in his application of it to the facts. His decision that the change of position defence was sustainable to the extent of the value of the unemployment benefits accorded with basic principle and authority relating to like cases.

Has the change of position defence displaced estoppel by representation as a potential defence to claims for restitution of moneys paid by mistake?

41. In the course of his reasons, the Magistrate raised the question whether estoppel by representation remains a potential defence to a claim of the type here in issue or whether it has been displaced by the defence of change of position.

42. His Honour dealt with the law relating to estoppel as follows:

> Estoppel by representation prevents a person who, by a representation of fact, has led another to alter her position, from denying the fact is as represented. It is a rule of evidence. In this case, the defendant will be estopped from asserting its restitutionary claim if the following are established:[22]
> (a) the defendant must generally have made a representation of fact which led the plaintiff to believe that she was entitled to treat the money as her own;
> (b) the plaintiff must have, bona fide and without notice of the defendant's claim, consequently changed her position;
> (c) the payment must not have been primarily caused by the default of the plaintiff;
> (d) the defendant owed a duty to the plaintiff to speak or act in a particular way.
>
> The plaintiff referred me to the formulations of estoppel in pais stated by Dixon J in *Thompson v Palmer* and *Grundt v Great Boulder Pty Gold Mines Ltd*. In *Thompson*, Dixon J said:
> The object of *estoppel in pais* is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other's detriment.
>
> The only difference in the formulations of Dixon J and that of Slade LJ is the explicit reference to injustice in the former, while it is implicit in the latter.

> Unlike the change of position defence, estoppel by representation does not operate *pro tanto* because it is a rule of evidence. In effect, it provides a complete defence by preventing a contrary assertion of fact or law.
>
> Although this point was not argued before me, there is some basis for suggesting that estoppel by representation has been implicitly overruled in relation to restitutionary relief for mistake by the emergence of the change of position defence. This issue is the subject of a discussion in Meagher, Gummow & Lehane's 'Equity Doctrines & Remedies'.
>
> In *Philip Collins Ltd v Davis*, Jonathan Parker J said:
> In any event, as I read the relevant authorities, the law has now developed to the point where a defence of estoppel by representation is no longer apt in restitutionary claims where the most flexible defence of change of position is in principle available …
>
> On the other hand, there is a spirited defence of the estoppel in an article entitled 'Change of position and estoppel'. The authors give an example of where estoppel would apply but the change of position defence would not, to the disadvantage of a plaintiff – a recipient who acts upon a receipt (and representation) to forego a foreseeable and quantifiable opportunity to improve his wealth would not be protected.
>
> Both *Lipkin Gorman* and *David Securities* refer to *Avon's* case without expressly overruling it. In the former case, Lord Goff did say – '… where change of position has been relied upon by the defendant, it has been usual to approach the problem as one of estoppel … But it is difficult to see the justification for such a rationalisation.' In *David Securities*, the majority did no more than note the inflexibility of the related doctrine of estoppel as evidenced in *Avon's* case.
>
> Where applicable, estoppel has provided a longstanding approach to this issue. It should not be put aside by such observations, especially where the High Court notes the inflexible aspect of estoppel but says no more.[23]

43. The company now submits that in the light of the development of the law in *David Securities*, the defence of estoppel by representation is no longer available in the present case.

44. The Magistrate was bound by the doctrine of precedent and in my view did not err in holding that the defence of estoppel by representation remains open. There are a series of reasons why it should not lightly be discarded which I shall elaborate below:

