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CHANGE OF POSITION: THE VIEW FROM ENGLAND

*Andrew Burrows**

I. THE ACCEPTANCE OF THE DEFENSE

In *Lipkin Gorman v. Karpnale Ltd.*,¹ the House of Lords for the first time accepted that there is a change of position defense to a restitutionary claim founded on unjust enrichment.² In Lord Goff's words, "[t]he principle is widely recognised throughout the common law world. . . . The time for its recognition in this country is, in my opinion, long overdue."³

There are several reasons of principle or policy for wholeheartedly supporting that acceptance of the defense:

- (i) The essential concern of the change of position defense is with the defendant's loss of enrichment (i.e., "disenrichment"). English law's traditional insistence, through the estoppel defense, that the loss had to be induced by the claimant's representation was too restrictive. For example, if the payee has in good faith incurred a loss by relying on a payment being his or hers, it is hard to see why a court should additionally insist on a representation by the payor.
- (ii) According to *Avon County Council v. Howlett*,⁴ estoppel can only operate as an all-or-nothing defense.⁵ In contrast, change of position, divorced from the rule of evidence strictures of estoppel, can operate in a *pro tanto* fashion. The latter is more appropriate for

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1. [1991] 2 A.C. 548 (H.L.) (Eng.).

2. *See id.* at 579.

3. *Id.* at 579–80.

4. [1983] 1 All E.R. 1073 (C.A. 1982) (Eng.).

5. *See id.* at 1078.

restitution because it can be geared to the precise extent of the loss of enrichment.⁶

- (iii) Peter Birks suggests that the strongest argument in principle for change of position "lies in the logic of subjective devaluation."⁷ The argument runs as follows: If the defendant uses money received to buy benefits which would not otherwise have been bought, liability to make restitution to the payor in effect forces the defendant to pay for benefits that the defendant did not want; denial of change of position is therefore inconsistent with the acceptance in the law of restitution of the importance of a defendant's subjective devaluation.
- (iv) The expansion of the grounds for restitution, most obviously for mistaken payments (which can now include payments made by mistake of law), requires counterbalancing by an expansion of the restitutionary defenses to include change of position. Without that defense there might be too much restitution, both in the "floodgates of litigation" sense and from the perspective of giving inadequate security of receipt to payees.

II. THE INGREDIENTS OF THE DEFENSE

A. The Narrow and Wide Versions of the Defense

Since the acceptance of change of position in England, attention has shifted to the precise ingredients of the defense. The House of Lords in *Lipkin Gorman* expressly left this open for case law development.⁸ However, Lord Goff's tentative formulation was very broad:

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

6. See *infra* Part II.B.8.

7. PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 413 (1989).

8. See *Lipkin Gorman v. Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.) (Eng.).

in all the circumstances to require him to make restitution, or alternatively to make restitution in full.⁹

Cases subsequent to *Lipkin Gorman* have slowly but surely been clarifying the ingredients of the defense.

Two main versions of the defense can be and have been articulated. First, the narrow view is that change of position is the same as estoppel minus the representation.¹⁰ The defendant must have detrimentally relied on the benefit as being his to keep. Birks has written of change of position, "This defence is like estoppel with the requirement of a representation struck out. In other words the enriched defendant succeeds if he can show that he acted to his detriment on the faith of the receipt."¹¹ This version is embodied in section 94B of the New Zealand Judicature Act 1908,¹² according to which mistaken payments may not be recoverable

if the person from whom the relief is sought received the payment in good faith and *has so altered his position in reliance on the validity of the payment* that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.¹³

This version derives further support from *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.*,¹⁴ in which the Supreme Court of Canada first accepted change of position as a defense. Martland J said, "[I]t should be open to the Municipality to seek to avoid the obligation to repay the moneys it received if it can be established that it had materially changed its circumstances as a result of the receipt of the money."¹⁵

The alternative wide view says that detrimental reliance is not a necessary ingredient and that the defendant should have a defense where his position, consequent on the benefit, has so changed that it would be inequitable to order restitution. This is the version of the

9. *Id.* at 580.

10. See 3 GEORGE E. PALMER, THE LAW OF RESTITUTION 523-24 (1978).

11. BIRKS, *supra* note 7, at 410.

12. Judicature Act, 1908, § 94B (N.Z.).

13. *Id.* (emphasis added).

14. [1975] 55 D.L.R. (3d) 1 (Can.); see also *David Sec. Pty. Ltd. v. Commonwealth Bank of Australia* (1992) 175 C.L.R. 353, 386 (Austl.) (illustrating the High Court of Australia's acceptance of the defense).

15. *Rural Municipality of Storthoaks*, [1975] 55 D.L.R. (3d) at 13.

defense adopted by section 142(1) of the *Restatement of the Law Restitution*.¹⁶ This has also been Goff and Jones' preferred view. In the third edition of their book, *The Law of Restitution*, they wrote:

[U]nlike the legislature in New Zealand, we would not restrict the defence of change in position to cases where the defendant has "altered his position in reliance on the validity of the payment." No doubt, many cases of change of position will fall within that description. But there are others which do not, where it would be inequitable to order the defendant to make restitution. . . . The surest guide for the future is, we think, to be found in the broad general statement in section 142(1) of the Restatement of Restitution. Each case will have to be judged on its own facts in order to determine whether it is just and equitable to require the defendant to make restitution.¹⁷

Of the two versions being considered, Lord Goff in *Lipkin Gorman*, tentatively supports the wide view. On the facts of *Lipkin Gorman*, either version of the defense would have produced the same result. In that case, the relevant change of position was winnings paid to a thief on the assumption that the money he was betting with was his (and hence, the gaming club's) to keep, whereas in fact, it was stolen from the claimant solicitors.¹⁸ Although the amount of stolen money staked was much higher, the overall enrichment received by the defendant club from the stolen money was about £155,000.¹⁹ It was this sum that was awarded in restitution. As is expressly recognized in Lord Goff's judgment, the House of Lords took a rough-and-ready, rather than a strictly logical, approach to the acute factual difficulties in applying change of position to winnings paid out on bets: for on a strict approach, winnings on a bet relate to,

16. See RESTATEMENT OF THE LAW OF RESTITUTION § 142(1) (1937).

17. ROBERT GOFF & GARETH JONES, *THE LAW OF RESTITUTION* 693–94 (3d ed. 1986) [hereinafter GOFF & JONES (3d ed.)]; cf. ROBERT GOFF & GARETH JONES, *THE LAW OF RESTITUTION* 822 (5th ed. 1998) [hereinafter GOFF & JONES (5th ed.)] (summarizing Lord Goff's formulation of the defense in *Lipkin Gorman*, which gives common law support, from the 1991 case, to the theory propounded in the Third Edition).

