Introduction

1 This is an appeal from an order of Harrison J made in the Queen's Bench Division on 1 October 1999. He gave judgment in favour of the claimant, Scottish Equitable plc, for a principal sum of a little over £162,000, and accrued interest, in its claim against the defendant, Mr Gordon Derby. The judge's judgment is reported at [2000] 3 All ER 793 ([2000] PLR 1). The case raises questions of some general interest and importance as to claims for money paid under a mistake and the defences of change of position and estoppel.

The facts

2 Neither the appellant's notice nor the respondent's notice attacks any of the judge's findings of primary fact. There is however some criticism of his characterisation of some of the facts (for instance, whether Scottish Equitable was guilty of mere carelessness or, as Mr Derby contends, gross and repeated negligence) and there is an issue as to how broad a view the judge should have taken on change of position. It is therefore necessary to set out the facts as found by the judge in some detail. Further detail can be found in the reported first-instance judgment.

3 At the beginning of 1988 Mr Derby was aged 57. He was a married man with two stepchildren at fee-paying schools. He and his wife lived in Kent in a house then worth about £90,000 subject to a mortgage of about £35,000. He was employed by a company called Baltic Sawmills. His wife (who is 15 years younger) had her own business, running two clothes shops, but the business was not prospering (and it was to get worse rather than better).

4 In the spring of 1988 Mr Derby was made redundant. On his redundancy he received a total sum of £125,000 of which £90,000 seems to have been a transfer payment under his occupational pension scheme. The transfer payment went into a single-premium pension policy with Scottish Equitable. As an alternative source of earned income Mr Derby went into partnership as a recruitment consultant to the timber trade but until 1998 (when the partnership came to an end) he never derived more than about £13,000 a year from it. In 1989 his wife's business difficulties increased and he and his wife were under pressure from their bank.

5 In these circumstances Mr Derby considered, and eventually decided on, exercising an option to take early retirement benefits under his policy with Scottish Equitable. What happened (and it helps to explain, although it does not excuse, the
mistakes which were later made) was that in August 1989 Mr Derby asked for figures to be quoted for the option, decided to take it, and then changed his mind; and then in February 1990 he again asked for a quotation, decided to take it, and this time did not change his mind. The option which he took was for a tax-free lump-sum payment of £36,588 and an immediate single-life pension of £4,655 a year, escalating at three per cent per annum. (I follow the judge in disregarding odd pence throughout.) In fact through another quite separate error the escalator *166 was not applied for several years, but Mr Derby has been compensated for that and there is no issue on it. After exercising the option Mr Derby thought, correctly, that his remaining rights under the policy were worth about £50,000.

6 Mrs Derby's retail business came to an end and in 1991 she took employment with the Kent Probation Service. She was still in that employment at the time of the trial although she had nearly a year off with ill-health during 1993/94.

7 In April 1995 Mr Derby was approaching his 65th birthday (1 May 1995) and he telephoned Scottish Equitable (at its Customer Services Division in Edinburgh) to inquire what would happen to his pension when he became entitled to the state pension. On 22 May 1995 there was another more important telephone conversation which was recorded in a manuscript note made by an employee of Scottish Equitable (and subsequently annotated, it seems, by another employee). The judge's findings about this were as follows:

It would appear from the claimant's memorandum of that conversation that the defendant probably told the claimant that he was already receiving an annuity from them. The defendant cannot recall that conversation although his telephone bills show that he made a call to the claimant on that day. Another entry on the memorandum contains an internal instruction that a quotation should be prepared. A subsequent annotation on the memorandum suggests that the defendant's records were checked, but that it was concluded, wrongly, that the defendant had not received early retirement benefit, because the person checking the records had only looked at the defendant's cancelled decision to take early retirement benefit in August 1989, without looking at the rest of the microfiche.

