Given the rule's basis in nuisance, the House also insisted on the requirement of escape of the dangerous thing from the defendant's land (cf. *Read* v. *J. Lyons & Co. Ltd.* [1947] A.C. 156). There was no requirement of foreseeability with respect to the escape and here *Transco* remains true to strict liability. The problem with these "escape" and "proprietary interest" requirements is that they can result in uncertainty and arbitrariness. In *Transco* itself, the appellant had an easement over the embankment which belonged to the defendants. Four Lords accepted that this was a sufficient proprietary interest for the tort (Lord Hobhouse disagreeing, para. [68]); and again, four Lords accepted that there had been an "escape" (Lord Scott disagreeing, para. [78]). If the underlying policy of *Rylands* is that there are certain risks for which the creator must bear the cost, surely liability should not hang on the precise nature of the proprietary interest or, worse, geographical chance.

Transco is a welcome decision for its recognition that there is a need for a pocket of strict liability. As Lord Walker noted, even if negligence covered the field in most cases, the *Rylands* strict liability rule was still significant for it effectively shifted the burden of proof to the creator of the risk (para. [110]); justice required this in certain situations. It would have been better if the House had simply dissociated *Rylands* from nuisance and reinvented it as a special rule that was applicable in cases where fairness dictated the imposition of strict liability. This would have emancipated the rule from the unnecessary encumbrances of nuisance and provided a valuable, modern tort that afforded protection in an age where hazardous materials and activities relating to industry, war and terrorism abound.

KUMARALINGAM AMIRTHALINGAM

CLOUDING THE ISSUES ON CHANGE OF POSITION

THE defence of change of position has a pivotal role to play in controlling the scope of claims for restitution of unjust enrichments. The cause of action of unjust enrichment imposes a strict liability on the recipient. This might seem harsh and over-extensive were it not balanced by the recipient's right to say, "I am not liable because the enrichment has been lost". Since it was first authoritatively accepted by the House of Lords in *Lipkin Gorman* v. *Karpnale Ltd.* [1991] 2 A.C. 548 the courts, through a series of cases, have slowly but surely—in the finest traditions of the

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common law—been clarifying the ingredients of the defence. There is a danger that two recent decisions of the Court of Appeal will be interpreted in such a way as to undermine much of that good work.

In *Niru Battery Manufacturing Company* v. *Milestone Trading Ltd.* [2003] EWCA Civ 1446, [2004] 1 All E.R. (Comm) 193, the claimant bank (Bank Sepah) had paid $5.8m under a letter of credit to the defendant bank (Credit Agricole Indosuez) on presentation of a bill of lading that was false. The claimant did not know that the bill of lading was false. It therefore paid the money under a mistake of fact. The defendant, through one of its managers, Mr. Francis, knew that the goods for which the money was being paid had already been sold to other purchasers and that the claimant must therefore have been paying by mistake. Nevertheless, having received the money, the defendant, through Mr. Francis, paid it away in accordance with its customer's instructions. The sole question on appeal, as regards the law of restitution, was whether the defendant had a change of position defence to the claim for the mistaken payment. Upholding the decision of Moore-Bick J., the Court of Appeal held that it did not.

Moore-Bick J. had rationalised the disapplication of change of position by saying that the defendant, through Mr. Francis, had been acting in bad faith. Although it was not (subjectively) dishonest, bad faith extended beyond (subjective) dishonesty to include "a failure to act in a commercially acceptable way and sharp practice" ([2002] EWHC 1425 (Comm), [2002] 2 All E.R. (Comm) 795, para. [135]). On the facts, the defendant was acting in bad faith when it paid the money away realising that the claimant must have made a mistake and yet without making further enquiries of the claimant. Moore-Bick J. relied on Lord Goff's distinction in *Lipkin Gorman* between good faith and bad faith change of position; and on the Privy Council's judgment in *Dextra Bank & Trust Co. Ltd.* v. *Bank of Jamaica* [2002] UKPC 50, [2002] 1 All E.R. (Comm) 193 to the effect that, provided acting in good faith, fault of the recipient should not bar change of position.

Unfortunately the Court of Appeal did not simply adopt Moore-Bick J.'s reasoning. Instead both Clarke L.J. and Sedley L.J. (with both of whom Dame Elizabeth Butler-Sloss P. agreed) chose to express much of their reasoning in terms of whether it was, on all the facts of the case, inequitable or unconscionable or unjust to allow the recipient to deny restitution to the mistaken payer. In so doing, they relied on broad words of Lord Goff in *Lipkin Gorman* and also drew an analogy with the unconscionability test for "knowing receipt" proferred by Nourse L.J. in *Bank of Credit and*

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Commerce International (Overseas) Ltd. v. *Akindele* [2001] Ch. 437. But such broad tests tell us almost nothing. We need to know, for example, whether bad faith is wider than subjective dishonesty (as Moore-Bick J. thought) and whether fault short of bad faith can ever bar change of position; and, if the answer to the latter question is "yes", we need to build up examples—so that in time one can clarify the underlying principle—of when this will be so. Clear answers to such questions are obscured if the courts resort to saying, without more, that everything turns on whether it is inequitable to allow change of position on the particular facts.