> (a) Estoppel by representation is a defence potentially available to all claims at common law and equity. It would require clear authority to displace it in the particular context of restitution claims.
>
> (b) Estoppel by representation is a potential defence to only some claims for restitution of moneys paid by mistake in which the change of position defence would otherwise be available. It does not cover the same field.
>
> (c) David Securities was decided by the High Court relatively shortly after *Commonwealth v Verwayen*,[24] but the judgment of the plurality which articulates the defence of change of position does not refer to the defence of estoppel in terms which suggest it no longer exists.[25]
>
> (d) It was not open to the Magistrate to simply conclude the change of position rule is 'fairer' in accordance with the approach of some Canadian courts.
>
> (e) In principle, it is difficult to see that the terms of the representation associated with the mistake cannot go to the equities as between the parties. If this be so, the elements of estoppel reflect a different paradigm of fairness from one focussed simply upon change of position.
>
> (f) The ambit of the defence of change of position is not yet fully resolved.
>
> (g) The argument noted in *Scottish Equitable PLC v Derby*,[26] that the change of position defence removes any detriment upon which a party can rely for the purpose of maintaining an estoppel, asserts for the defence of change of position a priority which the law currently does not give it.
>
> (h) The unconscionability exception referred to in the judgments in *Avon County Council v Howlett*[27] does not assist the view that estoppel must be regarded as displaced by the change of position defence.

(a) The state of the authorities

45. The defence of estoppel by representation developed first in the Courts of Chancery and

was then adopted by the common law. In consequence, its elements are the same in law and equity and it is a potential defence to all claims in law and equity.[28]

46. The passage in the judgment of Dixon J in *Thompson v Palmer*[29] quoted by Lauritsen M identifies the fundamental concepts of unjust departure from an assumption which would cause another material detriment. Dixon J continued the passage quoted as follows:

> Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights which would exist only if the assumption were correct, as in *Yorkshire Insurance Co. v Craine*; *cp. Cave v Mills*; *Smith v Baker*; *Verschures Creameries Ltd v Hull and Netherlands Steamship Co.*; and *Ambu Nair v Kelu Nair*; or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party's adopting and acting upon the faith of the assumption; *or because he directly made representations upon which the other party founded the assumption.* But, in each case, he is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption be permitted.[30]

47. In *Grundt v Great Boulder Proprietary Gold Mines Limited*,[31] Dixon J subsequently articulated the basal purpose of the doctrine as being 'to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting'.[32]

48. His Honour went on to again make clear, however, that detriment was not sufficient to establish an estoppel:

> Fulfilment of the condition which so far I have discussed is not enough to make it just to preclude a party from setting up a state of facts. The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it. But the law does not leave such a question of fairness or justice at large. It defines with more or less completeness the kinds of participation in the making or acceptance of the assumption that will suffice to preclude the party if the other requirements for an estoppel are satisfied. A brief statement of the recognized grounds of preclusion is contained in the reasons I gave in *Thompson v Palmer* ...[33]

49. In *Verwayen*, the High Court divided on the question whether there is an overarching doctrine of estoppel.[34] In turn in *Giumelli v Giumelli*,[35] the majority noted the dicta in *Verwayen* of Mason CJ concerning 'a single overarching doctrine' and Deane J referring to 'a general doctrine of estoppel by conduct'.[36] The majority in *Giumelli* then observed that the other members of the High Court in *Verwayen* had not accepted this thesis and that *Giumelli* was not the occasion on which to consider whether the various doctrines and remedies in the field of estoppel should be brought together. The situation thus remains that there is no unified single doctrine of estoppel.

50. In *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd*[37] Hodgson JA, with whom Beazley and Ipp JJA agreed, stated:

> The first matter to be considered is whether there is still an all-or-nothing common law estoppel, distinct from the equitable estoppel under which the appropriate relief is the minimum relief required to do equity and avoid unconscionable conduct. In my opinion, having regard to the comments in *Giumelli* referred to by Mr. Newlinds, it is appropriate for this Court to proceed on the basis that there is still an all-or-nothing doctrine of common law estoppel by representation and conventional estoppel. I also accept that there can be such an estoppel as to rights and not merely as to facts: see *Eslea*[38] and *Heggies*,[39] and cases there cited.[40]

51. In the course of his judgment in *Grundt*, Dixon J referred to *Holt v Markham*,[41] a case of the type with which I am concerned. In that case the defendant had been led by the plaintiff's conduct to believe he might treat a war gratuity paid to him as properly paid and in that belief

changed his position by spending it. The evidence showed a course of correspondence as to the entitlement to the gratuity prior to the expenditure of the money. The plaintiff was held to be estopped from denying the entitlement.

