

## Change of position: A defence of unjust disenrichment

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### Introduction

Section 65 of the *Restatement (Third) Restitution and Unjust Enrichment* ('Restatement') refers to the defence of change of position in a claim for unjust enrichment. The section provides:

*"If receipt of a benefit has led a recipient without notice to change position in such manner that an obligation to make restitution of the original benefit would be inequitable to the recipient, the recipient's liability in restitution is to that extent reduced."*

In England, when the defence of change of position was first explicitly recognised it was stated in very similar terms. The case which recognised the defence in England was *Lipkin Gorman (A Firm) v Karpnale Ltd.*<sup>1</sup> In that case change of position was described as a defence available "to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution".<sup>2</sup>

These leading statements of the defence in both the United States and English law express the focus of the defence at this extremely abstract level of inequity. But inequity does not operate at large. In particular, in England, the courts have recently, and rapidly, developed a considerable number of rules in relation to the defence of change of position to claims based on unjust enrichment. As the Reporter's Note (a) to section 65 of the Restatement observed of English law, "the belated discovery of a general defense of change of position has been the occasion for a much fuller examination of its definition and basic principles than it has ever received in U.S. courts."

This analysis utilises the explosion in this English case law to explain what is meant by the notion of inequity and what it tells us about the nature of the defence of change of position. In English law, the defence of change of position is sometimes referred to as a defence of disenrichment. The thesis of this article is that this is a necessary requirement, but not sufficient. As the rules concerning change of position begin to coalesce in England, the picture which has emerged is that a defendant must prove that any disenrichment is unjust.

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\* Justice of the Supreme Court of Western Australia. My thanks to Elise Bant, Andrew Burrows, Andrew Kull, Charles Mitchell, Robert Stevens and William Swadling for helpful comments upon, and criticisms of, an earlier version of this article.

<sup>1</sup> *Lipkin Gorman (A Firm) v Karpnale Ltd* [1990] 1 AC 548.

<sup>2</sup> *Lipkin Gorman (A Firm) v Karpnale Ltd* [1990] 1 AC 548 at 580 (Lord Goff).

This paper is divided into three parts. The first part explains that the foundations of change of position in ‘inequity’ do not permit unbridled judicial discretion. Instead, this inequity is manifest in established principles. Recent English law is used to explain these principles. Nevertheless, there are difficult questions which require resolution in relation to each and every one of these principles. These questions can only be answered in a principled way once the concept of inequity, and the rationale of the defence, is elucidated.

The second part of the paper turns to the rationale of the defence. Suggestions that the rationale is “security of receipt”, “loss allocation”, “disenrichment” or “irreversibility” are rejected, although it is acknowledged that disenrichment is an essential element the defence and security of receipt and loss allocation may be effects of the defence. The rationale is the protection of the autonomy of the defendant. The degree of protection for a defendant’s autonomy which the courts have chosen is the same protection as that which is given to the claimant’s autonomy. The way this has been made manifest is by the courts effectively developing change of position in tandem with the rules for the claimant to establish a prima facie case. In other words, if a claimant has a prima facie claim for unjust enrichment by proving that the defendant has been enriched, and that the enrichment is caused by an unjust factor, then a defendant will have a defence of *unjust disenrichment* if, like the claimant, she can prove that she was disenriched and that the disenrichment was caused by an unjust factor. There is a principled coherence to this approach. It could hardly be just for a claimant to be able to insist upon restitution, in order to protect his autonomy, and yet to deny the same protection to the autonomy of the defendant.

The final part of this paper then applies that approach to the principles and questions for the defence which require resolution. With a principled path forward, the many unanswered questions concerning the operation of the defence of change of position can be answered without resort to idiosyncratic notions of palm tree justice.

## **I. Change of position: the principles governing ‘inequity’ and the remaining questions**

When the defence of change of position was introduced into English law for the first time in *Lipkin Gorman (A Firm) v Karpnale Ltd*,<sup>3</sup> the House of Lords was required to overrule the decision of *Baylis v Bishop of London*.<sup>4</sup> In *Baylis*, a bishop failed in his attempt to raise a defence of change of position to a claim for restitution of rent charges paid by mistake. The Court of Appeal in *Baylis* had refused to recognise a defence of change of position. Hamilton LJ asserted that a plural and transparent twentieth century law had no place for vague, discretionary and unprincipled “justice”.<sup>5</sup> In overruling the *Baylis* decision, the House of Lords was concerned that the defence be developed in a principled way, thus sidelining the objections of Hamilton LJ. In the leading speech, Lord Goff spoke of unjust enrichment in the following terms:<sup>6</sup>

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<sup>3</sup> *Lipkin Gorman (A Firm) v Karpnale Ltd* [1990] 1 AC 548.

<sup>4</sup> [1913] 1 Ch 127.

<sup>5</sup> [1913] 1 Ch 127 at 140.

<sup>6</sup> *Lipkin Gorman (A Firm) v Karpnale Ltd* [1990] 1 AC 548 at 578.

*“The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied, it is denied on the basis of legal principle.”*

It is in this light that the references by Lord Goff to inequity must be understood. Lord Goff could not have been suggesting that judges can exercise an idiosyncratic discretion in deciding whether the defence applies. This was the very objection which he was trying to counter. On this point a strong consensus has developed in England.<sup>7</sup> The foundation of the defence in “inequity” is not a prescription for an oneiric image of justice masquerading as unprincipled discretion.