18. See *Lipkin Gorman*, [1991] 2 A.C. at 548.

19. See *id.* at 559.

and cancel out, only the receipt of that particular bet and not other losing bets.²⁰

One implicit limitation of the wide view is the necessity for a sufficient causal link between the defendant's unjust enrichment and his change of position.²¹ In other words, the defense must be concerned with loss of benefit (i.e., "disenrichment") and not with general hardship suffered by the defendant. Say, for example, the unjustly enriched defendant, subsequent to receipt, is made financially redundant or is injured in a car crash. Or say, having received a mistaken payment of £100 the defendant in turn has £500 stolen from her, which would have been stolen irrespective of the mistaken payment. These changes of circumstance may make it more difficult for the defendant to repay the claimant, but they ought not to afford a defense to restitution. Unless the subject is to disintegrate into a case-by-case discretionary analysis of the justice of individual facts, far removed from principle, it is imperative that, even on the wide formulation, there is a sufficient causal link between the defendant's unjust enrichment and his pecuniary loss.

The Court of Appeal in *Scottish Equitable plc v. Derby*²² has expressly supported this position. There, Robert Walker LJ said, "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."²³

A crucial practical question is what should be the test for that sufficient causal link. As Walker LJ indicated, it should at least be for the defendant to show that but for the enrichment received he would not have suffered the loss.²⁴ Yet, by analogy to the parallel position in relation to compensatory damages, (namely, to what extent subsequent benefits should be taken into account to reduce the plaintiff's loss), one should probably add that, even if factually caused, the loss is irrelevant if too indirectly related to (i.e., too far

20. *See id.* at 582–83.

21. Even on the narrow version of the defense one may want some causal limitation over and above "reliance."

22. [2001] 3 All E.R. 818 (C.A.) (Eng.).

23. *Id.* at 827.

24. *See id.*

removed from or essentially coincidental to) the enrichment received.

The main range of situations where the above narrow and wide versions of change of position may produce different results is where a third party or a natural event brings about loss. For example, money mistakenly paid to the defendant is immediately stolen or destroyed by fire. Or assume that a building the claimant is erecting for the defendant is half complete when destroyed by fire. In those examples, only the wider version of change of position would afford a defense because the defendant has not suffered the loss as a result of relying, in any meaningful sense, on the benefit being his or hers.

Which of the two versions of change of position is to be preferred? Although one advantage of the narrower version is that it is more closely tied to the existing law since it is closer to the long-established defense of estoppel, the wider view is to be preferred. For example, it seems grotesque that a defendant who is mistakenly (perhaps even negligently) paid £100,000 by his bank, which is immediately stolen from him,²⁵ can be held (strictly) liable to restitution of £100,000. Even though the subsequent loss of the benefit cannot be blamed on the bank, the fact remains that the bank started the chain of events by first making the mistaken payment.

Furthermore, there is much to be said at this stage in its development, for holding the law of restitution in check by a wider, rather than a narrower, change of position defense. The wide view has now won the support of the Court of Appeal in *Scottish Equitable plc*. Walker LJ said,

The judge noted the view, put forward by Andrew Burrows (*The Law of Restitution* (1993) pp 425–428) 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

25. That is, the defendant would not otherwise have lost £100,000.

extends protection to (for instance) an innocent recipient of a payment which is later stolen from him.

In this court Mr[.] Stephen Moriarty QC . . . did not argue against the correctness of the wide view, provided that the need for a sufficient causal link is clearly recognised. . . . 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.'²⁶

The wide view has also been adopted by the New Zealand Court of Appeal in *National Bank of New Zealand Ltd. v. Waitaki International Processing (NI) Ltd.*²⁷ In that case, the claimant bank mistakenly paid NZ \$500,000 to the defendant.²⁸ The defendant told the bank of the mistake and, despite the bank's insistence, believed throughout that it was not entitled to the money.²⁹ The defendant then lost the money by investing it, without security, in a company that became insolvent.³⁰ The majority of the New Zealand Court of Appeal (Thomas and Tipping JJ) held that section 94B of the Judicature Act 1908 did not apply to these facts.³¹ Given the defendant's belief that it was not entitled to the money, it could not be said to have "altered . . . [its] position in reliance on the validity of the payment."³² In contrast, the defendant could rely on the non-statutory change of position defense put forward in *Lipkin Gorman*³³ because it was wider and was not dependent on detrimental reliance on the validity of the payment. Thomas J said that the wider version of change of position was "obviously superior."³⁴

26. *Scottish Equitable plc*, [2001] 3 All E.R. at 827 (citing Lord Goff in *Lipkin Gorman*, [1991] 2 A.C. at 581).

27. [1999] 2 N.Z.L.R. 211 (C.A. 1998).

28. *See id.* at 213.

29. *See id.* at 213–14.

30. *See id.* at 215.

31. *See id.* at 227, 232.

32. *Id.* at 227 (citing Judicature Act, 1908, § 94B (N.Z.)).

33. The Privy Council in *Goss v. Chilcott*, [1996] 1 A.C. 788, 798–99 (N.Z.), accepted that the common law change of position defense could be applied in New Zealand despite section 94B of the Judicature Act 1908.

34. *Nat'l Bank of New Zealand Ltd.* [1999] 2 N.Z.L.R. at 228–29.

B. Eight Further Issues

1. Does change of position cover losses incurred prior to the receipt of the benefit? In other words, does it extend to anticipatory, as well as subsequent, change of position?

Until recently, in almost all discussions of the defense, the assumption was that it only applies to subsequent losses. This was expressly stated in section 142(1) of the *Restatement of the Law of Restitution*: "The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution."³⁵

Yet there seems to be no significant distinction between the following two defendants. *D1* who, having been paid £1,000 by the claimant by mistake, pays £100 to charity; and *D2* who, having been mistakenly told that he has won £1,000, pays £100 to charity and then is subsequently mistakenly paid the £1,000. Although *D2*'s change of position was consequent on the expectation of payment, rather than on an actual payment, and although *D2* could not have directly enforced such an expectation (absent a contract or promissory estoppel), that seems unimportant given that the concern here is with a defense to restitution. As I have previously written, "the fact that the defendant would have no active claim to recoup particular losses does not mean that those losses should not be taken into account as a defence to restitution."³⁶ The crucial common feature is a clear causal link between the defendant's loss of £100 and the mistaken payment of £1,000. If the defendant were required to make restitution of £1,000, he would be worse off by £100 than if the payment, or the indication of payment, had never been made.

35. RESTATEMENT OF THE LAW OF RESTITUTION § 142(1) (1937); see also 3 GEORGE E. PALMER, THE LAW OF RESTITUTION 510 (1978) (affirming that such a defense of change of position arises only when one who has received a benefit for which he was required to make restitution has changed position after receipt of the benefit).