52. In *Avon County Council*,[42] the Court of Appeal of England and Wales upheld a defence of estoppel in respect of overpayment of wages to an injured teacher. The overpayment continued from January of one year through to August of the following year. The Court held that the terms of the defendant's employment and the plaintiff's control over the assessment of the defendant's pay created a duty to determine the defendant's entitlement and not to misrepresent it. In turn the Court held that the plaintiff had misrepresented the defendant's entitlement to him. In reliance on the representation, the defendant spent the money he received when he would not otherwise have done so. He also did not claim social security benefits to which he would have been entitled. Slade LJ (with whom the other members of the Court agreed) formulated the elements of the defence of estoppel by representation in the terms quoted by the Magistrate.

53. His Lordship further rejected the trial judge's conclusion that the defence operated *pro tanto*.

> On further reflection, however, I think that references to broad concepts of justice or equity in a context such as the present may be somewhat misleading, as well as uncertain in their application. The conclusion of the judge in the present case really involves the proposition that, if the defendant is successfully to resist a claim for repayment of the entire sum of £1,007, the onus falls on him to prove specifically that the pecuniary amount of the prejudice suffered by him as a result of relying on the relevant representations made by the plaintiffs equals or exceeds that sum. For present purposes, however, one has to postulate a situation in which the defendant was perfectly entitled to conduct his business affairs on the assumption that the relevant representations were true, until he was told otherwise. Meantime, a defendant in the situation of the defendant in the present case may, in reliance on the representation, have either altered his general mode of living or undertaken commitments or incurred expenditure or entered into other transactions which it may be very difficult for him subsequently to recall and identify retrospectively in complete detail; he may even have done so, while leaving some of the particular moneys paid to him by the plaintiff untouched. If the pecuniary amount of his prejudice has to be precisely quantified by a defendant in such circumstances, he may be faced with obvious difficulties of proof. Thus, though extreme hypothetical cases can be envisaged, and indeed were canvassed in argument, in which broad considerations of equity and justice might appear to require the barring of a plaintiff's claim only *pro tanto*, if this were legally possible, I would not expect many such cases to arise in practice. In any event I do not consider the present case to be one of them, even on the basis of the facts as pleaded. I prefer to approach it simply by what I regard as the established legal principles governing the doctrine of estoppel.[43]

54. His Lordship then referred to the character of estoppel by representation as a rule of evidence and to a number of cases in which estoppel was not regarded as operating merely *pro tanto* as a defence to claims for money had and received.

55. Having affirmed the all or nothing potential of estoppel as a defence, he went on to nevertheless leave open the question whether there may be cases in which it would be unconscionable to allow a defendant to retain a balance received as the result of a mistake and not paid out by the defendant.[44] Cumming-Bruce and Eveleigh LJJ also left open this issue.[45]

56. In the most relevant decision of this Court to which I was referred, O'Bryan J, in a case concerning a redundancy payment made by mistake, treated both the defences of change of position and promissory estoppel as potentially open.[46] It is difficult to conclude that the Magistrate erred in law by taking the same course.

57. It is clear that the principles articulated by Dixon J in *Grundt* are of broad application and have been applied to cases such as the present. In the absence of clear authority to the contrary, the Magistrate was not entitled to deny the employee a defence for which the law has long provided.

(b) Estoppel does not cover the same field as change of position

58. Next it is to be noted that, as the analysis in *Grundt* demonstrates, the conceptual basis of estoppel contains an additional element to that of the defence of change of position. Indeed, it was the requirement of a representation which in Dixon J's view was one of the points which led the plaintiff to fail in *Grundt*.[47] It follows that it cannot be said that the notion of estoppel is

co-extensive in its basis with that of change of position. Insofar as estoppel may create additional rights, it is also premised upon an additional fundamental element requiring proof. I do not accept the company's submission[48] that to the extent to which estoppel by representation goes further than the change of position defence, it 'undermines entirely' that defence. It is a different defence based on different elements. Further, the factual situation which develops in consequence of a representation may be one in which it would not be equitable to require a defendant to strictly prove retrospectively every element of change of position.

