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

advance corporation tax (ACT), which the appellant duly discharged. Had both the company and its parent been resident in the United Kingdom, they would have made a "group income election" so that dividends could be paid without attracting ACT. The effect of this would have been to delay payment of the corporation tax which was due. The European Court of Justice subsequently found that the relevant domestic legislation infringed the European Community Treaty insofar as it denied the right to make a group income election to companies whose parents were resident abroad (*Metallgesellschaft Ltd.* v. *Inland Revenue Commissioners* (Joined Cases C-397 and C-410/98) [2001] Ch. 620). The Court instructed the United Kingdom to provide an effective remedy for the breach. The appellant in *Deutsche Morgan Grenfell*, having on three separate occasions paid tax earlier than it would have done had it been permitted to make an election, sought recovery of an amount representing the interest generated by the premature payments. However, there was a limitation problem: one of the three ACT payments was made more than six years prior to the claim being brought. This precluded recovery in unjust enrichment unless the claim was framed on the ground of mistake, for which the limitation period would only start running upon the mistake being discovered in 2001 when the ECJ handed down its judgment. So could a successful claim be brought in unjust enrichment for mistake? The House of Lords decided by a majority of four to one that the claim would succeed. Three main factors were considered.

First, the Revenue had argued that recovery of tax at common law is governed exclusively by the principle established in *Woolwich Equitable Building Society* v. *Inland Revenue Commissioners* [1993] A.C. 70 according to which payments made to a public authority pursuant to an unlawful demand are recoverable, regardless of whether or not the claimant has made a mistake. In arguing that a claim in mistake is not available in this case, the Revenue relied on *dicta* from Lord Goff in *Kleinwort Benson* v. *Lincoln City Council* [1999] 2 A.C. 349 in which he referred to the *Woolwich* principle and mistake as "two separate and distinct regimes" of unjust enrichment. The Revenue's argument, although successful in the Court of Appeal, was rejected unanimously by the House of Lords. Their Lordships were critical of the Court of Appeal's handling of Lord Goff's dicta: first, the words were taken out of context; secondly, Lord Goff had said merely that the two regimes were different, not mutually exclusive; and finally the words were *obiter dicta* only and should not be given the force of legislation. Indeed their Lordships were keen for the law not to be tied to such dicta but to develop in a principled manner. Mistake and the *Woolwich* principle are merely two different ways of proving that an enrichment is unjust. "Unjust factors" such as

these frequently overlap: mistake and failure of consideration, for example, commonly arise concurrently on the same facts. Their Lordships decided that as a matter of principle, just as a claimant can choose between competing remedies in contract and tort, he should be free to elect between "unjust factors" in a claim for unjust enrichment. This approach is to be welcomed. If the payer's mistake is considered a reason for an enrichment being unjust, the injustice created by the mistake is in no way lessened by the presence of a competing unjust factor. That the mistake claim attracts a more advantageous limitation period is a matter for the law of limitation. It should not affect the availability of the cause of action.

Secondly, having decided that the mistake claim was available in principle, their Lordships considered whether the payments had been caused by a mistake on the facts. The Lords all agreed that they had been, but for differing reasons. For Lords Hope and Scott, the appellant's mistake was in wrongly believing that it was not entitled to make a group income election. Lord Hoffmann, with whose view Lord Walker seemed to agree, took a broad and purposive interpretation of the ECJ judgment, deciding that its effect was to exempt the appellant from ACT altogether. The appellant's mistake was in wrongly believing that ACT was due. Lord Brown did not specify to which view he inclined. In terms of finding a mistake, little turned on the differing views: on either interpretation, the mistake had been a "but for" cause of the payments.

Thirdly, however, the difference did have a bearing on whether the tax was actually due at the time the payments were made. Would this affect the claim? Lords Hoffmann and Walker, having decided for the reasons given above that ACT was not due, allowed the claim to succeed with little analysis of the issue. Lord Brown similarly found for the appellant. However, according to Lords Hope and Scott, the appellant's failure to make a group income election meant that ACT remained payable. For this reason, Lord Scott dissented and denied the claim. For him, just as the presence of a contractual obligation to make a payment bars recovery in unjust enrichment (see e.g. *Bell* v. *Lever Bros. Ltd.* [1932] A.C. 161), so too does the existence of a valid statutory obligation. Lord Hope, by contrast, found for the appellant notwithstanding his view that ACT was due: it sufficed that there was a causative mistake for the payments. However, there are problems with Lord Hope's approach. As a possible *reductio ad absurdum*, take, for example, a driver who crosses London by driving through the city centre, attracting liability for the statutory Congestion Charge. Having paid, he is told that he could have avoided the charge by taking a different route. Arguably a consequence of Lord Hope's reasoning is that the charge is recoverable because his payment was caused by his

mistakenly electing the wrong route. It is surely undesirable for unjust enrichment law to subvert statutory liability in this manner.

Perhaps the result in *Deutsche Morgan Grenfell* can be explained by its unique facts: whilst the appellant company was entitled to make a group income election as a matter of EC law, it could not have done so at the relevant time even if it had tried. Both EC law and the justice of the case required a finding for the appellant. Lords Hoffmann and Walker achieved this by taking a purposive interpretation of the effect of the ECJ decision; Lord Hope, by expanding the law of unjust enrichment beyond its proper limits. Lord Scott, however, by taking a technical approach to both the ECJ decision and unjust enrichment, was unable to effect justice in the broader sense. If one accepts that the appellants should have won, the reasoning of Lords Hoffmann and Walker is preferable: it does justice on the facts whilst upholding a principled law of unjust enrichment.

Finally, the Lordships were invited to consider whether English unjust enrichment law should replace its system of unjust factors by a requirement that there be an "absence of basis" for the payment, a view advocated by the late Professor Birks (*Unjust Enrichment*, 2nd ed. (Oxford 2005)). Lord Walker, alone in expressing a view, inclined, *obiter*, towards welcoming such a change, but suggested that it would rarely make any difference to the outcome of cases. How would it have affected *Deutsche Morgan Grenfell?* It would certainly have produced a more focused analysis: without unjust factors the concurrent claims issue would disappear, so too the need to find a mistake. Instead attention would rightly be focused on understanding whether the ACT was due, the importance of which some of their Lordships failed to appreciate. However, the new approach would generate one problem of its own, for it is unclear whether a mistaken payer would benefit from the generous limitation period were the claim framed as "absence of basis". Despite this uncertainty, the new approach is attractive.

AMY GOYMOUR

ACQUITTING THE INNOCENT AND CONVICTING THE GUILTY - WHATEVER WILL THEY THINK OF NEXT!

UNTIL now, one aspect of our criminal justice system has been what might be called the "penalty shoot-out theory" of the trial. To win the match, the prosecution are allowed one shot at goal; and if their striker misses, however unluckily, they do not get another chance. Traditionally, this has been so even where the reason the prosecution fail to score is that the defence, having carefully "kept its powder dry"