36. Andrew Burrows, *Swaps and the Friction between Common Law and Equity*, 1995 RESTITUTION L. REV. 15, 21. In that article I recanted from the tentative view, expressed in ANDREW BURROWS, THE LAW OF RESTITUTION 424 (1st ed. 1993) [hereinafter BURROWS, THE LAW OF RESTITUTION], that the defense applied only to a subsequent change of position.

Clarke J, in *South Tyneside Metropolitan Borough Council v. Svenska International plc*, took the contrary view that anticipatory change of position does not count.³⁷ This was one of the many interest rate swap cases, except here, it was the bank rather than the local authority that was the defendant. The defendant bank sought to establish that it had changed its position by incurring losses on “hedging transactions” (including valid swap contracts with other banks) that had been entered into as a consequence of, and to limit the risk on, the void swap contract with South Tyneside.³⁸ Those hedging contracts were entered into prior to the receipt of payments from South Tyneside.³⁹ Clarke J said,

[S]ave perhaps in exceptional circumstances, the defence of change of position is designed to protect a person who receives money in good faith and who thereafter changes his position in good faith so that it would be inequitable to require him to repay part or all of the money to its rightful owner.⁴⁰

More specifically, the defense was thought to be inapplicable on the facts because the bank’s reliance in entering into the hedging contracts was upon the apparent contractual promise of South Tyneside rather than upon the receipt of any payments.

However, the Privy Council has now forcefully expressed the better view (and Clarke J’s decision is now consequently regarded as dependent on the exceptional facts of that case)⁴¹ in *Dextra Bank &*

37. See [1995] 1 All E.R. 545 (Q.B. 1994) (Eng.); see also *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, [1994] 4 All E.R. 890, 948–49 (Q.B. 1993) (Eng.) (explaining Hobhouse J’s reasons, at first instance, for change of position not to include “hedging contracts”).

38. See *S. Tyneside Metro. Borough Council*, [1995] 1 All E.R. at 545.

39. See *id.* at 549–55.

40. *Id.* at 566.

41. It is hard to see that the decision can be reconciled with the Privy Council’s reasoning. On the face of it, losses on “hedging contracts” should have constituted change of position (unless, where those contracts were themselves void, the losses could have been avoided by claiming restitution). Goff and Jones criticize Clarke J’s reasoning and decision: “[I]t is inequitable to conclude that the bank should repay its gain made on the swap but should not be allowed to set off its losses on the hedging transactions.” GOFF & JONES (5th ed.), *supra* note 16, at 823. One conceivable justification for ignoring the hedging contracts may be that to take them into account would cut across the counter-restitution that was allowed in treating the claim as being merely for the net enrichment. Another possible justification is that once one

Trust Co. v. Bank of Jamaica.⁴² Here the claimant, Dextra, drew a check for U.S. \$2,999,000 on its bankers in favor of the defendant, the Bank of Jamaica ("BOJ").⁴³ Dextra drew the check on the assumption that it would constitute a loan to BOJ under a secured loan agreement with BOJ.⁴⁴ However, that loan agreement was never concluded. Agents whom BOJ reimbursed in advance of receiving the check had arranged the check on BOJ's behalf. The Privy Council held that Dextra was not entitled to restitution of the money as money paid by mistake of fact because Dextra had paid the money on the basis of a misprediction (that a loan agreement would be entered into) and not a mistake.⁴⁵ In any event, BOJ had the defense of change of position to the claim by virtue of their reimbursement of their agents. It did not matter that the change of position was anticipatory. In the words of Lords Goff and Bingham, giving the opinion of the Privy Council,

Here what is in issue is the justice or injustice of enforcing a restitutionary claim in respect of a benefit conferred. In that context, it is difficult to see what relevant distinction can be drawn between (1) a case in which the defendant expends on some extraordinary expenditure all or part of a sum of money which he has received from the plaintiff, and (2) one in which the defendant incurs such expenditure in the expectation that he will receive the sum of money from the plaintiff, which he does in fact receive. Since *ex hypothesi* the defendant will in fact have received the expected payment, there is no question of the defendant using the defence of change of position to enforce, directly

takes into account hedging contracts, there may be further consequential contracts to take account of, and to avoid endless inquiries it is preferable to treat all such losses as too remote.

42. [2002] 1 All E.R. (Comm.) 193 (P.C.) (Eng.). See also obiter dicta of Jonathan Parker J in *Phillip Collins Ltd. v. Davis*, [2000] 3 All E.R. 808, 827 (Ch.) (Eng.), who stated:

[W]hether or not a change of position may be anticipatory, it must (as I see it) have been made as a consequence of the receipt of, or (it may be) the prospect of receiving, the money sought to be recovered: in other words it must, on the evidence, be referable in some way to the payment of that money.

43. See *Dextra Bank & Trust Co.*, [2002] 1 All E.R. (Comm.) at 195.

44. See *id.*

45. See *id.* at 202.

or indirectly, a claim to that money. It is surely no abuse of language to say, in the second case as in the first, that the defendant has incurred the expenditure in reliance on the plaintiff's payment or, as is sometimes said, on the faith of the payment.⁴⁶

2. Does change of position apply only to extraordinary expenses?

It is sometimes said that to count as a change of position, expenses incurred by the defendant must be extraordinary.⁴⁷ The ambiguity of that qualification can cause confusion. The only requirement is that the defendant would not have otherwise incurred those expenses (i.e., that they are extraordinary *to the defendant*). Whether the expenses are extraordinary in the sense of being used to buy luxuries as opposed to everyday items, like food and drink, is not decisive.

3. What standard of proof does the defendant need to attain in establishing change of position?

It is submitted that, while there is no reason to depart from the normal balance of probabilities standard, a broad-brush approach should be taken which would tend to favor defendants. This is in line with the need for change of position to be a wide defense so as to prevent too much restitution and to ensure security of receipt. It would impose an excessively onerous burden on defendants to require them, for example, to show precisely how each item of money received had been spent.

In *RBC Dominion Securities Inc. v. Dawson*,⁴⁸ the Newfoundland Court of Appeal held that, in relation to change of position consequent on a mistaken payment, while the onus of proving change of position was on the defendant, detailed evidence of expenditure by the defendant was not required.⁴⁹ Reasonable approximation was sufficient. The court said,

The appellant argues that the respondents should have been required to submit receipts, dates of purchase and precise

46. *Id.* at 204.

47. See PETER D. MADDAUGH & JOHN D. MCCAMUS, *THE LAW OF RESTITUTION* 232–34 (1990).

48. [1994] 111 D.L.R. (4th) 230 (Nfld.).