8 On 25 May 1995 Scottish Equitable sent Mr Derby a print-out statement showing that his policy had a value of £201,938. Mr Derby's evidence was that he was very pleasantly surprised by this (since the fund value appeared to have increased by a factor of four within five years) but that he was naive in pension matters. The judge said that he had initially been sceptical about Mr Derby's evidence, especially as he had engaged a financial consultant, Mr Colin Donald of Fairmount Trust plc, to advise him. But having seen and heard Mr Derby give evidence the judge accepted him as an honest witness:

I find, on the balance of probabilities, that he did inform the claimant that he was already receiving a pension from them, and that he was nevertheless assured by them that the figures quoted in the statement of retirement benefits were correct. I am surprised that the mistake was not discovered by Mr Donald, his financial advisor, but I feel I must accept the defendant's evidence that Mr Donald did not tell him that a mistake had been made.

9 Mr Donald raised various queries with Scottish Equitable and on 9 June 1995 Scottish Equitable issued a further statement of retirement benefits with four options. These were permutations on the choice between taking part of the benefits in the form of a tax-free lump sum or taking them all in the form of a retirement pension and widow's pension, and the choice between taking the benefits from Scottish Equitable or from some other provider. On 16 June Mr Derby, acting on Mr Donald's advice, chose option 3, which was to take a lump sum of £51,333 from Scottish Equitable and to have £150,604 (referred to as the ‘balance open market option’) paid to Norwich Union.

10 On 20 June 1995 Scottish Equitable sent Mr Donald a cheque for £51,333 in favour of Mr Derby and a separate cheque for £150,604 in favour of Norwich Union. The fact that there were two separate payments is relied on in the respondent's notice. Norwich Union had quoted for a (non-escalated) pension of £13,521 for Mr Derby and a widow's pension of half that amount. So from June 1995 Mr Derby was receiving a pension at the annual rate of £4,655 from Scottish Equitable (the three per cent escalator having been overlooked) and a pension at the annual rate of £13,521 from Norwich Union.

11 In quoting a fund value of £201,938 Scottish Equitable had made a serious error. It had not taken account of the early retirement benefits which Mr Derby had taken (after a false start) in 1990. Evidence about the mistake was given by Miss Phyllis Duncan, a project team manager in Scottish Equitable's data quality department in Edinburgh. The judge's findings were as follows:

… when the defendant was paid his early retirement benefits in February 1990 his computer records should have been amended to show that only his residual fund necessary to pay his guaranteed minimum pension remained. That residual fund should have been £29,486, producing the guaranteed minimum pension of £2,637. That had not been done, as a result of *167 which the claimant mistakenly paid to the defendant the amount to which he would have been entitled had
he not taken the early retirement benefits under the policy in February 1990.
The mistake should have come to light in December 1992, when Miss Duncan was working as an assistant manager in
the claims department on a project to check that the files were correct for the end of year valuation. When she was
 carrying out that exercise, she noticed that the records did not tally, in so far as the annuity payment system for the
defendant in 1992 showed that an annuity had been set up, but the VPR record did not show that a tax-free lump sum
had been paid. As a result, Miss Duncan sent a memorandum dated 11 December 1992 to Mr Clark, her section
manager, requesting his department to alter the VPR records for the defendant's policy. If that had been done, the record
would have been updated to show that the defendant had received early retirement benefit in 1990 and, therefore, show
the true value of his remaining fund. Miss Duncan did not take any further action to check if the record had been
corrected because she moved to another department. Mr Clark, in his evidence, said that he had no recollection of that
memorandum, but it would have been his procedure to have passed such a memorandum to someone in his section to
update the VPR records. However, for some reason, it was not allocated to a specific member of staff and he could not
say why the instruction to update the records was not actioned.
(No-one in court was able to tell the judge what 'VPR' stood for, but it was part of the computerised system. Paper
records were stored on microfiche.)

12 It was common ground that the amount of the overpayment was £172,451 (being the difference between £201,938
and £29,486). It was also not in dispute that of the £51,333 received by Mr Derby himself, £41,671 was used to reduce
(by about two-thirds) the mortgage
on the matrimonial home. The disparity between the evidence as to the size of the mortgage in 1988 and 1995 is not fully
explained either in the judgment or in the witness statements, but it appears that at some stage there was a further
advance of £30,000 to Mrs Derby.