(c) *David Securities*

59. The judgment in *David Securities* referred to estoppel in the following terms when discussing the defence of change of position:

> In England, there is strong authority in favour of acceptance of the defence, viz. the judgment of Kerr L.J. in *Rover International Ltd*, *Barclays Bank* and most importantly the recent decision of the House of Lords in *Lipkin Gorman v Karpnale Ltd*. In the last case, Lord Bridge of Harwich, Lord Ackner and Lord Goff of Chieveley held that English law should recognize the defence, although they declined to define its scope. Text writers, such as Goff and Jones and Birks, also support the existence of the defence, particularly in view of the inflexibility of the related doctrine of estoppel, as evidenced by *Avon C.C. v Howlett* where the Court of Appeal held that estoppel could not operate *pro tanto*. And, in Canada and the United States, the defence of change of position has been recognized. Section 125(1) of the *Property Law Act 1969* (WA) and s94B of the *Judicature Act* 1908 (NZ) also provide for this defence.[49]

60. There is some real force in the Magistrate's observation that:

> Where applicable estoppel has provided a longstanding approach to this issue. It should not be put aside by such observations, especially where the High Court notes the inflexible aspect of the estoppel but says no more.[50]

61. *David Securities* does not purport to state that estoppel by representation is no longer available as a defence in cases such as the present. The terms in which the majority judgment is expressed simply refer, without further comment, to argument based on the related doctrine of estoppel.

(d) Fairness

62. The company sought to rely on the judgment of the Newfoundland Court of Appeal in *RBC Dominion Securities Inc v Dawson et al*:[51]

> The estoppel defence while protecting the innocent payee, may unnecessarily maintain the inequity for the payor. To make the estoppel defence one which operates *pro tanto* would be inconsistent with the most commonly accepted view of estoppel: that is a rule of evidence which prevents evidence of the event which resulted in the change of circumstances from being considered. We conclude that estoppel is no longer an appropriate method of dealing with the problem. The change in circumstance defence is the one which most fairly balances the equities. It is, as Klippert stated in *Unjust Enrichment*, 'tailored to the general principles of unjust enrichment' (at page 252). The defence of estoppel to actions for recovery of money paid under mistake of fact is rejected.[52]

63. Reference was also made to the observations of Jonathan Parker J in *Philip Collins v Davis*,[53] quoted by the Magistrate. These observations were made in the context of a case concerning a change of position defence arising in circumstances where the making of the payments sought to be repaid did not amount to a representation for the purposes of estoppel by representation.

64. Until the acceptance of a unified doctrine of estoppel as advanced by some members of the High Court in *Verwayen*, the conceptual basis of common law *estoppel in pais* and equitable estoppel must be understood to differ. The distinction was articulated by McHugh J in *Verwayen* as follows:

> One important difference between the common law doctrine of estoppel in pais and the equitable doctrines of promissory and proprietary estoppel is that the common law doctrine is concerned with the rules of evidence, notwithstanding that a common law claim of estoppel must be pleaded, while the equitable doctrines are concerned with the creation of new rights between the parties. The common law will not permit 'an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations': *Grundt v. Great Boulder Pty. Gold Mines Ltd.* In so far as the assumed fact gives rise to a cause of action or alters the