However, despite the consensus that change of position is based on principle, not unbridled discretion, the defence has developed without clear enunciation of a core rationale. Unless we know *why* the defence exists, and unless the nature of “inequity” can be elucidated, then it is very difficult to avoid the descent into the chasm of discretionary instance-specific adjudication which Lord Goff was so anxious to avoid.<sup>8</sup> Consider a case like *Scottish Equitable Plc v Derby*.<sup>9</sup> Mr Derby was a married man with two children who struggled to make ends meet. He was then made redundant. He took early retirement and drew early on his pension. When he turned 65 he drew down his pension. Scottish Equitable mistakenly failed to deduct the early pension payments. Mr Derby was overpaid £51,333. He was on the breadline. He had no spare cash and had borrowed to the hilt. He used £41,671 to discharge the mortgage on his modest home. When Scottish Equitable sought restitution of the payment, one question was whether Mr Derby’s repayment of his mortgage entitled him to the change of position defence. Applying a discretionary ‘inequity’ approach the answer might seem easy. Mr Derby desperately needed the money. He had acted honestly. Scottish Equitable had been at fault. But the defence was denied. The Court of Appeal rightly said:

*“it is impossible not to feel sympathy for him, beset as he now is by financial problems, matrimonial problems and health problems. But the court must proceed on the basis of principle, not sympathy, in order that the defence of change of position should not (as Burrows puts it...) “disintegrate into a case by case discretionary analysis of the justice of individual facts, far removed from principle”.*

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<sup>7</sup> *Philip Collins Ltd v Davis* [2003] 3 All ER 808 at 827 (Jonathan Parker J); *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369; [2001] 3 All ER 818 at [53] (Simon Brown LJ); *Standard Bank London Ltd v Canara* [2002] EWHC 1574 (QB) at [90] (Moore-Bick J). See also *The Test Claimants in the FII Group Litigation v The Commissioners for Her Majesty’s Revenue & Customs* [2008] EWHC 2893 (Ch) at [326] (Henderson J); C Mitchell ‘Change of Position: the developing law’ [2005] LMCLQ 168 at 169. A Burrows [2004] CLJ 276 at 280 says that a descent into discretionary adjudication of this defence “would be to take us back to the dark ages of the subject”

<sup>8</sup> Witness, for instance the siren call for such unbridled discretion, based on unconstrained notions of ‘equity’ by Munby J in *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [56]. See also *Vaught v Tel Sell UK Ltd* [2005] EWHC 2404 (QB) at [175]-[176].

<sup>9</sup> [2001] EWCA Civ 369; [2001] 3 All ER 818.

And so it is that English cases have rapidly proceeded to recognise such principles:

- a. The burden of proof of all of the elements of the defence is on the defendant. Therefore, the defence will fail in a situation where the defendant does not “*give a full account*” of how the enrichment was dissipated.<sup>10</sup>
- b. The defendant’s position must have changed detrimentally.<sup>11</sup> In other words, the defendant must have been “disenriched” because the defence operates only *pro tanto* to the extent that the defendant’s wealth has been reduced at the time of trial.<sup>12</sup>
- c. Disenrichments include situations where the claimant’s wealth has been reduced by his own acts or omissions as well as the acts or omissions of a third party or natural event such as where a defendant receives a mistaken payment from a claimant and the payment is then stolen from the defendant.<sup>13</sup> This is described by Andrew Burrows as the “wide view” of change of position.<sup>14</sup>
- d. The defendant must prove that the disenrichment was causally related to the enrichment at the claimant’s expense.<sup>15</sup>
- e. The causal relation can include both changes of position subsequent to the receipt of the enrichment as well as changes of position which anticipate an enrichment which is later received.<sup>16</sup>

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<sup>10</sup> *MGN Ltd v Horton* [2009] EWHC 1680 (QB) at [33].

<sup>11</sup> *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369; [2001] 3 All ER 818 at [35].

<sup>12</sup> *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [1], [28], [36], [39], [40] (Mummery LJ); *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34; [2008] 1 AC 561 at [112] (Lord Nicholls) *NEC Semi-Conductors Ltd v Inland Revenue Comrs* [2006] STC 606 at [175] (Mummery LJ). See also A Burrows *The Law of Restitution* (2<sup>nd</sup> edition, 2002) at 515; P Birks *Unjust Enrichment* (2<sup>nd</sup> edition, 2005) at 207-212; G Virgo *Principles of the Law of Restitution* (2<sup>nd</sup> edition, 2006) at 695. Other jurisdictions label the change of position defence as “disenrichment” because of this requirement. See the discussion of German law in T Krebs *Restitution at the Crossroads* (2001) at 279 and G Dannemann *The German Law of Unjustified Enrichment and Restitution* (2009) at 138. Cf *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [66]-[72] (Munby J).

<sup>13</sup> *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369; [2001] 3 All ER 818 at [31]; *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47; [2004] 1 WLR 2775 at [41]; *Abou Rahmah v Abacha* [2006] EWCA Civ 1492 at [85] (Arden LJ); *The Test Claimants in the FII Group Litigation v The Commissioners for Her Majesty's Revenue & Customs* [2008] EWHC 2893 (Ch) at [325] (Henderson J); *Rose v AIB Group (UK) Plc* [2003] EWHC 1737 (Ch); [2003] 1 WLR 2791 at [49] (Nicholas Warren QC) *National Westminster Bank Plc v Somer International (UK) Ltd* [2001] EWCA Civ 970; [2002] Q.B. 1286 at [25]. This principle was applied in a Hong Kong case when an enrichment was stolen immediately after receipt: *Hua Rong Finance Ltd v Mega Capital Enterprises Ltd*, unreported 25 October, 2000, Court of First Instance, Hong Kong.

<sup>14</sup> A Burrows *The Law of Restitution* (2<sup>nd</sup> edition, 2002) at 515.