13 In his witness statement Mr Derby stated that between June 1995 and October 1996 (when Scottish Equitable
discovered its mistake) he omitted to take various steps which he would or might have taken, had he realised the true
financial position. But (as the judge recorded) his oral evidence was rather different:
… he agreed in evidence that the only thing he did differently after receiving the monies was to pay off the sum of £41,671
from the mortgage, and to use the remaining £9,662 from the tax-free sum of £51,333, together with the increased
income under the Norwich Union policy, to live a little better by improving the lifestyle of himself and his family in very
modest ways, which he agreed were not irreversible commitments. The defendant accepted that, without those payments,
he would not have been in any position to save any money. He was on the breadline, he had no spare cash and he was
borrowed up to the hilt. He also accepted that his age precluded him from obtaining useful employment. He said: ‘Once
you are 65, it’s impossible to get employment.’ When asked in re-examination what he could have done to improve his
position, he said, ‘Not very much’, although he would have stayed in the recruitment business, but done less.

14 When Scottish Equitable discovered the mistake in October 1996 it asked Mr Derby to repay the overpayment, but he
decided to decline to repay it. It is clear that without the co-operation of Norwich Union he could not possibly have repaid it, but
Norwich Union has accepted in open correspondence with Scottish Equitable (copied to Mr Derby's solicitors) that in the
wholly exceptional circumstances of this case it would unwind the pension policy which it had granted. It would do so
either completely or to the extent necessary to reduce Mr Derby's pension to the annual rate of £2,637. This was
confirmed at trial by the evidence of Mr John Evans, an actuary with Norwich Union.

15 Proceedings were commenced by Scottish Equitable on 13 March 1997. No repayment has been made by Mr Derby.
It is unnecessary to comment on the course of the proceedings except to mention that on the last day before the hearing
Mr Derby's solicitors served a supplementary witness statement made by Mr Derby stating that he and his wife had
decided to separate and to sell the matrimonial home, marketing it for £140,000. Mr Derby referred in the statement to his
and his wife's health problems. He also stated that the house belonged not to himself but to his wife, but the judge
excluded that evidence (as being contrary to Mr Derby's pleaded case, and impossible to investigate at that very late
stage).

The issues

16 Scottish Equitable conceded at trial that if the judge found that Mr Derby did not know of the mistake when he received
the payment, it would *168 not seek to recover the sum of £9,662 spent by Mr Derby on modest improvements to the
family's style of life. The judge made such a finding, on the balance of probability, and so the total claim was reduced by
£9,662. But for the purposes of some of the arguments it is necessary to look at the sequence of events as a whole.

17 In this court, as before the judge, the legal argument has been directed to three main issues. First, at what stage (if at
all) does carelessness or recklessness on the part of the payer give the court a discretion to decline to order repayment?
Second, how far does the defence of change of position (first unequivocally recognised in English law by the House of Lords in Lipkin Gorman v Karpnale [1991] 2 AC 548) assist the payee in the circumstances of this case? Third, what part (if any) has estoppel to play, now that the defence of change of position has been recognised?

18 The judge resolved all these issues (except in relation to the sum of £9,662) in favour of Scottish Equitable. His detailed reasoning is examined below. Consequently he gave judgment against Mr Derby for £162,790 with interest from 12 October 1996 at one per cent over base rate. He refused permission to appeal but it was granted by Otton LJ in open court on 3 April 2000.

Mere carelessness

19 On this issue the argument (in this court, as below) started with the well-known decision of the Court of Exchequer in Kelly v Solari (1841) 9 M&W 54, which Robert Goff J (in Barclays Bank v Simms Son & Cooke (Southern) [1980] QB 677, 686) described as providing the basis of the modern law. It was a case of a mistaken payment by a life office, Argus, on a life policy for £200 effected in 1836, which had lapsed shortly before the death of the life assured in 1840. A director of the company had written ‘lapsed’ on the policy but this was overlooked. Argus paid £987 to his widow, the executrix, on the lapsed policy and two other policies (presumably for a total of £800) which had not lapsed. After discovering the error Argus claimed £187 from the executrix as money paid under a mistake of fact.