> legal relationship between the parties, it does so because of the operation of the general law on the assumed fact either alone or in conjunction with other facts. Equity, like the common law, also will not permit an unjust departure from an assumption of fact which one person has caused another to adopt or accept for the purpose of their legal relations: *Thompson v. Palmer*. But the equitable doctrines of estoppel create rights. They give rise to equities which are enforceable against the party estopped. The equitable doctrines result in new rights between the parties when it is unconscionable for a party to insist on his or her strict legal rights. It will be unconscionable for a party to insist on his or her strict legal rights if that party has induced the other party to assume that a different legal relationship exists or will exist between them, if he or she knew that the other party would act or refrain from acting on that assumption and if, as a result, the other party will suffer detriment unless the assumption is maintained. Hence, to avoid detriment to the party who has been induced to act or refrain from acting on that assumption, equity will require the parties to act on the basis of the relationship assumed by the innocent party until the detriment is removed or the innocent party otherwise compensated. The equitable right of the innocent party will take precedence over the strict legal rights of the party estopped. And because the doctrines of promissory and proprietary estoppel create equitable rights, they operate differently from the common law doctrine of estoppel in pais. The purpose of both the common law and equitable doctrines is 'to avoid or prevent a detriment to the party asserting the estoppel by compelling the opposite party to adhere to the assumption upon which the former acted or abstained from acting': *Grundt*. But because the common law doctrine of estoppel in pais is a rule of evidence, it operates to preclude the party estopped from denying the assumption of fact whenever it is necessary to do so for the purpose of determining the rights of the parties. On the other hand, because the equitable doctrines create rights, they preclude the party estopped from denying the assumption of fact (or law) only as long as the equitable right exists. Once the detriment has ceased or been paid for, there is nothing unconscionable in a party insisting on reverting to his or her former relationship with the other party and enforcing his or her strict legal rights.[54]

65. The better view is that the distinction still persists and that the law of estoppel by representation is in essence an evidentiary principle. To similar effect, Potter LJ stated in *National Westminster Bank v Somer International Limited*:[55]

> In the light of the state of the authorities and the clear statement in *Avon County Council v Howlett* on a matter integral to the Court's decision, it does not seem to me that it is open to this Court at least to depart from the traditional classification of estoppel by representation as a rule of evidence.

66. In *Somer's case*, the bank credited moneys by mistake to the trading account of the defendant. The trial judge held that the bank had represented that the money was the amount which a customer owed to the defendant and that the defendant could treat it as its own. The defendant relied to its detriment on this representation by shipping goods to the customer, believing the customer had reduced the trading account.

67. The Court of Appeal of England and Wales applied the *Avon County Council case*, affirming that estoppel by representation is a rule of evidence which remains a potential defence to claims for money had and received, despite the development of the change of position defence. The Court recognised, however, that in appropriate circumstances a residual equity may arise to relieve the clearly unconscionable or wholly inequitable retention of moneys by a defendant.[56]

68. In my view, it was not open to the Magistrate to take the view adopted in the Canadian authorities referred to.

(e) The representation may affect the equities

69. It is also difficult to see that the terms of a representation associated with mistake cannot go to the equities as between the parties. In *Somer's case* Potter LJ observed:[57]

> ... However, the two defences will remain distinct, unless or until the House of Lords rules otherwise. There may indeed be good reasons why this should be so and why the issue is not simply one of jurisprudential 'tidiness'. First, in considering the equities between the parties, there are plainly arguments for holding that the fact that a representation was made (albeit mistakenly) may in particular circumstances affect the Court's view as to whether and how far, detriment having been established, it should order a restitutionary payment.

70. The elements of estoppel reflect a different paradigm of fairness from one focussed simply upon change of position.[58]

(f) The content of change of position

71. Next, the ambit of the change of position defence is not fully resolved. Thus, Potter LJ went on to observe in *Somer*, following the passage just quoted:

> Secondly, as pointed out by Fung and Ho in their article, 'Change of Position and Estoppel', the defence of 'change of position' only protects actual reduction of the transferee's assets following receipt. A transferee who, in reliance upon a receipt, forgoes a realistic and quantifiable opportunity to increase his assets is not apparently protected. It has also been held in *South Tyneside Metropolitan Borough Council v Svenska International plc*, following Hobhouse J in *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council*, that in order to be successful a change of position defence must be based on a change *after* the receipt of the mistaken payment, the facts of *Lipkin Gorman v Karpnale Ltd* having been exceptional. The *South Tyneside* decision has been the subject of some criticism: see *Goff v Jones*. However, assuming its correctness (and we have heard no submissions in that regard), it marks a further difference between the defence of 'change of position' and of estoppel in any case where a representation as to the entitlement of the payee has been communicated to him and relied on in anticipation of actual receipt.[59]

72. In Australia, a broader view of the change of position defence has been taken in respect of the question of foregoing a realistic and quantifiable opportunity than that referred to by his Lordship.[60] Nevertheless, the limits of the doctrine which the company submits should now be regarded as comprehensive are not free from controversy.