<sup>15</sup> *Abou Rahmah v Abacha* [2006] EWCA Civ 1492 at [56], [85]; *Lipkin Gorman (A Firm) v Karpnale Ltd* [1990] 1 AC 548 at 560 (Lord Templeman’s used car example); *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369; [2001] 3 All ER 818 at [31].

<sup>16</sup> *Dextra Bank & Trust Co. Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193.

- f. The change of position must be in good faith.<sup>17</sup>
- g. Carelessness by a payer in making the payment or a payee in changing his or her position is irrelevant.<sup>18</sup>
- h. The change of position must not be made with the knowledge of the claim for unjust enrichment.<sup>19</sup>
- i. The change of position will usually not suffice if the defendant believed that the enrichment would otherwise have to be paid back to the claimant or some performance rendered in exchange.<sup>20</sup>
- j. The person claiming change of position must not be a “wrongdoer”.<sup>21</sup>

However, even in England where the explosion of recent cases has elucidated these principles, there is uncertainty in relation to the boundaries of each and every one of these principles as pronounced in the cases. Consider the following in relation to each of the principles set out above:

- a. Although the burden of proof is on the defendant, what must the defendant prove to discharge this burden? In *Scottish Equitable Plc v Derby*<sup>22</sup> the Court of Appeal held that the defendants were not required to prove precise details of expenditure but they were required to (and did) satisfy the court that their levels of expenditure would have been lower if they had been paid the correct sums. But how can a defendant prove how much lower the levels of expenditure would have been?
- b. What will count as a relevant disenrichment? The “disenrichment” might be a reduction in the defendant’s assets as well as a reduction in a defendant’s future income stream, or potential future income stream.<sup>23</sup> But what about cases where the defendant has paid money to charity,<sup>24</sup> and has a potential claim against the charity for the return of the money paid by the claimant by mistake? Would it make a difference if the charity is prepared voluntarily to return the money even without litigation?

<sup>17</sup> *Lipkin Gorman (A Firm) v Karpnale Ltd* [1990] 1 AC 548 at 580; *Dextra Bank & Trust Co. Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193.

<sup>18</sup> *Dextra Bank & Trust Co. Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193.

<sup>19</sup> *Lipkin Gorman (A Firm) v Karpnale Ltd* [1990] 1 AC 548 at 580; *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47; [2004] 1 WLR 2775 at [41]. In *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446; [2004] QB 985 at [168]-[169] this knowledge bar was conflated with ‘good faith’.

<sup>20</sup> *Goss v Chilcott* [1996] 1 AC 788; *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579.

<sup>21</sup> *Lipkin Gorman (A Firm) v Karpnale Ltd* [1990] 1 AC 548 at 580; *Barros Mattos Junior v Macdaniels Ltd* [2005] 1 WLR 247; *The Test Claimants in the FII Group Litigation v The Commissioners for Her Majesty’s Revenue & Customs* [2008] EWHC 2893 (Ch) at [337]-[338].

<sup>22</sup> [2001] EWCA Civ 369; [2001] 3 All ER 818.

<sup>23</sup> *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [39]. *Getsch v Atsas* [1999] NSWSC 898. Cf Fung & Ho, Change of Position and Estoppel (2001) 117 LQR 14 at 17.

<sup>24</sup> Lord Goff’s paradigm example in *Lipkin Gorman (A Firm) v Karpnale Ltd* [1990] 1 AC 548.

- c. How “wide” is the wide view of change of position? If the innocent defendant *would have* wasted the money even if he had known of the claimant’s mistake, should the defence still apply? So, in the example where a mistaken payment is subsequently stolen, would the defence still apply if the defendant would have gambled, and lost, the money even if he had known of the mistake?
- d. What is the test of causation to be applied?
- e. How can anticipatory changes of position be reconciled with a requirement that there be a causal link for the defence to apply? Plainly, the *receipt* of the enrichment cannot be the cause of the disenrichment since the disenrichment occurs *before* the enrichment in cases of anticipatory change of position.
- f. What is meant by good faith and how far does it extend? In particular, it has been suggested that the concept of good faith does not mean acting without bad faith but can extend to a defendant to acting in a commercially unacceptable way.<sup>25</sup> What does this mean?
- g. Why should carelessness or even negligence by a defendant be irrelevant? Why is it “equitable” to allow the defence to a negligent defendant?
- h. Is it always true that knowledge of a claim for unjust enrichment will bar the defence? Suppose a mistaken payment is stolen or lost before the recipient is able to repay it, or before the mistaken payer will accept repayment?<sup>26</sup> Further, what amounts to “knowledge” of the unjust enrichment claim for the purposes of the bar to the defence? Does “constructive knowledge” suffice?<sup>27</sup> What about knowledge of a potential or possible claim?<sup>28</sup>
- i. When will a belief that an enrichment must be paid back prevent the operation of the defence of change of position? Suppose a defendant receives an advance payment under a void contract and pays the money to a third party, believing that the contract is valid. Courts have held that the defence will not apply.<sup>29</sup> But suppose the defendant spends the money buying materials or doing preparatory work *in performance of* the putative contract. Will the defence be denied in such a case?
- j. What is the meaning of the “wrongdoing” bar to the change of position?

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<sup>25</sup> *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446; [2004] QB 985 at 1004 [164].

<sup>26</sup> *Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211.

<sup>27</sup> See *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446; [2004] QB 985 at 1004 [164]; *Jones v Churher* [2009] EWHC 722 (QB), [2009] 2 Lloyd’s Rep 94.

<sup>28</sup> *Rose v AIB Group (UK) Plc* [2003] EWHC 1737 (Ch); [2003] 1 WLR 2791 at [39].