20 The issue was whether the Chief Baron (who was himself a member of the court) had been right in ruling at trial that if the directors of the life office had knowledge, or the means of knowledge, of the policy having lapsed, the claim must fail. Lord Abinger CB accepted that he had put the matter too broadly at trial by using the expression ‘means of knowledge’, which he described as a very vague expression. He expressed his considered view as follows:

The safest rule however is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there can be no doubt that he is equally bound. Then there is a third case, and the most difficult one, – where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too widely to the jury, when I told them that if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment.

21 Parke B agreed and set out his view in a much-quoted passage:

If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it.

22 Gurney B and Rolfe B also agreed, the latter mentioning two views of the facts which the jury might possibly reach at a retrial:

first, that the jury may possibly find that the directors had not in truth forgotten the fact; and secondly, they may also come to the conclusion, that they had determined that they would not expose the office to unpopularity, and would therefore pay the money at all events.

23 In his judgment the judge referred at some length to Kelly v Solari and he may be taken to have recognised that deliberate waiver of inquiry, where there are circumstances which put the payer on inquiry, will preclude recovery. Such cases are akin to cases of settlement of or deliberate *169 submission to an honest claim (see Goff & Jones The Law of Restitution, 5th ed (1998) pp53-55 and also the American cases mentioned at pp198-199, including Meeme Mutual Home Protection Fire Insurance Co v Lorfeld (1927) 194 Wis 322). But deliberate waiver of inquiry or acceptance of risk is not to be equated with carelessness or negligence (even if it is termed gross negligence).

24 It is reasonably clear that when the judge referred ([2000] 3 All ER at p800C) to the general rule that mere carelessness does not preclude recovery, he did not (by his use of the word ‘mere’) intend to make a contrast with some more heinous type of carelessness or negligence, since he had just quoted Parke B’s words, ‘however careless the party paying may have been’, and Robert Goff J’s comment (in the Simms case at p687) that that conclusion has stood ever since. (Some of the most important cases in which it has been followed are mentioned in the speech of Lord Shaw in Jones v Waring and Gillow [1926] AC 670, 688-689). The judge was making a contrast between carelessness, however
culpable, and the situation where the paying party is on inquiry but consciously decides to pay without making further inquiry. In this case Scottish Equitable did take steps to investigate the matter. Its investigation was inadequate, but there was no deliberate waiver of inquiry.

25 The judge was therefore right to follow the observations of Lord Goff in Lipkin Gorman at p578: But it does not in my opinion follow that the court has carte blanche to reject the [claimants'] claim simply because it thinks it is unfair or unjust in the circumstances to grant recovery. The recovery of money in restitution is not, as a general rule, a matter of discretion for the court.

Change of position

26 The facts of Lipkin Gorman, in which the House of Lords recognised the defence of change of position, are well known. The gaming club had received large sums of money misappropriated by a solicitor who was addicted to gambling, but it had changed its position by paying out on his winning bets. Lord Goff (with whose speech Lord Bridge, Lord Griffiths and Lord Ackner agreed) noted that in the past, where change of position had been relied on by the defendant, it had been usual to treat the problem as one of estoppel (as in, for instance, Jones v Waring and Gillow and Avon County Council v Howlett [1983] 1 WLR 605).

27 There were two main objections to that sort of approach. First, estoppel required there to have been a representation made by one party on which the other had placed reliance and had acted to his detriment: but in many cases involving a dishonest third party (such as Lipkin Gorman itself) the true owner had done nothing that could possibly be regarded as the making of a representation. (Jones v Waring and Gillow was another case involving a fraudster, a confidence man whose plan might have been frustrated by an unexpected contact between the two innocent parties; the House of Lords were divided as to whether that equivocal contact amounted to a representation.) Second, estoppel was (as this court had held in Avon, a case to which it will be necessary to return) an inflexible all-or-nothing defence. Lord Goff observed (at p579E):

Considerations such as these provide a strong indication that, in many cases, estoppel is not an appropriate concept to deal with the problem.

28 Lord Goff went on:

In these circumstances, it is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these? The answer must be 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. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position.