49. See *id.* at 240.

amounts rather than oral evidence and estimates. Certainly, the best evidence available should be provided the court. However, to require that a private individual, who believed she was spending her own money, prove her expenditures as if she were claiming damages in an action for negligence would be most unfair. It was the plaintiff's error that put her in the funds in the first place and led her to believe the funds were hers to spend without having to account to anyone for her expenditures. . . . In the circumstances, the trial judge was not in error to be satisfied with reasonable approximations.⁵⁰

Jonathan Parker J took a similar approach in *Philip Collins Ltd. v. Davis*.⁵¹ Two musicians forming a backing band to the pop-star Phil Collins had been mistakenly overpaid. They successfully raised a change of position defense regarding half the overpayment on the ground that their general philosophy of life was to alter their lifestyle according to their income.⁵² The court concluded that it was not necessary for them to account precisely for how they had spent the money.⁵³ Instead, the court adopted a broad approach.⁵⁴

The Court of Appeal approved this approach in obiter dicta in *Scottish Equitable plc v. Derby*.⁵⁵ Walker LJ said,

I would . . . 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 Ltd v. Davis* with which I respectfully agree.⁵⁶

50. *Id.*

51. [2000] 3 All E.R. 808 (Ch.) (Eng.).

52. *See id.* at 813.

53. *See id.* at 830.

54. *See id.* at 827.

55. [2001] 3 All E.R. 818 (C.A.) (Eng.).

56. *Id.* at 827–28 (citations omitted).

4. What if the defendant's expenses were incurred in purchasing property that he still retains?

The fourth issue pertains to a situation where the defendant still retains the property he purchased with the mistakenly paid money. For example, say the defendant uses an overpayment of £500 to buy a television. The television could now be sold for £300. Assuming that he would not otherwise have bought the property, there are two possible lines of argument. One is that the defendant is not worse off to the full extent of the money spent for he retains the pecuniary value of the property—he has changed his position to the extent of the difference between what the property cost him and, in the usual case, its resale value (i.e., his change of position is £200). Alternatively, it might be argued that, applying the strict logic of subjective devaluation through to the defense of change of position, it is irrelevant that the defendant still retains the property unless he is reasonably certain to realize its value (i.e., his change of position is £500)—otherwise to deny the defendant a full change of position defense would force him either to sell the property or to end up paying for property that he would not otherwise have chosen to buy.

The former argument is more attractive.⁵⁷ Subjective devaluation should carry less force once the claimant has established the defendant's *prima facie* restitutionary liability and the focus has switched to whether there is a defense. Moreover, the defendant seeking to establish his change of position is in an analogous position to a claimant who seeks to prove his loss in order to recover compensatory damages. In that context, the duty to mitigate one's loss dictates that the claimant cannot deny that he is benefited by property that should reasonably be realized. In addition, the former argument is supported by dicta of Lord Templeman (whose reasoning on the application of change of position was agreed with by a majority of the Lords) in *Lipkin Gorman*:

[I]f the donee spent £20,000 in the purchase of a motor car which he would not have purchased but for the gift, it seems to me that the donee has altered his position on the faith of the gift and has only been unjustly enriched to the

57. *Contra* Peter Birks, *Overview: Tracing, Claiming and Defences*, in *LAUNDERING AND TRACING* 289, 331–32 (Peter Birks ed., 1995) (appearing to favor the latter “subjective devaluation” argument).

extent of the secondhand value of the motor car at the date when the victim of the theft seeks restitution.⁵⁸

To avoid any doubt, it must be stressed that this issue has nothing to do with tracing. The claimant is not seeking to establish that he can trace to the property bought.

5. To what extent is the fault of the defendant (or the claimant) relevant to change of position?

Certainly a defendant who has changed his position in bad faith (i.e., dishonestly) is disqualified from raising the defense (hence Lord Goff's emphasis on good faith change of position in *Lipkin Gorman*). Yet, is it relevant that the defendant has merely been negligent, for example, in failing to realize that he was not entitled to the benefit or in foolishly changing his position? Given that change of position is not an all-or-nothing defense, the defendant's "contributory negligence" could be taken into account to reduce the relevant loss.

This is the position under the New Zealand statutory defense of change of position as laid down in *Thomas v. Houston Corbett & Co.*⁵⁹ Here, a solicitor's clerk fraudulently induced the claimant firm of solicitors to pay £1,381 into the defendant's bank account as part of a scheme to convince the defendant that he was making a profit from money paid to the clerk to invest.⁶⁰ The defendant relied on that money being his by paying a further £840 to the clerk.⁶¹ Upon discovering the fraud, the claimant sought to recover its mistaken payment of £1,381 from the defendant.⁶² Applying a causation test for restitution of mistaken payments—and rejecting the need for

58. [1991] 2 A.C. 548, 560 (H.L.) (Eng.); cf. *RBC Dominion Sec. Inc. v. Dawson*, (1994) 111 D.L.R. (4th) 230 (Nfld.) (ignoring, without explanation, the fact that the defendant kept furniture bought with (and which would not have been bought but for) the overpayment, and reasoning that a broad-brush approach to change of position was more appropriate than a precise approach). However, where real property has been purchased, not as an investment but to live in, the position would be different. The defendant can deny that he is benefited by the property and it would be unreasonable to require him to realize it—that is, his change of position should relate to the full expenditure without a deduction for the resale value of the property.

59. [1969] N.Z.L.R. 151 (C.A. 1968).

60. *See id.* at 159.

61. *See id.*

62. *See id.* at 160.

supposed liability between payor and payee—the court held that the claimant firm was *prima facie* entitled to recover the money subject to the change of position defense embodied in section 94B of the Judicature Act 1908.⁶³

In “balancing the equities” and deciding which of the parties should have spotted the fraud, the New Zealand Court of Appeal held that the defendant, as a young and inexperienced doctor, was one-third at fault for his change of position, whereas the claimant solicitors were two-thirds responsible.⁶⁴ The relevant change of position was therefore reduced by a third from £840 to £560. Restitution of £821 was therefore ordered.⁶⁵

To give a further simple example, imagine that *C* pays *D* £100 by mistake. *D* changes his position to the tune of £80. If both parties are equally at fault, then a “contributory negligence” approach to change of position means that *C* would have restitution of £60 (i.e., $£100 - 80 + \frac{80}{2}$).

The New Zealand Court of Appeal applied the same contributory negligence approach to the non-statutory change of position defense in *National Bank of New Zealand Ltd. v. Waitaki International Processing (NI) Ltd.*⁶⁶ Here, the defendant was held to have a 90% change of position defense.⁶⁷ The court compared the fault of the parties: the claimant bank’s fault in making the mistaken payment and the defendant’s fault in losing the money in an imprudent unsecured investment. The court assessed the bank’s fault at 90% and the defendant’s at 10%, so that the defendant’s change of position defense was reduced by 10%.⁶⁸

Should the English version of change of position follow the approach in New Zealand? It is submitted that the introduction of contributory negligence would involve too much uncertainty and complexity, and would hamper out of court settlements. One would not want most restitution cases descending into disputes about comparative blameworthiness.