<sup>29</sup> *Goss v Chilcott* [1996] 1 AC 788; *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579.

For instance, Lord Goff in *Lipkin Gorman* said that the casino defendant who paid money out under a void gambling transaction was not a wrongdoer.<sup>30</sup> But in *Barros Mattos Junior v Macdaniels Ltd*<sup>31</sup>, Laddie J considered that the Nigerian defendants who innocently received \$8 million of stolen money and converted it to foreign currency (and paid it out, less commission) were wrongdoers because the foreign exchange transaction was unlawful under Nigerian law. This creates a fine distinction between acts which are void but “lawful” (gambling transactions) and acts which are void but “unlawful” (the Nigerian foreign exchange transactions).<sup>32</sup> It has also been suggested that a government which demands payment of a tax which is not due is a wrongdoer for the purposes of a restitutionary claim based on constitutional principles but is not a wrongdoer for the purposes of a claim based on a mistaken payment by the taxpayer.<sup>33</sup>

There is therefore uncertainty in the operation of each of the established principles for the defence of change of position. Further principled development of the defence of change of position in the future will be very difficult without identification of a clear rationale for the defence.

## II. The rationale for operation of the defence

### *The rationale is not the security of a defendant’s receipt or loss allocation*

A second contender for the rationale can also be easily excluded. This is the rationale based on security of receipts. That rationale was rejected by the Privy Council in *Dextra Bank & Trust Co. Ltd v Bank of Jamaica*.<sup>34</sup> Dextra Bank argued that the Bank of Jamaica should be denied the defence because the Bank of Jamaica changed its position in anticipation of a receipt. Hence, it was argued, a rationale based on security of actual receipt could not justify the defence in the case. The Privy Council rejected this argument and explained that such a rationale could not usefully be used to delimit the contours of the defence.

There is a plain reason for this. ‘Security of receipt’ is not a rationale; it is the *effect* of the defence. The rationale *explains* the degree of security which is to be given to the defence.

At one extreme, a rationale which dictated that maximum security be given to receipts would defeat all unjust enrichment claims to ensure that every receipt was completely secure. Maximum security of receipt would mean that any benefit received by a defendant ought to be secure from the strict liability of a claim in unjust enrichment.

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<sup>30</sup> *Lipkin Gorman (A Firm) v Karpnale Ltd* [1990] 1 AC 548 at 580.

<sup>31</sup> [2005] 1 WLR 247.

<sup>32</sup> A different view of what “wrongdoing” means is that it excludes from claims for change of position those claims for restitution based on a tort, such as a breach of statutory duty. See J Edelman *Gain-based Damages* (2002) at 96 referring to this approach in the *Restatement of Restitution* s141(2).

<sup>33</sup> *The Test Claimants in the FII Group Litigation v The Commissioners for Her Majesty's Revenue & Customs* [2008] EWHC 2893 (Ch) at [337]-[338].

<sup>34</sup> [2002] 1 All ER (Comm) 193 at [38].

At the other extreme, a rationale which required only minimal security to be given to receipts would only allow the defence in limited circumstances where a defendant had positively relied upon the receipt of the enrichment. The defence would be denied in a number of cases where it is now recognised as being required. For instance, the defence would be denied in a case where a defendant received a mistaken payment which was immediately stolen.<sup>35</sup> Or if a defendant were the recipient of a mistaken transfer of shares the value of which had depreciated by the time the defendant was aware of the claimant's monetary claim and in a position to sell them.<sup>36</sup> The final example where change of position should be available, but where it would be denied if it were limited to cases of reliance is in a situation where a claimant bank makes a mistake about instructions from its customer. The bank pays money to a defendant who is a creditor of the customer. The payment discharges a debt owed to the defendant by the creditor. The bank seeks restitution. In England, the defendant is allowed a defence of change of position because a valuable debt owed to him has been discharged.<sup>37</sup> But if security of *relied upon* receipts were required then the defence would be denied because the defendant has not relied upon the receipt. Interestingly, the *Restatement of Restitution* suggests that the defence of change of position in this final example might be denied, but permits instead a defence of bona fide payee where the receipt discharges a claim which the defendant has as a creditor.<sup>38</sup>

The same point can be made in relation to an alleged rationale of loss allocation. Like security of receipt, an *effect* of the defence of change of position may be that losses are reallocated if both the claimant and defendant have suffered a loss. But a rationale is needed to explain *when* such loss allocation should occur.

### ***The rationale is not “irreversibility” or “restitutio in integrum impossibile”***

In a book which I co-authored with Dr Bant, we advocated an approach to change of position based, in part, on irreversibility.<sup>39</sup> In a recent book on change of position, Dr Bant has argued that this concern with protecting a defendant against irreversible transactions lies at the core of the defence. This approach is very similar to the defence to rescission of *restitutio in integrum impossibile*.<sup>40</sup> The two approaches proceed by the following syllogism: (1) Restitution is concerned with reversing transfers; (2) If a defendant subsequently enters into an irreversible transaction, then the prior transfer between claimant and defendant can no longer be reversed; (3) Restitution to the claimant must therefore be impossible and must be refused.

This argument is unsustainable. First, such a rationale is simply an inaccurate description of the cases. A defendant who receives a mistaken payment of £10,000 and spends it on a holiday has entered into an irreversible transaction. If the rationale

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<sup>35</sup> See note 13 above and *Hua Rong Finance Ltd v Mega Capital Enterprises Ltd*, unreported 25 October, 2000, Court of First Instance, Hong Kong.

<sup>36</sup> See Restatement of Restitution (Third) s65, comment d.