(g) Does the change of position defence remove the detriment which might otherwise found an estoppel?

73. For completeness I should next mention the argument recorded by Robert Walker LJ in the *Scottish Equitable case* that the defence of change of position pre-empts and disables the defence of estoppel by negating detriment to the defendant. His Lordship found the argument not only ingenious but convincing. In the event, however, he did not base his decision upon it. In turn, in *Somer's case* the Court of Appeal did not accept and rely on the argument and in my view it should be rejected for the reasons articulated by the learned authors Edelman and Bant:[61]

> The argument makes application of the estoppel defence conditional on the prior application of another defence. But there is no justification for change of position applying prior to estoppel – other than that it may free the court from having to apply the estoppel defence. Indeed, as a general rule of evidence, one might think there is some case for awarding estoppel priority over change of position. Nor is there any reason for thinking that the nature of the estoppel defence has suddenly changed from looking to the detrimental acts of the defendant in reliance on the representation of the plaintiff to looking to the effect of a legal finding on the defendant's position. Defences operate by reference to the facts of the case, not by reference to a court's assessment of the availability of a separate defence –which may or may not be pleaded. A finding that the change of position defence applies is not a 'fact' on which the estoppel defence should be assessed.[62]

74. I also doubt that the extent of detriment required to establish a change of position defence is necessarily coextensive with that which might found an estoppel. The better view is that an estoppel may arise where substantial, but not necessarily precisely quantifiable, detriment can be established.

(h) The unconscionability exception

75. Lastly, in *Riseda v St Vincent's Hospital*,[63] Callaway JA observed that there may be cases where equity will intervene to prevent the unconscientious assertion, or modify the consequences, of a common law estoppel.

76. In this connection, I note that in *Somer's case* each member of the Court of Appeal recognised[64] that although a defence of estoppel by representation does not operate *pro tanto*, it may itself be subject to notions of unconscionability as recognised as potentially applicable by the judgments in the *Avon County Council* case.

77. This issue was not agitated before the Magistrate nor by the grounds of appeal and I will say no more than to observe that their Lordships' view, if applied, would not demonstrate that the Magistrate's decision was wrong in law in the present case.

The separate defence of estoppel persists

78. In summary, it is not enough for the company to postulate a potential forward direction

in the law of estoppel. It must demonstrate that the Magistrate's decision was vitiated by error of law. In my view, the Magistrate did not err in holding that estoppel by representation persists as a potential separate defence to a claim for restitution of money paid out by mistake.

Does estoppel by representation give rise only to a *pro tanto* defence?[65]

79. In *Roche*, the New South Wales Court of Appeal expressly considered whether there is still an all or nothing defence of common law estoppel, distinct from equitable estoppel under which the appropriate relief is the minimum relief required to do equity. As I have indicated, the Court concluded that, having regard to the state of High Court authority, and in particular the decision in *Giumelli*, the all or nothing defence of common law estoppel persists. I respectfully agree.

Was it open to the Magistrate to conclude the estoppel was made out?

80. The company submits that if estoppel is a valid potential defence it was not applied properly by the Magistrate. The company submits that the central element of all estoppels is unconscionability and the Magistrate did not give consideration to the question whether such detrimental reliance as occurred was 'accompanied by a sufficient element of unconscionability attaching to the retreat from the assumed state of affairs'.

81. In my view, it is plain that the Magistrate made a finding of unconscionability in the sense sufficient to establish estoppel by reference to the principles stated by Dixon J in *Thompson* and *Grundt*. The Magistrate expressed his conclusions on the question in terms of the phrase 'unjust departure' which he had previously quoted from Dixon J's judgment in *Thompson*. The Magistrate is to be understood to have intended to make a finding directly responsive to the law as he had stated it. There was no error in this.