63. *See id.* at 163–64.

64. *See id.* at 164–65.

65. *See id.* at 165.

66. [1999] 2 N.Z.L.R. 211 (C.A. 1998).

67. *See id.*

68. *See id.* at 211–12.

Much more difficult is whether one would want a pragmatic all-or-nothing approach to fault under which the defendant would be disqualified from the change of position defense if clearly more at fault than the claimant.⁶⁹ This was the approach I favored in the first edition of *The Law of Restitution*. There, I also stressed that the relevant fault of the claimant and the defendant was, respectively, avoiding making payment (or avoiding conferring another type of benefit) and avoiding relying on it as one's own.⁷⁰ A possible problem with this is that all-or-nothing approaches, by definition, tend to be conducive of some injustice. Also, it can be argued that, provided the defendant was acting in good faith and honestly—thereby ruling out, for example, the defendant who silently knows of the claimant's mistake⁷¹ or who founds his change of position on criminal expenditure—there is no principled reason to exclude negligently incurred change of position.

In *Dextra Bank & Trust Co.*, the Privy Council has now rejected the relevance of the defendant's fault short of bad faith.⁷² Having looked at the New Zealand cases, Lords Goff and Bingham thought that the introduction of what they termed "relative fault" would render the defense of change of position too uncertain.⁷³ Their central conclusion was expressed as follows: "Their Lordships are . . . most reluctant to recognise the propriety of introducing the concept of relative fault into this branch of the common law, and indeed decline to do so."⁷⁴ Moreover, their Lordships thought it would be very strange to examine the fault of the parties given the well-established starting point for mistaken payments that

69. See Jack Beatson & William Bishop, *Mistaken Payments in the Law of Restitution*, 36 U. TORONTO L.J. 149 (1986) (labeling this "relative fault" as distinct from "comparative fault"). The *Restatement of the Law of Restitution* section 142(2) also appears to adopt a relative fault approach. RESTATEMENT OF THE LAW OF RESTITUTION § 142(2) (1937).

70. See BURROWS, THE LAW OF RESTITUTION, *supra* note 36, at 430–31.

71. See, e.g., *Nat'l Bank of New Zealand Ltd. v. Waitaki Int'l Processing (NI) Ltd.* [1999] 2 N.Z.L.R. 211 (where the defendant was acting in good faith even though it knew of the claimant's mistake because it had reluctantly kept the money having told the claimant of the mistake).

72. See *Dextra Bank & Trust Co.*, [2002] 1 All E.R. (Comm.) at 207; see also Peter Birks, *Change of Position and Surviving Enrichment*, in THE LIMITS OF RESTITUTIONARY CLAIMS: A COMPARATIVE ANALYSIS 41 (William Swadling ed., 1997); GOFF AND JONES (5th ed.), *supra* note 16, at 826.

73. See *Dextra Bank & Trust Co.*, [2002] 1 All E.R. (Comm.) at 205–07.

74. *Id.* at 207.

restitutionary liability is strict so that the fault of the payor does not bar restitution.⁷⁵ With respect, this latter point is unconvincing. Strict liability goes hand-in-glove with unjust enrichment. But the issue of change of position rests on the defendant having been disenriched and it is hard to see why the same considerations as to fault should necessarily apply in relation to that issue.

6. To what extent does change of position apply beyond mistaken payments or money paid away without the owner's consent?

Change of position will no doubt be primarily applied to mistaken payments and to money paid to the defendant without the knowledge of its owner. But there seems no reason in principle why it should not apply as a defense with respect to any type of benefit and with respect to other unjust factors, *provided* the defendant does not fall foul of the bad faith disqualification (as he or she often will where the unjust factor is duress, undue influence, or exploitation of weakness). For example, in *Goss v. Chilcott*,⁷⁶ the Privy Council accepted that change of position was a possible defense to a claim for total failure of consideration even though, on the particular facts, that defense failed.⁷⁷ Similarly, in the swaps cases, change of position was regarded as a possible defense irrespective of whether the ground for restitution was treated as being total failure of consideration, absence of consideration, or mistake of law.

What about restitution for wrongs? Clearly, change of position is irrelevant to compensation for wrongs. But the position is not so obvious in relation to restitution for wrongs assuming that the wrongdoer was not dishonest and has therefore changed his or her position in good faith. The essence of change of position is that it allows a good faith defendant to claim that, although enriched, the enrichment has caused him or her to suffer a "loss," which should be taken into account in arriving at the measure of restitution. That

75. *See id.*

76. [1996] 1 A.C. 789 (P.C.) (N.Z.).

77. Clarifying the reason why the defense failed is not easy. The defendants had been loaned money under a mortgage instrument that had been avoided. They had then in turn lent the money, without security, to a third party. One possible reason for denying change of position is that the defendants were no worse off because they would otherwise have taken out a valid loan, which they would have had to repay.

reasoning may be thought relevant to restitution from an innocent wrongdoer just as it is in relation to unjust enrichment by subtraction.

It is true that section 142(2) of the United States *Restatement of the Law of Restitution* says that change of position is not available to a tortfeasor.⁷⁸ This may be what Lord Goff had in mind when in *Lipkin Gorman* he said, "it is commonly accepted that the defence should not be open to a wrongdoer."⁷⁹ However, it cannot be argued that Lord Goff was definitively laying that down as the law. In the next sentence he said,

These are matters, which can, in due course, be considered in depth in cases where they arise for consideration. They do not arise in the present case. Here there is no doubt that the respondents have acted in good faith throughout, and the action is not founded upon any wrongdoing of the respondents.⁸⁰

In considering whether it is at least arguable that change of position is applicable with respect to restitution for wrongs, it might help to focus on an example. *D*, a little old lady, buys a painting from *X*, who is a rogue and has stolen the painting from *C*. *D* has been honest and indeed has acted reasonably. She sells the painting at well above its market price for £10,000. She then uses that money to take a once-in-a-lifetime holiday. *C*, the owner, brings an action in the tort of conversion against *D* and claims £10,000 in an action for money had and received. *D* wishes to raise the defense of change of position to the restitutionary claim for the conversion on the ground that she changed her position in honest reliance on that money being hers and has, therefore, "lost" the enrichment.

The (admittedly sparse) academic discussion of this question tends to the view that change of position should be available in this sort of situation.⁸¹ For example, Goff and Jones give as an illustration of where change of position may be invoked, other than in respect of mistaken payments, a claim based on an innocent breach of confidence.⁸² They write,

78. See RESTATEMENT OF THE LAW OF RESTITUTION § 142(2) (1937).

79. *Lipkin Gorman*, [1991] 2 A.C. at 580.