<sup>37</sup> *Barclays Bank Limited v Simms* [1980] QB 679.

<sup>38</sup> See Restatement of Restitution (Third) s67, Illustration 1.

<sup>39</sup> J Edelman and E Bant *Unjust Enrichment in Australia* (2006) chapter 14. For an earlier exposition of this view see E Bant and P Creighton 'The Australian Change of Position Defence' (2002) 30 UWAL Rev 208 at 212-213.

<sup>40</sup> D O'Sullivan, S Elliott and R Zakrzewski *The Law of Rescission* (2008) esp at 557, 576.

were irreversibility then the defence ought to be available whether the defendant is in bad faith, or whether the defendant has knowledge of the claim or a liability to repay the money, or if the defendant would have taken the holiday in any event. In all of these situations the defendant has no defence, despite entering into a transaction which might be said to be “irreversible”.

Confronted by this difficulty, Dr Bant suggests that irreversibility is only one aspect of the defence.<sup>41</sup> But irreversibility cannot even play a limited role. In any personal restitutionary claim, as long as the defendant remains enriched and solvent every transfer of value to a defendant is reversible. A simple example will suffice. Suppose a claimant pays a £100 note to a defendant by mistake and the defendant deposits that note in the bank. Restitution of the claimant’s rights to the precise note will be practically impossible and irreversible. But, as long as the defendant remains solvent, there is no difficulty with reversing the transfer of the £100 value received by the defendant. The defendant simply repays the value.

In truth, all the examples of irreversibility cited by Bant reduce to an enquiry about whether a defendant has been disenriched. In attempting to differentiate her irreversibility requirement from a disenrichment requirement, Bant gives the example of a mistaken payment (say £50 million) which induces a defendant’s irreversible decision to have another child.<sup>42</sup> The defendant might not be able to point to any significant disenrichment, or at least any disenrichment amounting to the mistaken payment. However, far from supporting her thesis, this example undermines it. Suppose that defendant had been considering having another child but would not have done so unless he or she had another £500,000. The defendant is then mistakenly awarded a lottery prize pool of £60 million. Although the decision to have a child is irreversible, the irreversibility is surely only relevant to the extent that the defendant has been disenriched, ie £500,000. No court would allow a defendant to keep the £60 million, at the claimant’s expense, when evidence exists that the defendant would have committed to the same course of action for £500,000. Similar decisions show that this obvious conclusion would be reached by courts in such a case. Thus, an irreversible decision by a defendant to give up an offer of alternative employment will not be a change of position unless the alternative employment was remunerated at a higher level as the defendant’s current job.<sup>43</sup> An irreversible decision to give up employment to become a student is relevant only to the earnings which were forgone.<sup>44</sup>

### ***The rationale of the change of position defence is not “disenrichment”***

The late Professor Birks suggested that the rationale for the defence was that it showed that a key element of the cause of action was absent. Birks considered one of the central rationales for the defence to be its concern with the enrichment element of the defence and a concern to ensure that the defendant is only liable to the extent that his assets remain swollen.<sup>45</sup> This view has attracted supporters.<sup>46</sup>

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<sup>41</sup> See Bant *The Change of Position Defence* at 217.

<sup>42</sup> Bant, 134.

<sup>43</sup> *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [39].

<sup>44</sup> *Getsch v Atsas* [1999] NSWSC 898.

<sup>45</sup> P Birks *Unjust Enrichment* (2<sup>nd</sup> edn, 2005) at 207-209. At 209, Birks also suggested a second rationale being the need to protect the security of a defendant’s receipt.

The most obvious problems with this rationale is that it is inconsistent with the English case law and is also inconsistent with the principled operation of the defence. Consider the defendant who receives a mistaken payment of £10,000 and spends the money on a holiday. Just as the receipt of a holiday would not be an enrichment if the defendant chose it only because he believed it to be free,<sup>47</sup> so too a defendant will be disenriched if he spends the money on a holiday believing that he was not required to repay the money received.

But the simple example can easily be altered so that the disenrichment is not sufficient for a defence of change of position. So, if the defendant took the holiday in bad faith, or knowing of the claimant's mistake then the defence will be denied. If the defence were based only upon a rationale of disenrichment then the defence should be available no matter whether the defendant is in bad faith, or whether the defendant has knowledge of the claim or a liability to repay the money. Yet, as we have seen, the defence is denied in these cases.

Although "disenrichment" cannot be the rationale for the change of position defence, there is significant support for it as an *element* of the defence which must be proved before the defence can succeed.<sup>48</sup> In other words, disenrichment is a necessary but not sufficient requirement for the defence. As will be seen below, the defence of change of position also requires that the disenrichment be *unjust*.

### ***The rationale is equal protection for the defendant's autonomy***

There have been several important statements in English law which have attempted to elucidate the defence's rationale. In each statement, the courts have emphasised that the "equity" in relation to change of position requires comparison between the position of the payer and the payee.<sup>49</sup> Perhaps the most well known statement of the rationale of change of position was by Lord Goff in *Lipkin Gorman*:<sup>50</sup> "*the injustice of requiring him to repay outweighs the injustice of denying the plaintiff restitution.*" This has been subsequently emphasised by the Court of Appeal as the rationale for the defence.<sup>51</sup> The question then is how to determine when a defendant's disenrichment is *unjust*? The degree of protection which the courts have chosen is the same protection as is given to the autonomy of the claimant. This ought to be the minimum protection given to a defendant. A claimant should not be entitled to insist upon a right to

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<sup>46</sup> R Chambers "Two kinds of enrichment" in R Chambers, C Mitchell, and J Penner (eds) *The Philosophical Foundations of the Law of Unjust Enrichment* (Oxford 2009) 242-278.

