and the English traditions, categorisations are provisional and made for particular purposes.

Secondly, if the element of conscience is to be removed from equitable liability for receipt of misapplied trust assets, thought must be given to the question whether this is appropriate in the context of receipt of registered land. This question was noted above, and it deserves careful attention even if such liability becomes strict in other contexts.

Say-Dee has attracted much comment, some of it laudatory. However, it cannot provide a firm basis for the adoption of strict liability in equity for the receipt of property applied in breach of trust or fiduciary duty.

MATTHEW CONAGLEN
RICHARD NOLAN

ASSISTING THE VICTIMS OF FRAUD: THE SIGNIFICANCE OF DISHONESTY AND BAD FAITH

THE appellants in *Abou-Ramah* v. *Abacha* [2006] EWCA Civ 1492, [2006] 1 All E.R. (Comm.) 247 had been the victims of a money-laundering scam involving two payments of substantial sums of money to the respondent, a Nigerian bank, which was then transmitted to one of the fraudsters, a client of the bank. The appellants brought two distinct claims against the bank in respect of these payments. First, a claim for dishonestly assisting a breach of fiduciary duty; a claim which was accurately and significantly described by Rix L.J. as being an 'equitable tort'. Secondly, an action for money had and received, which the respondent argued was defeated by the defence of change of position in good faith. Although the claims were different, the appeals relating to them raised similar issues and turned on whether the bank had been at fault. The trial judge had found that when the client's account was opened the bank suspected that the client's principals might be using their business to assist corrupt politicians to launder money, but subsequently there was no suspicion that the two particular payments to the bank might be the proceeds of money-laundering. So could the bank be considered to have acted dishonestly and in bad faith?

As regards the claim for dishonest assistance, the definition of dishonesty has been a matter of some controversy. In *Twinsectra* v. *Yardley* [2002] UKHL 12, [2002] 2 A.C. 164 the House of Lords adopted a hybrid test of dishonesty, involving objective and subjective elements, where the conduct must be contrary to the ordinary

standard of honest behaviour and the defendant must be aware that it was dishonest by that standard. However, in *Barlow Clowes International Ltd.* v. *Eurotrust International Ltd.* [2005] UKPC 37, [2006] 1 All E.R. 333 the Privy Council interpreted this as an objective test of dishonesty, which was to be determined by reference to the normally acceptable standard of honest conduct in the light of the defendant's knowledge of the facts of the transaction, but without the defendant needing to be aware that the conduct was dishonest. In *Abou-Ramah* Arden L.J. considered that the decision of the Privy Council should be followed in England. The other two judges did not consider it necessary to examine the conflict between the two cases, because they held that the bank's conduct could not be considered to be even objectively dishonest, as it had no suspicions about the legitimacy of the two payments. Arden L.J. agreed with this conclusion on the facts and emphasised that the bank's general suspicions about the client's business dealings were not sufficient to make its assistance in the transfer of the two particular payments dishonest. Consequently, the claim for dishonest assistance failed.

Rix L.J. did, however, speculate that a subjective test of dishonesty might still be of some significance, although he seemed unsure whether this would add anything to the requirement to consider the defendant's knowledge of the elements of the transaction. But this tentative endorsement of the hybrid test of dishonesty is inappropriate. Dishonesty should refer to an objective standard of conduct and the defendant's thought process should only be relevant to assist in the determination of whether the conduct can be considered to be objectively dishonest. As Arden L.J. correctly concluded, it is unnecessary to have regard to the defendant's views as to the morality of his actions when considering the imposition of civil liability, as opposed to criminal liability where a hybrid test of dishonesty is appropriate.

As regards the claim for money had and received arising from a mistaken payment, the only live issue concerned whether the bank could rely on the defence of change of position following its payment of the money to the fraudsters. This defence is not available if the defendant has acted in bad faith and so it was necessary to consider whether the bank's earlier suspicions about the nature of the client's business constituted bad faith. Bad faith was defined in *Niru Battery Manufacturing Co. Ltd.* v. *Milestone Trading Ltd.* [2003] EWCA Civ. 1446, [2004] Q.B. 985 as failing to act in a commercially acceptable way and sharp practice which falls short of dishonesty. The Court in *Abou-Rahmah* was, however, split, as to whether this test was satisfied. Rix L.J. considered that the bank had acted in bad faith because of its general suspicions about the nature of the client's business. Arden

and Pill L.JJ. disagreed on the basis that bad faith had to be determined at the time of the defendant's change of position and when the bank paid the money to the fraudsters it did not suspect that the transaction was fraudulent. Consequently, the defence succeeded and the restitutionary claim failed.

This difference of opinion is significant because it indicates a fundamental difference of approach as regards the interpretation and application of the defence of change of position. There has been a tendency in the recent cases which have considered this defence (including *Niru Battery* and *Commerzbank AG* v. *Gareth Price-Jones* [2003] EWCA Civ. 1663, [2005] Lloyd's Rep. 298) to evaluate all of the circumstances of the defendant's change of position to determine whether it is inequitable or unconscionable to require the defendant to make restitution. This is the approach which Rix L.J. purported to adopt in taking account of the bank's earlier suspicions about the client's business. Indeed Rix L.J. subtly shifted the language of his analysis from whether the bank had acted in bad faith to whether it was inequitable to make restitution. Arden and Pill L.JJ. focused only on the defendant's conduct at the time it changed its position. The decision in *Abou-Rahma* indicates that bad faith is only concerned with the events which relate to the change of position itself and is not concerned with the general nature of the defendant's conduct. It suggests a return to a more principled interpretation of the change of position defence.

The decision in *Abou-Rahma* might be considered to be a disappointment since, despite the best efforts of Rix L.J., the equitable tort and the law of unjust enrichment could not help the appellant victims of money-laundering fraud. But, against that, it must not be forgotten that the tort of dishonest assistance requires proof of fault and the absence of fault is a significant factor in establishing the defence of change of position. Once the trial judge had concluded that the bank had not been at fault in paying the money to the fraudsters, neither equity nor the law of unjust enrichment could legitimately assist the appellants.

GRAHAM VIRGO

PREMATURE TAX PAYMENTS AND UNJUST ENRICHMENT

IN *Deutsche Morgan Grenfell Group plc* v. *Commissioners of the Inland Revenue* [2006] UKHL 49, [2006] 3 W.L.R. 781 the appellant company, resident in the United Kingdom, paid dividends to its German parent company. This attracted immediate liability for