In *Commerzbank AG* v. *Gareth Price-Jones* [2003] EWCA Civ 1663 Mr. Price-Jones, an investment banker, was mistakenly paid £265,000 instead of £15,000 as a bonus by his employer ("the bank"). The payment was made in December 2000. Earlier, in June 2000, the bank had told Mr. Price-Jones by letter that he would be paid a bonus and he had mistakenly interpreted the letter as indicating that his bonus would be £265,000 rather than £15,000. But for his expectation of that bonus, Mr. Price-Jones would have sought employment with another investment bank in June 2000. When he later sued the bank for other monies owing, the bank sought to set-off the £250,000 overpayment as money paid by mistake. To that restitutionary "counterclaim", Mr. Price-Jones argued that he had a change of position defence constituted by his having forgone the opportunity to take up equivalent employment elsewhere.

Mummery L.J., with whom Sedley L.J. agreed, held that while, applying the *Dextra Bank* case, an anticipatory change of position counts, there were two reasons why the change of position defence should here fail. First, it was not clear that Mr. Price-Jones had suffered any detriment or loss. In Mummery L.J.'s words at para. [40], "The fact that, but for his expectation of a very large additional bonus, he would have decided to seek similar employment elsewhere is not sufficiently significant, precise or substantial in extent to be treated as a change of his position ...". Certainly there was no evidence that Mr. Price-Jones would have been paid an initial bonus of £250,000 by another investment bank.

Second, even if he had changed his position by staying with the bank, he had been induced to do so by his own mistaken interpretation of the bank's letter of June 2000. The bank was therefore not causally responsible for that change of position. Oddly, in a judgment that is otherwise to be applauded in striving to articulate clear principle, Mummery L.J. did not mention how this could be reconciled with the Privy Council's view in *Dextra Bank* that fault, short of bad faith, does not bar the change of position defence.

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The tenor of the third judge's—Munby J.'s—reasoning is most worrying. He expressly attacks an approach to change of position which seeks clarity through the development of articulated principle. According to Munby J., the defence should be frozen in its new-born state as described by Lord Goff's broad words in *Lipkin Gorman*. All should turn on whether the defendant's position has so changed that it would be inequitable on the facts of the particular case to require him to make restitution. There should be no gloss or refinement. "Lord Goff saw his statement of principle as sufficiently meeting the standard of adequately defined legal principle" (at para. [50]). But, with respect, this is not the best interpretation of what Lord Goff had in mind. In first authoritatively accepting the defence, Lord Goff stressed that "nothing should be said *at this stage* to inhibit the development of the defence on a case by case basis in the usual way" (my italics); and he later said, "*At present*, I do not wish to state the principle any less broadly than this" (my italics). It is submitted that Lord Goff was anticipating the refinement and clarification of the ingredients of the defence through subsequent decisions. He was anxious not to pre-empt that principled development by an initial over-narrow articulation. He was not contemplating that his broad words should stand as the final word on change of position.

Munby J.'s approach leads him to draw some odd distinctions between "judicial discretion" and "judicial evaluation" and between stating specific factors that do not count as change of position (he regards this as acceptable) and stating specific factors that do count as change of position (this is, apparently, unacceptable). But the real danger of his approach is shown by the issue of the recipient's fault. For having recognised the apparent inconsistency between *Dextra Bank*'s rejection of "relative fault" and saying that Mr. Price-Jones should not be able to rely on change of position because he had "only himself to blame for his predicament" (para. [82]), Munby J. simply evades the need for a reconciliation by saying that the relevant question is whether it is inequitable to deny the defence and "I can see nothing inequitable in denying the defendant such a defence" (para. [83]). Not surprisingly, Munby J. found support for his approach in the judgments in *Niru Battery*.

This is a pity because elsewhere in his judgment Munby J. assists the development of principle by agreeing emphatically that anticipatory change of position is a defence; by clarifying that an opportunity foregone can amount to a change of position just as much as a "reduction of assets"; and, most interestingly, albeit controversially, by suggesting that a non-pecuniary change of position may count.

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The success of the modern law of restitution has been built on the articulation of clear principles gleaned from a mass of often obscure common law and equitable cases and concepts. To accept, without further articulation, that the change of position defence is simply a matter of whether the change means that it is inequitable or unconscionable or unjust to deny restitution would be to take us back to the dark ages of the subject.

ANDREW BURROWS

ENRICHMENT: THE CASE OF THE CHERISHED MARK

THE notion of enrichment within the law of unjust enrichment is notoriously complex but largely unimportant since the vast majority of restitutionary claims relate to money which, being the measure of value, always constitutes an enrichment. Exceptionally, however, the precise definition of enrichment is crucial to the determination of a case. *McDonald* v. *Coys of Kensington* [2004] EWCA Civ 47 is such a case.

In *McDonald* a firm of auctioneers, Coys, had sold a car on behalf of the executors of Mr. T.A. Cressman. This car carried the personalised registration mark TAC1, known as a "cherished mark". McDonald was the successful bidder. It was an express term of the contract of sale that the purchaser would not get the personalised mark, but the auctioneers mistakenly failed to retain the right to the mark. Consequently, when the car was delivered to McDonald, he was entitled to have the car registered in his name with that mark, which he did. McDonald refused to transfer the mark to the executors when requested to do so. Coys sought restitution of the mark or its value by means of a claim for contribution, since Coys had already settled the executors' claim for breach of contract against it.

Mance L.J., delivering the leading judgment, concluded that the just result was that McDonald should make restitution, but the problem lay in fitting the facts of the case within the unjust enrichment principle, especially the notion of enrichment. The putative enrichment in this case was the mark itself. Although the matter was not considered explicitly by the Court of Appeal, the preferable analysis of an enrichment is first to determine whether the defendant has received something of objective value. A cherished mark certainly has such a value. However, it is possible for the defendant to argue that he did not value the enrichment. The defendant in this case could assert such a subjective

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