<sup>47</sup> *Bridgewater v Griffiths* [2000] 1 WLR 524; *Rowe v Vale of White Horse District Council* [2003] EWHC 388 (Admin) at [14].

<sup>48</sup> See, eg, *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [1], [28], [36], [39], [40] (Mummery L.J.); *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34; [2008] 1 AC 561 at [112]; *NEC Semi-Conductors Ltd v Inland Revenue Comrs* [2006] STC 606 at [175] ("unjustly gained and retained"). See also A Burrows *The Law of Restitution* (2<sup>nd</sup> edition, 2002) at 515; P Birks *Unjust Enrichment* (2<sup>nd</sup> edition, 2005) at 207-212; G Virgo *Principles of the Law of Restitution* (2<sup>nd</sup> edition, 2006) at 695 ("loss of benefits").

<sup>49</sup> *Trustee of Principal Group Ltd v Anderson* (1997) 147 DLR (4th) 229 at 234. See also *Rose v AIB Group (UK) Plc* [2003] EWHC 1737 (Ch); [2003] 1 WLR 2791 at [39].

<sup>50</sup> *Lipkin Gorman (A Firm) v Karpnale Ltd* [1990] 1 AC 548 at 579.

<sup>51</sup> *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579 at [122] (Aikens LJ). See Briggs and Edelman 'Restitution and Not-So-Local Authorities' (2010) 126 LQR 500.

protection of his autonomy in a primary claim without affording the same protection to the autonomy of the defendant in a defence.

In relation to a claimant's primary claim, the late Professor Birks described a mistaken payment of a non-existent debt as the "core case" of unjust enrichment.<sup>52</sup> This is a core case of unjust enrichment because it illustrates that the payer's normative claim to an enrichment is caused by to some impairment. The claimant's entitlement is based on (1) the enrichment of the defendant at his expense; and (2) the injustice of that enrichment. Birks explained that the rest of the subject of unjust enrichment was concerned with all events "materially identical" with that core case of the mistaken payment.<sup>53</sup> There is now a consensus that the generalisation of this core case extends to situations where a claimant's intention to enrich a defendant is impaired or qualified. A defendant is entitled to restitution of unjust enrichment if he pays money to a defendant by mistake, by duress or undue influence or qualified by a condition which fails.<sup>54</sup> Each of these situations involves a right to restitution from a defendant where the defendant's enrichment would not have arisen but for the imperfect intention of the claimant. Outside unjust enrichment, restitution can also be awarded for reasons of wrongdoing, or for particular policy reasons. It has been recognised that restitution for wrongdoing has nothing to do with unjust enrichment<sup>55</sup> and arguably neither does restitution for policy reasons.<sup>56</sup>

If the core meaning of "unjust" in relation to a claimant's claim for restitution of unjust enrichment is that his intention was vitiated or qualified, then the natural meaning of "unjust" for the defendant's defence ought to be the same. This is particularly the case if the defendant's position is being compared with the claimant's. In other words, if a claimant is entitled to restitution of a defendant's enrichment when the receipt of that enrichment is unjust then the defendant should be entitled to defend that claim by showing that the defendant has subsequently been disenriched in circumstances which are unjust, as measured by the same yardstick. Change of position is, essentially, a defence of "unjust disenrichment".

We can apply this thesis to the core case for the defence of change of position. We have seen that the core case of unjust enrichment involves the enrichment of a defendant when the claimant would not have conferred that enrichment but for a mistake as to liability to pay the defendant. Therefore, the core case for the defence of

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<sup>52</sup> P Birks *Unjust Enrichment* (2<sup>nd</sup> edition, 2005) at 3.

<sup>53</sup> P Birks *Unjust Enrichment* (2<sup>nd</sup> edition, 2005) at 3.

<sup>54</sup> *Moses v Macferlan* (1760) 2 Burr 1005, 1012; 97 ER 676, 681. *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61. *Deutsche Morgan Grenfell plc v IRC* [2006] UKHL 49; [2007] 1 AC 558, [21]; *Sempra Metals Ltd (formerly Metallgesellschaft) v Inland Revenue Commissioners* [2007] UKHL 34; [2007] 3 WLR 354, [23] and [25]; *Farah Constructions Pty Ltd v Say Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89, [150].

<sup>55</sup> *Sempra Metals Ltd v HMRC* [2007] UKHL 34; [2008] 1 AC 561 at [116] (Lord Nicholls), [132]-[146] (Lord Scott), [230]-[231] (Lord Mance); *Kingstreet Investments Ltd v New Brunswick* [2007] SCC 1; [2007] 1 SCR 3 at [33]; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; 230 CLR 89 at [150].

<sup>56</sup> It was assumed, without argument to the contrary, that constitutional policy is a ground of unjust enrichment in *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558. Compare *Kingstreet Investments Ltd v New Brunswick* [2007] SCC 1; [2007] 1 SCR 3 and J Edelman and E Bant *Unjust Enrichment in Australia* (2006) chapter 13.

change of position is where a defendant would not have been disenriched but for a mistake as to liability to repay the claimant. So, a claimant who pays a defendant £10,000, mistakenly believing himself to be liable to do so, will have a *prima facie* entitlement to restitution if, but for the mistake, the money would not have been paid.<sup>57</sup> But if the defendant disenriches herself by spending that £10,000 on a holiday, which would not have been taken but for the mistaken belief that she was not liable to repay the claimant, then she will have a defence of change of position.