He noted the general acceptance of the defence in other common law jurisdictions (his citations could now be supplemented by reference to the decision of the High Court of Australia in David Securities v Commonwealth [Bank] of Australia (1992) 109 ALR 57).

29 Lord Goff said (at p580C, F-H):

I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way … 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 *170 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. In this connection I have particularly in mind the speech of Lord Simonds in Ministry of Health v Simpson [1951] AC 251, 276.

30 The judge noted the view, put forward by Andrew Burrows (The Law of Restitution (1993) pp425-428) that there is a narrow and a wide version of the defence of change of position, and that the wide view is to be preferred. The narrow view treats the defence as ‘the same as estoppel minus the representation’; (so that detrimental reliance is still a necessary ingredient). The wide view looks to a change of position, causally linked to the mistaken receipt, which makes
it inequitable for the recipient to be required to make restitution. In many cases either test produces the same result, but the wide view extends protection to (for instance) an innocent recipient of a payment which is later stolen from him (see Goff & Jones, The Law of Restitution 5th ed (1998) p822, also favouring the wide view).

31 In this court Mr Stephen Moriarty QC (appearing with Mr Richard Handyside for Scottish Equitable) did not argue against the correctness of the wide view, provided that the need for a sufficient causal link is clearly recognised. The fact that the recipient may have suffered some misfortune (such as a breakdown in his health, or the loss of his job) is not a defence unless the misfortune is causally linked (at least on a ‘but for’ test) with the mistaken receipt. In my view Mr Moriarty was right to make that concession. Taking a wide view of the scope of the defence facilitates ‘a more generous approach … to the recognition of the right to restitution’ (Lord Goff in Lipkin Gorman at p581; and compare Lord Goff’s observations in Kleinwort Benson v Lincoln City Council [1999] 2 AC 349 at p385A-F).

32 The criticisms of the judgment made by Mr Bernard Weatherill QC (appearing with Mr Paul Emerson for Mr Derby) were directed, not so much to the principles of law enunciated by the judge, as to the way in which he applied those principles to the facts as he found them. Before considering those criticisms in detail I think it may be useful to note that when a person receives a mistaken overpayment there are, even on the narrow view as to the scope of the defence, a variety of conscious decisions which may be made by the recipient in reliance on the overpayment. Some are simply decisions about expenditure of the receipt: the payee may decide to spend it on an asset which maintains its value, or on luxury goods with little second-hand value, or on a world cruise. He may use it to pay off debts. He may give it away. Or he may make some decision which involves no immediate expenditure, but is nevertheless causally linked to the receipt. Voluntarily giving up his job, at an age when it would not be easy to get new employment, is the most obvious example. Entering into a long-term financial commitment (such as taking a flat at a high rent on a ten-year lease which would not be easy to dispose of) would be another example. The wide view adds further possibilities which do not depend on deliberate choices by the recipient.

33 Mr Weatherill criticised the judge for looking simply at particular items of expenditure (the £9,662 which was conceded, the sum used to pay off the mortgage and the sum paid to the Norwich Union) and for paying insufficient attention to Mr Derby’s decision to slow down his work, and his omission to take alternative steps to provide for the future of himself and his family. I would readily accept that the defence is not limited (as it is, apparently, in Canada and some states of the United States: see David Securities Pty v Commonwealth Bank of Australia (1992) ALJR 768, 780, noted in Goff & Jones at p819) to specific identifiable items of expenditure. I would also accept that it may be right for the court not to apply too demanding a standard of proof when an honest defendant says that he has spent an overpayment by improving his lifestyle, but cannot produce any detailed accounting: see the observations of Jonathan Parker J in Philip Collins v Davis [2000] 3 All ER 808, 827, with which I respectfully agree. The defendants in that case were professional musicians with a propensity to overspend their income, and Jonathan Parker J took a broad approach (see at p830).