80. *Id.*

81. In addition to the views cited below, see Phillip Hellwege, *The Scope of Application of Change of Position in the Law of Unjust Enrichment: A Comparative Study*, 1999 RESTITUTION L. REV. 92, 96-100.

82. See GOFF & JONES (5th ed.), *supra* note 16, at 820 n.21.

A defendant who did not know and ought not to have known that he was betraying another's confidence acts honestly. He may then plead change of position. In our view, a defendant who is honest but ought to have known of the breach of confidence should also be allowed to invoke the defence.⁸³

Furthermore, they later suggest that wrongdoers who have not acted in bad faith or with a want of probity should be able to invoke the defense.⁸⁴

Richard Nolan, in his essay *Change of Position*, writes:

[N]ot all . . . wrongs involve fault, or some turpitude or want of probity on the part of the defendant: for example, a claim for an account of profits from a fiduciary does not necessarily entail any wickedness on the part of the fiduciary. Now if an innocent fiduciary obliged to make restitution in respect of profits made in breach of duty can be awarded an allowance for his skill by way of counter-restitution [as in *Boardman v. Phipps*⁸⁵] then, assuming Lord Goff has not ruled out any application of change of position in the context of restitution for wrongs, it would seem odd if the law could take into account the defendant's conferring of a benefit on the plaintiff, but be unable to take into account any other way in which the defendant had changed his position: both the allowance and the defence are directed to ensuring that the defendant is not worse off in consequence of making restitution to the plaintiff. Perhaps, then, change of position may have a very limited role to play in the context of restitution for wrongs, where the wrong in question is a wrong as a matter of law only.⁸⁶

Similarly, Virgo argues that change of position may be a defense to restitution for a wrong depending on whether the wrong was committed in bad faith or not.⁸⁷

83. *Id.* at 763.

84. *See id.* at 826.

85. [1967] 2 A.C. 46 (H.L. 1966) (Eng.).

86. Richard Nolan, *Change of Position*, in LAUNDERING AND TRACING 135, 154 (Peter Birks ed., 1995) (internal citations omitted).

87. *See* GRAHAM VIRGO, THE PRINCIPLES OF THE LAW OF RESTITUTION 727 (1999); Graham Virgo, *What is the Law of Restitution About?*, in RESTITUTION: PAST, PRESENT AND FUTURE 321 (Cornish et al. eds., 1998).

Finally, Andrew Tettenborn writes that he regards Lord Goff's statement in *Lipkin Gorman* as a little difficult to understand, and that a blanket refusal to apply change of position to restitution for wrongs is neither necessary nor desirable.⁸⁸ He points to an innocent wrongdoer, such as the unwitting converter, and states, "It is hard to see why he should not have the benefit of the defence if the plaintiff chooses to waive the tort and sue for money had and received."⁸⁹

Pitted against these views is the argument that change of position is inextricably bound up with the cause of action of unjust enrichment alone; that the security of receipt that change of position is designed to ensure is not relevant to restitution for wrongs. In other words, the cause of action of unjust enrichment requires a reversal of a transfer of wealth for reasons that do not relate to the need to "remedy" a wrong. On this argument, change of position operates to counter the non-wrongful transfer of wealth but can never outweigh the policies justifying restitution for a wrong.⁹⁰

At the present stage in the law's development—and particularly in light of the different possible arguments—the safest conclusion is that it is unclear whether change of position can ever apply to restitution for wrongs.

7. Should change of position apply to proprietary, as well as personal, restitutionary remedies?

Although there has, as yet, been no case law on point, in principle change of position should apply with respect to proprietary, as well as personal, restitutionary remedies.⁹¹ By definition, proprietary restitution is triggered by the defendant's unjust enrichment at the claimant's expense. Therefore, to ignore the defendant's change of position in relation to proprietary restitution is to ignore a fundamental aspect of the explanation and justification of proprietary restitution. In other words, whether the response to unjust enrichment is personal or proprietary should not affect the central elements of the unjust enrichment inquiry. It would also

88. See ANDREW TETTENBORN, *LAW OF RESTITUTION IN ENGLAND AND IRELAND* 253–54 (2d ed. 1996).

89. *Id.* at 254.

90. See Birks, *supra* note 57, at 325–26 (favoring this view).

91. See *id.* at 319–22, 326–27; GOFF & JONES (5th ed.), *supra* note 16, at 110–11, 824–25; JILL E. MARTIN, *HANBURY AND MARTIN MODERN EQUITY* 701–03 (16th ed. 2001).

produce the oddity that a claimant would be presented with the opportunity to outflank the change of position defense by invoking proprietary, rather than personal, restitution.

Say, for example, *C* mistakenly pays *D* £5,000. *D* buys shares with that money. Relying on his new financial security, *D* then treats himself to a holiday for £1,000. *D* is clearly entitled to raise the change of position defense to *C*'s personal claim for £5,000. It would be odd if *C* could avoid the change of position defense by instead bringing a proprietary claim to the shares. This is because the best explanation of that proprietary claim is that it is concerned with reversing *D*'s unjust enrichment at *C*'s expense.

It is submitted that the position would be different if *C* was bringing a pure proprietary claim or was claiming compensatory damages for conversion. Such claims are not triggered by unjust enrichment and are therefore not diminished by the change of position defense. Indeed, this is the most important practical reason why the House of Lords in *Foskett v. McKeown*⁹² can be criticized for relying on pure proprietary (rather than restitutionary proprietary) reasoning to explain the proprietary claim following tracing. That reasoning would produce the incorrect result in relation to the change of position defense.⁹³

How does one give effect to *pro tanto* change of position in relation to proprietary restitution? Where the remedy in question is an equitable lien, there is no difficulty. The lien affords a security interest over particular property in relation to a particular sum of money and there is no difficulty in reducing the sum of money secured to take account of the change of position. In the example given above, the lien would therefore secure £4,000 rather than £5,000.

The more difficult case is where the remedy in question is a (sole or proportionate) beneficial interest in property. For example, *C* may be given equitable ownership of shares. That interest cannot be reduced by a fixed amount to reflect the defendant's change of position. However, there seems to be no reason why the claim to a

92. [2000] 2 W.L.R. 1299 (H.L.) (Eng.).

93. Cf. GRAHAM VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 727 (1999) (arguing that change of position should be a defense to personal and proprietary claims even if founded on what he terms "the vindication of proprietary rights").

beneficial interest should not be made conditional on *C* paying *D* a fixed amount equivalent to *D*'s change of position. Therefore, in the example above, *C* may be given beneficial ownership of the shares subject to his paying *D* £1,000. The imposition of terms on a claimant seeking a remedy is well established in relation to equitable remedies, such as rescission⁹⁴ and specific performance,⁹⁵ and there seems no reason why it should not be applied here.