The application of this rationale of change of position is not confined to a defendant's disenrichments caused by mistake. A claimant who pays money to a defendant by mistake would be met with a defence of change of position if the defendant had been compelled, by duress, to dissipate that money in a manner which disenriches himself. An example might be a fraudulent scheme where the claimant is defrauded into mistakenly paying money to the defendant who, under duress, is made to pay the money to the fraudster.<sup>58</sup>

The approach applies in the same way to cases of failure of consideration. In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*<sup>59</sup> a Polish company ordered textile machinery from a company in England and made a part payment of £1,000. The English company incurred expenses in preliminary work for manufacturing the machines. But before the machines could be completed and sent to the Polish company, the outbreak of World War II frustrated the contract. The House of Lords was unanimous in finding that the Polish company was entitled to restitution of its payment because the English company had been unjustly enriched. The enrichment was unjust because there was a failure of consideration. "Consideration" meant the condition for which the work had been performed.<sup>60</sup> The condition for the Polish company's payment was that machines would be provided, and none were. Viscount Simon LC observed that English law did not recognise any defence based on the expenditure by the defendant.<sup>61</sup> Even if the Law Reform (Frustrated Contracts) Act 1943 had not been enacted, the recognition of the common law defence of change of position would mean that the common law result in a case like *Fibrosa* would be different today. The claimant paid money on the condition of receiving machines. It was entitled to restitution because the defendant was enriched and that condition failed. This precise conclusion was reached by Robert Goff J in relation to what he considered to be a statutory recognition of the change of position defence in the Law Reform (Frustrated Contracts) Act 1943, section 1(3).<sup>62</sup> Robert Goff J explained that the defence applied to the extent of a defendant's expenditures "*for the purpose of the*

<sup>57</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 372 (Lord Goff) 399 (Lord Hoffman) 407-8 (Lord Hope); *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249; *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193; *Saunders & Co v Hague* [2004] 2 NZLR 475 at 490-1 (Chisholm J).

<sup>58</sup> *D Owen & Co v Cronk* [1985] 1 QB 265 is the reverse of such a case: the claimant was acting under duress in conferring the enrichment and the defendant was mistaken in the disenrichment.

<sup>59</sup> [1943] AC 32.

<sup>60</sup> The House of Lords brought English law in line with their earlier decision for Scottish law in *Cantiare San Rocco SA v Clyde Shipbuilding and Engineering Co* [1924] AC 226. At 235 Lord Birkenhead LC (with whom Lord Atkinson agreed) said "The rule may, I think, be fairly stated thus: A person who had given to another any money or other property for a purpose which had failed could recover what he had given."

<sup>61</sup> [1943] AC 32 at 49.

<sup>62</sup> In *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 804.

*performance of the contract.*” The defendant had expended money for a shared condition or purpose (producing the machines) which failed. In the absence of the statute, the defendant would have had a defence to the extent that it was unjustly *disenriched* by its expenditure for the condition of fulfilling the contract.

Finally, the same restrictions which apply to the unjust factor in unjust enrichment have been applied to the element of injustice in the defence of unjust disenrichment. For instance, the law sometimes recognises that enrichment at the expense of another is not unjust even if the claimant conferred the enrichment upon the defendant by mistake. An example of this is where the claimant labours under a unilateral mistake when entering into a bilateral contract with the defendant. In unjust enrichment no recovery is generally possible. I have explained elsewhere that this principle is based on the need for respect for mutual autonomy in bi-lateral arrangements.<sup>63</sup> In bi-lateral exchanges, a claim for unjust enrichment (whether expressed as mistake, or failure of consideration) is only possible where the objective condition of the claimant’s transfer to the defendant has failed. The conditionality means that the autonomy of both parties to the bi-lateral arrangement is protected. This is true even if the bi-lateral arrangement is a void contract.<sup>64</sup> The same ought to be true in relation to change of position. Assume that a claimant and defendant enter into a contract which turns out to be void. The claimant cannot recover for payments to the defendant as a result of a unilateral mistake. Equally, the defendant in this case cannot have a defence of change of position if the defendant labours under a unilateral mistake. Thus, there will be no defence for a defendant who receives a payment under a void contract, but mistakenly gambles with the money and loses it. The defendant’s mistake is unilateral; the gambling is not a shared condition for the use of the money.<sup>65</sup>

### **III Application: This rationale explains the existing principles and provides clarity for future development**

We turn now to the application of this equality of treatment rationale. In relation to each of the areas identified in Part I of this paper, we can see that the rationale explains the existing principles as well as providing a clear and coherent manner in which the defence can be developed for each of the difficult issues which arise in these areas:

- a. A claimant is required to prove that a defendant would not have been enriched but for the mistake that the claimant made. But suppose that the claimant makes a payment to a defendant as a result of a mistake about some relevant fact. Suppose also that there is evidence that the claimant might have paid a lesser sum to the defendant even if aware of the relevant fact. It is unlikely that the claimant would have to prove precisely the reduced amount which would have been paid. This is likely to be a matter of “judicial estimation” which is assessed in the same

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<sup>63</sup> J Edelman 'Liability in Unjust Enrichment when a contract fails to materialise' in Burrows and Peel (eds), *Contract Formation and Parties* (OUP 2010).

<sup>64</sup> See Lord Hoffmann in *Deutsche Morgan Grenfell Group Ltd v Inland Revenue Commissioners* [2006] UKHL 49; [2007] 1 AC 558 at [26]-[28]. See also Lord Brown at [175]. And see also *Sharma v Simposh Limited* [2011] EWCA Civ 1383.