34 In the present case, however, the judge made some clear findings of fact, set out in para 13 above, to the effect that the improvements which Mr Derby was able to make in his family’s *171 lifestyle, between June 1995 and October 1996, were very modest and not irreversible, and that there was nothing that he could usefully have done to make provision for the future. Mr Weatherill has submitted that that seriously understates the devastating effect which the demand for repayment has had on Mr Derby, with his annual income after tax being reduced at a stroke from a sum of the order of £20,000 to a sum of the order of £12,000 (these figures do not include Mrs Derby’s earned income). It is easy to accept that Scottish Equitable’s demand for repayment must have come as a bitter disappointment to Mr Derby, and it is impossible not to feel sympathy for him, beset as he now is by financial problems, matrimonial problems and health problems. But the court must proceed on the basis of principle, not sympathy, in order that the defence of change of position should not (as Burrows puts it at p426) ‘disintegrate into a case by case discretionary analysis of the justice of individual facts, far removed from principle’. Mr Weatherill took the court to various passages in the transcript of Mr Derby’s oral evidence but I am not persuaded that the judge erred in his findings of fact or that he failed to take advantage of seeing and hearing the witnesses.

35 Mr Weatherill submitted that the payment-off of the mortgage was a change of position, but I cannot accept that submission. In general it is not a detriment to pay off a debt which will have to be paid off sooner or later: RBC Dominion Securities v Dawson (1994) 111 DLR (4th) 230. It might be if there were a long-term loan on advantageous terms, but it was not suggested that that was the case here; and as the judge said (at p803f) the evidence was that the house was to be sold in the near future.

36 In relation to the Norwich Union policy it was argued below that Mrs Derby had certain rights or claims because of the impending divorce, and this argument is put forward again in para 16 of the grounds of appeal and in oral argument. I
found this argument rather surprising since it appears from the terms of the policy that Mrs Derby is named as a payee in respect of a reversionary annuity of £6,760 a year but that her right to the annuity ceases on divorce (although Mrs Derby may be able to take advantage of the new pension sharing arrangements introduced by the Welfare Reform and Pensions Act 1999). However it was only by reference to the impending divorce that Mr Weatherill attacked the judge’s conclusion (at p798e) that Mrs Derby’s rights were no impediment to the unwinding of the policy to which Norwich Union is prepared to agree. Her potential rights on divorce do not depend on her having a power to veto the unwinding of the policy, nor do they have the effect of conferring such a power on her. They do not in my view assist Mr Derby’s argument on change of position.

37 For these reasons the judge was in my view correct to accept the defence of change of position only in relation to the sum of £9,662.

Estoppel

38 I have already quoted Lord Goff’s observation in Lipkin Gorman (at p579) that estoppel is not an appropriate concept to deal with the problem, partly because of its ‘all or nothing’ operation. The same view has been widely expressed, both by academic writers and in the courts. The Newfoundland Court of Appeal (in RBC Dominion Securities v Dawson) has flatly rejected it. Jonathan Parker J (in Philip Collins v Davis at pp825-826) has described it as no longer apt. In doing so he referred to the judgment now under appeal, in which the judge avoided a general statement of principle but (on the facts of this case) distinguished Avon County Council v Howlett and said (at p807c):

In my judgment, the justice of the situation is met by the extent to which the defence of change of position has succeeded and it would be wholly unjust and inappropriate in those circumstances to allow estoppel to operate so as to provide a complete defence to the whole of the overpayment.

39 In considering this part of the case the judge proceeded on the footing that Scottish Equitable had made to Mr Derby a representation that he really was entitled to the payment made to him in June 1995. It is not entirely clear whether the judge made a positive finding to that effect, or simply set out counsel’s submission (at p804f) and assumed for the purposes of argument that it was correct; but on any view there was ample evidential material to justify such a finding.

40 The decision of this court in Avon County Council v Howlett was discussed at length both below and in this court and it calls for detailed mention. Mr Howlett was a schoolteacher who had an accident at work and was off work (but still *172 employed) for more than a year and a half. After his employment had been terminated the county council, his employer, found that during his time off work it had paid him for eight months (rather than six months) at the full rate of pay and for a further eleven months (rather than six months) at half-rate. It claimed £1,007 from him as money paid under a mistake of fact. In his defence Mr Howlett pleaded that he had spent £460 on a suit and a second-hand car and that he had refrained from claiming social security benefit of £86. He pleaded that this detrimental reliance estopped the employer from recovering any part of the £1,007.