It follows that in *In re Diplock*,⁹⁶ if the claimants had been able to trace their money to new or improved buildings (it was held, incorrectly, that such tracing was not possible⁹⁷), the defendant should have had a change of position defense.⁹⁸ But for the receipt of the money, the buildings would not have been built or improved and the outlay could not now be recouped.

There is one final important point in relation to change of position and proprietary claims following tracing. One must be careful to distinguish between two separate questions. The first question is whether the enrichment traceably survives. This depends on the rules of tracing and has nothing to do with the defense of change of position. If the property has been lost or destroyed, tracing is not possible and one does not need to consider change of position as a defense to a proprietary claim. However, if the enrichment traceably survives, a second question is whether the defendant has a change of position defense to a proprietary claim to that traced property. The fact that the enrichment traceably survives does not mean that no change of position defense is possible. Thus, in the example above, the enrichment traceably survives in the shares and yet *D* can still invoke the change of position defense because, in reliance on having the shares, he has spent money on a holiday that he would not otherwise have bought.

94. See, e.g., *Solle v. Butcher*, [1950] 1 K.B. 671 (1949) (Eng.); *Cooper v. Phibbs*, [1867] 2 L.R. 149 (H.L.) (Eng.).

95. See, e.g., *In re Fawcett & Holmes' Contract*, [1889] 42 App. Cas. 150 (Eng.); *Harvela Invs. Ltd. v. Royal Trust Co. of Canada*, [1986] 1 A.C. 207 (H.L. 1985) (Eng.); see generally ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 383–85 (2d ed. 1994) (describing specific performance as a remedy).

96. [1948] 1 Ch. 465, 545–48 (Eng.).

97. For criticism of the Lordships' reasoning that tracing is not possible once the money has been used to alter, or improve, real property, see LIONEL D. SMITH, THE LAW OF TRACING 241 (1997).

98. See GOFF & JONES (5th ed.), *supra* note 16, at 110–11.

Conversely, of course, property may not traceably survive and yet, the defendant may be unable to establish a change of position defense. For example, the defendant may expend the money he received on paying off debts that he would, in any event, have had to pay. Although there is then no traceably surviving property, the defendant cannot establish a change of position defense.

8. What is the relationship between change of position and estoppel?

Estoppel is narrower than change of position in that it requires the defendant to establish that its change of position was induced by a representation made by the claimant. On the other hand, it may be that the effect of estoppel—deriving from its traditional status as a rule of evidence—is more drastic in constituting a total, rather than a partial, defense.

A leading case is *Avon County Council v. Howlett*.⁹⁹ The defendant there was mistakenly overpaid £1,007 sick pay.¹⁰⁰ Although the Court of Appeal was satisfied that the defendant had detrimentally relied on the plaintiff's representation to the extent of the full amount paid, his pleaded case—for the purpose of making this a test case—merely alleged detrimental reliance of £546.61. This was because the defendant had not claimed additional social security benefits he would otherwise have claimed, and had bought a car on hire-purchase and a suit which he would not otherwise have bought.¹⁰¹

Assuming a mistake of fact rather than of law (which the Court of Appeal thought was narrowly established), could the plaintiff recover the balance of £460.39? Cumming-Bruce LJ refused to decide a question not raised by the true facts, but Slade LJ and Eveleigh LJ held that estoppel operates as a total defense, even on the facts as pleaded, so that the plaintiff could not recover any of its mistaken payment.¹⁰² Slade LJ argued that this followed as a matter of principle from the nature of estoppel by representation as a rule of evidence, “the consequence of which is simply to preclude the representor from averring facts contrary to his own

99. [1983] 1 All E.R. 1073 (C.A. 1982) (Eng.).

100. *See id.*

101. *See id.* at 1077 (opinion of Eveleigh, L.J.).

102. *See id.* at 1074–89 (opinions of Cumming-Bruce, L.J., Slade, L.J., and Eveleigh, L.J.).

representation.”¹⁰³ If the representation is “this £500 is yours,” estoppel prevents the payor denying that the £500 validly belongs to the payee. As the statement is non-divisible, so must be the defense.

There are two possible counter-arguments to that line of reasoning. First, it may be doubted whether estoppel by representation should be seen as a rule of evidence rather than a substantive legal principle. One would surely not want to describe promissory estoppel, for example, as a rule of evidence whatever its historical origins. And as a substantive principle, the judges in *Avon* accept that the just solution would be to allow estoppel to operate in a *pro tanto* way.

Secondly, even playing the artificial “rule of evidence game,” one can argue, somewhat artificially perhaps, that a single representation is divisible into separate internal representations or parts. Hence, while the plaintiff in *Avon* was estopped from denying the statement (or that part of the statement) that £546.61 belonged to the defendant, he should have been free to deny the statement (or that part of the statement) that £460.39 belonged to the defendant. The argument is less artificial where, as in *Avon*, there are continuing payments and hence clearly more than one possible representation.

Having knocked out a *pro tanto* in form, Slade LJ left open the question whether estoppel could operate *pro tanto* in substance by making its application conditional on the defendant’s undertaking to repay a certain sum to the plaintiff; a course considered appropriate by Viscount Cave LC, with whom Lord Atkinson agreed, in his dissenting judgment in *Jones Ltd. v. Waring & Gillow Ltd.*¹⁰⁴ Eveleigh LJ, without explaining how this would fit in with his denial of a *pro tanto* estoppel, baldly said, “there may be circumstances which would render it unconscionable for the defendant to retain a balance in his hands.”¹⁰⁵ Presumably, it was the hypothetical nature of the facts that made it unnecessary for the judges to tie up those loose ends.

There is no doubt that the defense of change of position recognized in *Lipkin Gorman* can operate *pro tanto* and is therefore a more flexible and just defense. Indeed, Lord Goff referred to the all-or-nothing reasoning of *Avon* as one argument for accepting change

103. *Id.* at 1087.

104. [1926] 1 A.C. 670, 677 (H.L.) (Eng.).

105. *Avon*, [1983] 1 All E.R. at 1078.

of position.¹⁰⁶ But short of taking a very radical and forced interpretation of Lord Goff's judgment, the House of Lords has not wiped out estoppel as a restitutionary defense. It follows that, unless the above suggested ways around *Avon* are utilized, the unsatisfactory result remains that, despite *Lipkin Gorman*, a defendant can avoid *pro tanto* change of position by establishing estoppel.