82. It was further submitted the employee had not suffered detriment in the relevant sense in reliance upon the company's representation. I accept that common law estoppel by representation requires that a defendant place herself or himself in a position of significant disadvantage if departure from the assumption were permitted.

83. I do not, however, accept the company's submission that the employee did not suffer detriment in the relevant sense because mere expenditure on ordinary living expenses should not be regarded as sufficient detriment. This submission is premised on the same mischaracterisation of the facts as the company's submissions with respect to change of position. The employee suffered detriment because she relied upon the representation to make an application for unemployment benefits in terms which disclosed the receipt of the redundancy payment. In turn, she was refused those benefits and in those circumstances expended the redundancy payment on living expenses. It was plainly open to conclude that the employee suffered substantial detriment in the relevant sense.

Conclusion

84. For the above reasons the appeal must be dismissed. I will hear counsel with respect to the question of costs.

---

[1] The text of the email as placed before this Court in fact read 'We will do what is the letter of the law and no more.'

[2] [1992] HCA 48; (1992) 175 CLR 353; 109 ALR 57; (1992) 24 ATR 125; (1992) 66 ALJR 768; 66 ALLR 768 ('*David Securities*').

[3] Ibid, 373-4.

[4] [2005] VSCA 310; (2005) 13 VR 444.

[5] Quoted in [25] above.

[6] Ibid, [41] (citations omitted; emphasis in original).

[7] Ibid, [44] (citations omitted).

[8] *Kebakoska v TRA Global Pty Ltd* (Unreported, Magistrates' Court of Victoria, Lauritsen M, 12 November 2011), 5-6.

[9] Mason and Carter, cited in *Kebakoska v TRA Global Pty Ltd* (Unreported, Magistrates' Court of Victoria, Lauritsen M, 12 November 2011).

[10] Mason and Carter citing from *United Overseas Bank v Jiwani* [1976] 1 WLR 964, 968, cited in *Kebakoska v TRA Global Pty Ltd* (Unreported, Magistrates' Court of Victoria, Lauritsen M, 12 November 2011).

[11] [1991] 2 AC 548, 580; [1992] 4 All ER 512; [1991] 3 WLR 10, cited in *Kebakoska v TRA Global Pty Ltd* (Unreported, Magistrates' Court of Victoria, Lauritsen M, 12 November 2011).

[12] [1992] HCA 48; (1992) 175 CLR 353, 385-386; 109 ALR 57; (1992) 24 ATR 125; (1992) 66 ALJR 768; 66 ALLR 768, cited in *Kebakoska v TRA Global Pty Ltd* (Unreported, Magistrates' Court of Victoria, Lauritsen M,