41 At trial Mr Howlett’s evidence was that he had in fact spent all the money. But his counsel (who was instructed at a trade union’s expense and wished to treat the matter as a test case) declined to apply for permission to amend his pleadings. Judgment was given against Mr Howlett for the balance sum of £460 (which was, by a confusing coincidence, the same sum as Mr Howlett had spent on the suit and the car). In this court Cumming-Bruce LJ took an adverse view of counsel’s expedient. He was (at p608) disinclined:

to give a judgment founded on estoppel on facts which exist only in the mind of the pleader. The law does not and should not develop by such a device, and the ratio of such a decision is liable to be seriously misleading. I do not consider that the decision of this court in the instant appeal is authority for the proposition that where, on the facts, it would be clearly inequitable to allow a party to make a profit by pleading estoppel, the court will necessarily be powerless to prevent it. Cumming-Bruce LJ thought that the judge should have refused to decide the case on a basis which was neither pleaded (that is, that it would be inequitable to allow the defendant to retain part or all of the benefit) nor supported by evidence.

42 Eveleigh LJ gave a fairly short judgment agreeing, with some hesitation, with Slade LJ. Slade LJ gave a fairly long judgment, approaching the matter by the established legal principles governing estoppel. He emphasised that estoppel by representation is in origin a rule of evidence, and that that is what confers its ‘all or nothing’ character. He referred to some well-known cases including Skyring v Greenwood (1825) 4 B&C 281 and Holt v Markham [1923] 1 KB 504, commenting that if estoppel by representation could operate in a limited and proportionate way the courts which decided those cases (at p624):

would have been bound to conduct a much more exact process of quantification of the alteration of the financial positions
of the recipients, which had occurred by reason of the representations.

43 However Slade LJ also said (at pp624-625):

I recognise that in some circumstances the doctrine of estoppel could be said to give rise to injustice if it operated so as to defeat in its entirety an action which would otherwise lie for money had and received. This might be the case for example where the sums sought to be recovered were so large as to bear no relation to any detriment which the recipient could possibly have suffered.

Eveleigh LJ had made similar observations (at p611), and I have already quoted the remarks of Cumming-Bruce LJ (para 41 above). Harrison J (at p807c) treated the present case as 'just the sort of situation that the Court of Appeal must have had in mind in Avon County Council v Howlett when expressing reservations about the ambit of that decision'.

44 I would be content to follow the judge in refraining from attempting any general statement of principle and treating this case as comfortably within the exception recognised by all three members of this court in Avon County Council v Howlett. We cannot overrule that case but we can note that it was not seen, even by the court which decided it, as a wholly satisfactory authority, because of its fictional element.

45 I should record one further novel and ingenious argument addressed to us by Mr Moriarty (but generously attributed by him to his junior, Mr Handyside). That is that, since Lipkin Gorman, the defence of change of position preempts and disables the defence of estoppel by negativing detriment. Detriment must, it was correctly submitted, be judged at the time when the representer seeks to go back on his representation, since:

… the real detriment or harm from which the law seeks to give protection is that which would flow from the change of position if the assumptions were deserted that led to it. So long as the assumption is adhered to, the party who altered his situation upon the faith of it cannot complain. His complaint is that when afterwards the other party makes a different state of affairs the basis of an assertion of right against him then, if it is allowed, his own original change of position will operate as a detriment. *173 (Dixon J in Grundt v Great Boulder Pty Gold Mines (1938) 59 CLR 641, 674-675, quoted in Spencer Bower and Turner, The Law Relating to Estoppel by Representation 3rd ed (1977) pp110-111).

46 The argument can be simply explained by an illustration in the form of a dialogue. A pays £1,000 to B, representing to him 'I have carefully checked all the figures and this is all yours'. B spends £250 on a party and puts £750 in the bank. A discovers that he has made a mistake and owed B nothing. He learns that B has spent £250 and he asks B to repay £750.