Cases subsequent to *Lipkin Gorman* have accepted that all-or-nothing estoppel survives, but have then relied on the unconscionability exception in *Avon* to escape from the consequences of that conclusion. In *Scottish Equitable plc v. Derby*,¹⁰⁷ the defendant had a pension policy with the claimant, Scottish Equitable. In 1990, the defendant exercised an option to take early retirement benefit under that policy so that he was paid £36,588 and £4,655 per annum.¹⁰⁸ This left about £50,000 to be paid under the pension. Five years later, on his 65th birthday, Scottish Equitable told him that his pension was worth £201,938.¹⁰⁹ Scottish Equitable had mistakenly forgotten about his earlier exercise of the option. In truth, his pension was worth £29,486. The defendant queried the matter but Scottish Equitable confirmed orally, and in writing, the higher figure. Then Scottish Equitable went ahead and paid him the £201,938, an overpayment of £172,451.¹¹⁰

The defendant (who was held to be naïve but honest) spent £9,662 on modest improvements in his lifestyle; £41,671 in reducing his mortgage; and invested the £121,100 in a pension, which would pay him annually £11,000 more than he would otherwise have been paid.¹¹¹ A year later, Scottish Equitable realized its mistake and sought to recover the overpayment less the £9,662, which it conceded, fell within the change of position defense. The Court of Appeal, upholding Harrison J, held that its claim to £162,900 should succeed.¹¹² The £41,700 that the defendant used to pay the mortgage did not constitute a change of position because that was a debt that he had had to pay anyway, so he was no worse off by having paid it.

106. See GOFF & JONES (5th ed.), *supra* note 16, at 828–29.

107. [2001] 3 All E.R. 818 (C.A.) (Eng.).

108. See *id.* at 821.

109. See *id.*

110. See *id.* at 822.

111. See *id.* at 823.

112. See *id.* at 819.

The £121,000 paid into the pension could now be unwound without difficulty, leaving the defendant with the same pension entitlement he would have had had he not been overpaid.

Most importantly, the Court of Appeal held that the defendant could not rely on estoppel—constituted by his detrimental reliance on the claimant's representation that he was entitled to the money—so as to give him a total defense.¹¹³ This was because, although *Avon* remained good law until overruled by the House of Lords, the facts of this case fell comfortably within its unconscionability exception.¹¹⁴

The same approach was taken in *National Westminster Bank plc v. Somer International (UK) Ltd.*¹¹⁵ where the claimant bank mistakenly credited the defendant's account approximately U.S. \$76,708. The defendant was expecting a payment from a customer, Mentor, and was led to believe by the claimant's representation that this payment was the sum being credited to its account.¹¹⁶ As a result, the defendant dispatched goods to Mentor to the value of £13,180. The Court of Appeal rejected the defendant's argument that it had a complete estoppel defense to the claim for restitution and instead awarded restitution of the difference between U.S. \$76,700 and £13,180.¹¹⁷ In line with *Scottish Equitable plc*, the unconscionability exception in *Avon* was applied so that, in substance if not in form, the estoppel operated *pro tanto*.¹¹⁸ In the words of Peter Gibson LJ, "the circumstances here . . . are such that the disparity between the U.S. \$76,708 mistakenly credited to Somer and £13,180, being the value of goods dispatched by Somer in reliance on the Bank's representation, makes it unconscionable and inequitable for Somer to retain the balance."¹¹⁹

However, in practice—and leaving to one side where there is an insignificant, *de minimis*, difference between the value of the defendant's change of position and the payment received—it will surely *always* be unjust and unconscionable for the defendant to retain a balance. In other words, the *Avon* exception swallows up its

113. *See id.* at 831.

114. *See id.* at 829.

115. [2002] 1 All E.R. 198 (C.A. 2001) (Eng.).

116. *See id.* at 201.

117. *See id.* at 215–16.

118. *See id.* at 220.

119. *Id.*

all-or-nothing rule. Estoppel will always, by this means, operate in a *pro tanto* fashion. The cleaner approach would be to recognize this, and to clarify that, in contrast to change of position, the all-or-nothing estoppel defense is in this context inapt and should be excised.

The Newfoundland Court of Appeal in *RBC Dominion Securities Inc.* favored this approach.¹²⁰ In light of the acceptance of change of position in Canada in *Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd.*,¹²¹ Cameron JA said,

To make the estoppel defense one which operates *pro tanto* would be inconsistent with the most commonly accepted view of estoppel: that it 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.¹²²

One can regard the controversy concerning *Avon* as turning on which aspect of the unjust enrichment principle estoppel relates to. On the one hand, the requirement of detrimental reliance seems to be concerned with the defendant's loss of the benefit received (i.e., enrichment). Viewed in this way, estoppel should wither away because its all-or-nothing approach is too inflexible in comparison with change of position.

On the other hand, one could regard estoppel as relating to the *injustice* of an enrichment. The plaintiff's mistake, while *prima facie* rendering the enrichment *unjust*, is cancelled out by his detrimentally relied-upon representation that the money belongs to the defendant. Hence the traditional explanation that estoppel prevents the plaintiff averring the facts contrary to those represented (i.e., *the plaintiff cannot establish that he was mistaken*).

The former view is to be preferred. The latter resorts to artificiality in explaining why the unjust factor is overridden. No one suggests that the representation *per se* cancels out the injustice and it

120. [1994] 111 D.L.R. (4th) 230 (Nfld.); *see also* Philip Collins Ltd. v. Davis, [2000] 3 All E.R. 808, 826 (Ch.) (Eng.) (finding that a defense of estoppel was no longer apt in restitutionary claims where the more flexible defense of change of position was available).

121. [1975] 55 D.L.R. (3d) 1 (Can.).

122. *RBC Dominion Sec.*, [1994] 111 D.L.R. (4th) at 237.

is submitted that by requiring detrimental reliance the essence of the defense is focused on the defendant's loss of benefit.

This, of course, is not to suggest that estoppel should disappear in the many other areas of law in which it applies. Rather the argument is that, in contrast to those other areas, in the law of restitution the injustice that estoppel is concerned to prevent is entirely, and more appropriately, achieved by another defense, namely change of position.

III. CONCLUSION

Subsequent to the acceptance of the change of position defense by the House of Lords in *Lipkin Gorman v. Karpnale*, the English courts have slowly but surely been clarifying the ingredients of the defense. Important recent cases have indicated that, for example, a wide version of the defense that does not require reliance is to be preferred but that the defense is not concerned with general hardship; that anticipatory, as well as subsequent, change of position should count; that fault, short of bad faith, should be irrelevant; and that estoppel as a separate defense from change of position has little, if any, role to play. These and the other issues of detail that have been discussed in this Article are ones that any legal system which accepts the change of position defense must seek to answer so as to provide clarity and predictability in the law of restitution.