12 November 2011).
[13] *Kebakoska v TRA Global Pty Ltd* (Unreported, Magistrates' Court of Victoria, Lauritsen M, 12 November 2011), 9-10; Magistrate Lauritsen footnotes 'I suspect that the unemployment benefit for a single adult for eight months would be considerably less than the amount of the redundancy payment.'
[14] Notice of Appeal dated 9 December 2010.
[15] [2011] NSWSC 416 ('*Moore*').
[16] [1999] NSWSC 898, cited in *Moore*.
[17] [1999] NSWSC 697, cited in *Moore*.
[18] *Moore*, [100].
[19] [1999] NSWSC 697.
[20] *Moore*, [105].
[21] Notice of Appeal dated 9 December 2010.
[22] *Avon County Council v Howlett* [1983] 1 WLR 605; [1983] 1 All ER 1073 at 1085-6 per Slade LJ.
[23] *Kebakoska v TRA Global Pty Ltd* (Unreported, Magistrates' Court of Victoria, Lauritsen M, 12 November 2011), 6-7 (citations omitted).
[24] [1990] HCA 39; (1990) 170 CLR 394 ('*Verwayen*').
[25] *David Securities*, 384-5.
[26] [2000] 3 All ER 793; [2001] 2 All ER (Comm) 119 ('*Scottish Equitable*').
[27] [1983] 1 All ER 1073; [1983] 1 WLR 605 ('*Avon County Council*').
[28] *Pritchard v Sears* [1837] EngR 195; (1837) 6 Ad & E 469; 112 ER 179. *Jorden v Money* (1854) 5 HL Cas 185; 10 ER 868; *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387, 447; (1988) 76 ALR 513; (1988) 62 ALJR 110; [1988] ANZ Conv R 98.
[29] [1933] HCA 61; (1933) 49 CLR 507; 40 ALR 47 ('*Thompson*').
[30] Ibid, 547 (citations omitted; emphasis added).
[31] [1937] HCA 58; (1937) 59 CLR 641 ('*Grundt*').
[32] Ibid, 674-5 (emphasis added).
[33] Ibid, 675-6.
[34] *Verwayen*. See Mason CJ at 409-13, Deane J at 431-46 on the one hand and Brennan J at 422-4, Dawson J at 454 and McHugh J at 499-50 on the other hand. See also Gaudron J at 481. Toohey J refers to promissory estoppel at 475.
[35] [1999] HCA 10; (1999) 196 CLR 101; (1999) 161 ALR 473; (1999) 73 ALJR 547; [2000] Aust Contract Reports 90-106; (1999) 6 Leg Rep 23 ('*Giumelli*').
[36] *Verwayen*, 411 and 440.
[37] [2005] NSWCA 39 ('*Roche*').
[38] *Eslea Holdings Ltd v Butts* (1986) 6 NSWLR 175, 185–189; (1986) 4 ANZ Insurance Cases 60-738 cited in *Roche*.
[39] *Heggies Bulkhaul v Global Minerals Australia* [2003] NSWSC 851; (2003) 59 NSWLR 312, [147]-[154]; [2004] ANZ Conv R 36 cited in *Roche*.
[40] *Roche*, [71]; See also *Lorimer v State Bank of New South Wales* [1991] NSWCA 176 per Kirby P.
[41] (1923) 1 KB 504; [1922] All ER 134.
[42] [1983] 1 All ER 1073; [1983] 1 WLR 605.
[43] Ibid, 621-2
[44] Ibid, 624-5.
[45] Ibid, 608, 612.
[46] *Commonwealth v Webster* (Unreported decision, Supreme Court of Victoria, O'Bryan J, 27 July 1995).
[47] *Grundt*, 677.
[48] [19].
[49] *David Securities*, 384 (citations omitted).
[50] *Kebakoska v TRA Global Pty Ltd* (Unreported, Magistrates' Court of Victoria, Lauritsen M, 12 November 2011), 7.
[51] (1994) 111 DLR (4th) 230.
[52] Ibid, 237. This view was followed by Lowry J in the Supreme Court of British Columbia in *Empire Life Insurance Company v Neufeld* (Unreported, C953171, 24 April 1998).
[53] (2003) All ER 808, 826.
[54] *Verwayen*, 500-1 (citations omitted); See also Brennan J at 422 and Dawson J at 454.
[55] [2001] EWCA Civ 970; [2002] QB 1286, 1303; [2002] 1 All ER 198; [2002] 3 WLR 64; [2001] All ER (D) 235; [2001] Lloyds Rep Bank 263 *('Somer*').
[56] *Somer*, Potter LJ, 1305; Clarke LJ, 1307-8; Peter Gibson LJ, 1311.
[57] *Somer*, 1305.
[58] Compare the judgment of Gaudron J in *Verwayen* at 487.
[59] *Somer*, 1305-6 (citations omitted; emphasis in original).
[60] See the NSW cases referred to at [34]-[36] above.
[61] *Unjust Enrichment in Australia* (Oxford University Press, 2000).
[62] Ibid, 359.
[63] (1998) 2 VR 70.
[64] Potter LJ, 46; Clarke LJ, 58; Peter Gibson LJ, 67.
[65] Although not ventilated by any specific ground of appeal, this issue was raised by the questions of law identified in the notice of appeal and was pursued without objection upon the hearing of the appeal.

APPEARANCES: For the appellant TRA Global Pty Ltd: Mr M Follett, counsel. Harmers Workplace Lawyers. For the respondent Kebakoska: Mr M McKenney, counsel. Madgwicks, solicitors.