- B: 'You are estopped by your representation on which I have acted to my detriment.'
  A: 'You have not acted to your detriment. You have had a good party, and at my expense, because I cannot recover the £250 back from you.'
  The facts that B has spent £250 in an enjoyable way, and that A readily limits his claim to £750, put the argument in its most attractive form. But it seems to have some validity even if B had lost £250 on a bad investment, and A began by suing him for £1,000.

47 I find this argument not only ingenious but also convincing. If I prefer to base my conclusion primarily on the grounds relied on by the judge it is partly because the argument is novel and appears not to have been considered by any of the distinguished commentators interested in this area of the law. But at present I do not see how the argument could be refuted.

48 Will estoppel by representation wither away as a defence to a claim for restitution of money paid under a mistake of fact? It can be predicted with some confidence that with the emergence of the defence of change of position, the court will no longer feel constrained to find that a representation has been made, in a borderline case, in order to avoid an unjust result. It can also be predicted, rather less confidently, that development of the law on a case by case basis will have the effect of enlarging rather than narrowing the exception recognised by this court in Avon County Council v Howlett. That process might be hastened (or simply overtaken) if the House of Lords were to move away from the evidential origin of estoppel by representation towards a more unified doctrine of estoppel, since proprietary estoppel is a highly flexible doctrine which, so far from operating as ‘all or nothing’, aims at ‘the minimum equity to do justice’ (Crabb v Avon District Council [1976] Ch 179, 198). Paul Key has drawn attention (Excising Estoppel by Representation as a Defence to Restitution [1995] CLJ 525, 533) to two decisions of the High Court of Australia (Waltons Stores (Interstate) v Maher (1988) 164 CLR 387 and Commonwealth of Australia v Verwayen (1990) 170 CLR 394) which he describes as a fundamental attack on the traditional perception of estoppel as a complete defence.
The remarks in the last four paragraphs are no more than tentative observations on points which were not fully argued, as not being necessary for the determination of the appeal. For the reasons given earlier in this judgment – which are essentially the reasons given by the judge in his admirable judgment – I would dismiss this appeal.

KEENE LJ

I agree.

SIMON BROWN LJ

I too would dismiss this appeal for the reasons given by Lord Justice Robert Walker which, as he observes, are essentially those of the judge below.

In doing so, however, I would not wish to be thought unsympathetic to Mr Derby's position. He is now beset by grave financial problems albeit, on the judge's findings, that would have been so even without the mistaken over-payment. He has suffered in addition the great disappointment of being called upon to repay the bulk of this money some 16 months after it was paid and after he had begun to accustom himself to a standard of living and a level of security beyond his true means. During those 16 months not only was he spending the £9,662 now acknowledged to be irrecoverable, but also he was enjoying a pension from the Norwich Union at the rate of £10,884 pa more than it should have been (£13,521 pa instead of £2,637 pa) and having to service a mortgage debt which was £41,671 less than it should have been – short-term benefits of which, like the £9,662, it is not now sought to deprive him. These bald figures apart, one has here on the one hand an impoverished elderly man entering upon retirement who, having initially taken the trouble to question the extent of his *174 entitlement, is then left for 16 months honestly believing in his good fortune, and on the other a rich and incompetent insurance company who, despite Mr Derby's 'protestations', carelessly pays out £172,451 too much and then takes 16 months to discover its mistake.

Tempting though it is, however, to take these additional factors into account with a view to mitigating the hardship of Mr Derby's present plight, Mr Moriarty QC has satisfied me that strictly they fall to be ignored and that to give effect to them would simply involve what Scrutton LJ in Holt v Markham at p513 called 'well-meaning sloppiness of thought'. As Lord Goff observed in Lipkin Gorman (a firm) v Karpnale Ltd at p578:

A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.

In my judgment there is no legal principle properly entitling the court to disallow recovery here by Scottish Equitable to the extent ordered below. That leaves Mr Derby with the benefit of an enhanced standard of living for the 16 months it took to notify him of the mistake – since to that extent he had changed his position by increased spending – but deprives him of any further benefit from the overpayment – since on the judge's findings, once he learned of the mistake, he would be no worse off having paid the amount ordered to be repaid than if the mistake had never been made.

Referring Principles:
IX.5 - Disenrichment