care in respect of goods was not owed by a third party to the beneficiary of a trust of those goods, because such a duty could only be owed to someone (*e.g.* a trustee) with a possessory title to the goods. Yet the House of Lords so held in *The Aliakmon* [1986] A.C. 785, 809. The ground on which the Court of Appeal distinguished that case – that it concerned *physical*, not *economic*, loss – is insubstantial. In each case the prior question of duty was materially the same. Whether *The Aliakmon* is "legalistic" seems doubtful, but clearly attaching that label did not facilitate a considered application of authority and principle in *Shell*.

Secondly, the Court of Appeal did not discuss or apply the principle that only in "special circumstances" will a trust beneficiary be entitled to sue in his own name a person who, for example, commits a tort in respect of trust property. Since *Shell* was decided, the Supreme Court has reaffirmed this principle: *Roberts* v. *Gill & Co Solicitors* [2010] UKSC 22, [2010] 2 W.L.R. 1227, [22]. Had the principle been attended to in *Shell*, the duty of care which the court formulated would not have been melded with an important but separate principle about the enforcement of trusts.

A final effect of these influences is to make the scope of duties of care in negligence harder to define. Several passages in the judgment can be understood as meaning that Total owed co-extensive duties of care *both* to the trustee and to the trust beneficiaries (at [142]–[144]). It seems unlikely that the Court of Appeal would have intended this. What they probably intended was simply to extend *The Albazero* to a similar problem arising in tort. It is to be hoped that future courts will come to "rationalise" *Shell* along those lines.

P. G. TURNER

RESTITUTION OF VOID LOANS

IN *Sinclair* v. *Brougham* [1914] A.C. 398 the House of Lord held that money lent pursuant to a contract which the borrower lacked capacity to make could not be recovered in "quasi-contract" as money had and received. This was doubted by some of the judges in *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1996] A.C. 669, but that was in the context of a claim for money paid pursuant to a void interest-rate swap contract rather than a loan. It remained unclear whether there is a policy against allowing restitution of money lent. Such a policy was identified in *Sinclair* v. *Brougham*, because restitution was considered only to be available by means of an implied contract, and the implication of a contract would enable the lender to

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recover indirectly money which could not have been recovered directly by suing on the void contract of loan. But with the rejection of the implied contract theory and the recognition of a law of unjust enrichment, can restitutionary remedies be awarded to recover the value of void loans? The Court of Appeal in *Haugesund Kommune* v. *Depfa ACS Bank* [2010] EWCA Civ 579 held that they can.

The dispute related to two Norwegian local authorities, known as "Kommunes", which had put money obtained from an Icelandic bank into investments which proved to be disastrous. The transactions with the bank had been described as "swaps agreements" but were actually borrowing contracts which the Kommunes lacked the authority to make as a result of a Norwegian statute. These contracts were governed by English law and the first question for the Court of Appeal to consider was whether the Kommunes lacked the capacity to enter into the contracts, which would render the contracts void, or only lacked the power to do so, which would not affect their validity under English law as the applicable law. This raised important issues of conflict of laws. It was held that the question of capacity to make the contract was to be determined by Norwegian law, the place of effective "incorporation" of the Kommunes. Although that law stated that the Kommunes lacked the substantive power to make the transactions, the majority characterised this as being equivalent to a lack of capacity in English law, so that the contracts were void.

The question then was whether the bank could obtain a restitutionary remedy to recover the value of the loan. This raised three significant questions for English law. The first concerned the identification of a ground of restitution. No reference was made to Birks's absence of basis thesis, whereby a claim in unjust enrichment could be established simply by proving that the contract was void; total failure of consideration was identified instead. Some cases and books have recognised a distinction between total failure and absence of consideration, with the former being relevant where the consideration failed factually, such as where the claimant received no benefit from the defendant, and the latter where the consideration failed as a matter of law, such as where money has been paid pursuant to a void contract. Aikens L.J., at [62], described this distinction as turning simply on a choice of the most apt terminology without any legal significance. But the distinction is not simply a matter of semantics. Where money has been paid by the claimant to the defendant and the claimant has received some benefit in return it will generally not be possible to conclude that the consideration has failed totally. This is what occurred in *Haugesund Kommune* since the bank, having lent money to the Kommunes, had received quarterly payments of interest and an amortisation payment so that the consideration had factually not failed

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totally, save if these payments could be apportioned: see *Goss* v. *Chilcott* [1996] A.C. 788. But, since the payments were made pursuant to a void contract, they were never validly received by the claimant as a matter of law and could legitimately be ignored: the consideration had not failed but was absent. Legal analysis is much clearer if total failure and absence of consideration remain distinct.

Secondly, the court considered whether there was any policy which should bar a claim for restitution involving money lent, either because restitution would have the effect of enforcing a void contract or because, in claims against public authorities, awarding a restitutionary remedy might undermine the policy of the *ultra vires* doctrine in protecting the public. In a very significant development, public policy was considered to be a distinct defence to restitutionary claims (although Etherton L.J. did suggest, at [151], that it usually formed part of the change of position defence) and would be relevant where, for example, restitution would be contrary to the objective of a statute. In this case it was considered appropriate to consider the policy underpinning the Norwegian statute, even though English law was the applicable law, for reasons of comity. The relevance of Norwegian law is, however, dubious. It legitimately determined the capacity of the Kommunes to borrow money, but it was for English law, as the applicable law of the restitutionary claims, to determine whether restitution should be barred by English public policy. In the end it was held that the award of restitution would not infringe Norwegian public policy. Further, Aikens L.J. justified this conclusion by reference to risk allocation, since the bank had not taken the risk that the transactions might be void.

Finally, the court considered whether the Kommunes had a defence of change of position since they suffered losses following investment of the money they had borrowed. The defence was held not to be available because the Kommunes knew at the time of receipt that the loans would need to be repaid, and had taken the risk that they would not be able to do so. This is a significant development in the change of position defence, since, in addition to the defence being unavailable where the change of position was not causatively linked to the receipt or where the defendant had not acted in good faith, the defence will now fail where the defendant has taken the risk of their position changing. As all investors know, the value of investments may go down as well as up and the former cannot constitute a change of position.

The result for the Kommunes was that they had to make restitution of the money lent. But the result for English law is even more significant: just under 100 years later, this is the final nail in the coffin of *Sinclair* v. *Brougham*.

GRAHAM VIRGO

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