<sup>65</sup> *Goss v Chilcott* [1996] 1 AC 788; *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579.

manner as the assessment of damages for a lost chance of investment.<sup>66</sup> By applying the rationale which protects the defendant in the same way as that of the claimant, the same must be true of a defendant's assertion of change of position. The defendant is not required to provide precise details of the levels of expenditure which would not have been made but for the defendant's mistake about liability to repay.<sup>67</sup> It is a matter of judicial estimation.

- b. By focussing on the symmetry of protection for the defendant with the claimant, the notion of what amounts to a disenrichment should be the same test as what amounts to an enrichment. Enrichment is concerned with the exercise of a deliberate preference by a defendant which enhances his wealth.<sup>68</sup> Hence, a defendant who, after demand, chose to retain a licence plate which had been mistakenly transferred was held to be enriched.<sup>69</sup> Disenrichment likewise requires that the enrichment which was acquired by the defendant is reduced and this also requires evidence of a deliberate preference by the defendant. Therefore the refusal by a defendant to request the return of a mistaken payment from a charity, which the charity would readily return, should not be a disenrichment. But if the defendant's claim is not readily realisable (such as if the defendant is required to litigate against the charity for the return of the payment) then disenrichment should be recognised without the need to litigate.<sup>70</sup>
- c. This rationale also explains why the wide view of change of position should not encompass every situation where a defendant is disenriched by the actions of a third party. As we saw above, the most commonly cited example of the "wide view" is where money is mistakenly paid to a defendant and then is stolen by a third party. In all of the cases in which this example is considered it has been assumed that a defendant would have behaved differently if she had known of the mistake: for instance, the money would have been immediately returned to the claimant. But suppose there is evidence, based on prior occasions, that even if the defendant had known of the mistake, the defendant would still have used the money for his own benefit, such as by gambling with it to make a profit. If the defendant would have appropriated the money to his own use, and for his own profit, had he known of the mistake, then he should also bear any risk of loss.<sup>71</sup>

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<sup>66</sup> *Parabola Investments Ltd v Browallia Cal Ltd* [2010] EWCA Civ 486. I am grateful to Dr Steven Elliott for drawing this analogy to my attention.

<sup>67</sup> *Philip Collins v Davis* [2000] 3 All ER 808, 827 (Jonathan Parker J); *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369; [2001] 3 All ER 818 at [33].

<sup>68</sup> *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775 at 2792.

<sup>69</sup> *Cressman v Coys of Kensington (Sales) Ltd* [2004] 1 WLR 2775.

<sup>70</sup> *Bishopsgate Investment Management Ltd. v. Maxwell (No. 2)* [1994] 1 All E.R. 261 at 266.

See, also the analogy drawn by Bant (at 131) with cases such as *Hillsdown Holdings Plc v Pensions Ombudsman* [1997] 1 All ER 862 at 904; *Hinckley and Bosworth BC v Shaw* (1999) 1 LGLR 385.

<sup>71</sup> Related authority which might support this view can be seen in the cases involving the change of position laches defence. See especially *Clegg v Edmondson* (1857) 8 De GM & G 747, 814

- d. The test for causation on this approach is also easily answered. It is that the disenrichment would not have occurred “but for” the unjust factor. A mistaken payment is only actionable if the claimant would not have conferred the enrichment but for the mistake.<sup>72</sup> The symmetrical protection of the defendant explains why the causation test for the defendant is a test of whether the defendant would have been *disenriched* “but for” a mistake. The defendant’s mistake will usually relate to his assumed absence of liability to repay.<sup>73</sup> But other mistakes will count for a defendant, just as other mistakes suffice for a claimant. The following example is a good illustration. Suppose a defendant is unjustly enriched by the receipt of goods which were requested from supplier A (against whom the defendant has a set off right) but supplied by supplier B. The defendant had no contract with supplier B but, by reason of his mistake about the identity of the supplier, the defendant consumes the goods thinking he has a set-off.<sup>74</sup> As Lord Millett has confirmed, this case is today understood as an application of change of position.<sup>75</sup>

Of course, the same difficulties will apply to the application of “but for” causation in this area of the law as are encountered in the law of torts. For example, suppose that a business mistakenly overcharges every customer by £10 over the course of a year. At the end of the year the owner of the business makes an additional £200,000 in profit as a result of these overcharges. Delighted at this profit, the owner takes 6 months off work and spends the profit on a long holiday which he would not otherwise have taken. Each individual customer brings a claim for his or her money back; £10 each. Each customer argues that the business owner has not changed his position because “but for” each single mistaken payment the business owner would still have taken the holiday. As in the law of torts, the “but for” test of causation will not always apply. It ought to be sufficient here that each payment made a material contribution to the defendant’s decision to take the holiday.<sup>76</sup>

- e. The puzzle of how causation operates in relation anticipatory change of position can also be explained on this approach. Anticipatory change of position is not a situation where the effect or outcome precedes its cause.

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(44 ER 593 at 604 (Knight Bruce LJ): “He should shew himself in good time willing to participate in possible loss as well as profit, not play a game in which he alone risks nothing.”  
<sup>72</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 372 (Lord Goff) 399 (Lord Hoffman) 407-8 (Lord Hope); *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249; *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193; *Saunders & Co v Hague* [2004] 2 NZLR 475 at 490-1 (Chisholm J).

<sup>73</sup> *The Test Claimants in the FII Group Litigation v The Commissioners for Her Majesty's Revenue & Customs* [2008] EWHC 2893 (Ch) at [263], [325]; *Scottish Equitable Plc v Derby* [2001] EWCA Civ 369; [2001] 3 All ER 818 at [31]; *National Westminster Bank Plc v Somer International (UK) Ltd* [2001] EWCA Civ 970; [2002] QB 1286 at [25].

<sup>74</sup> *Boulton v Jones* (1857) 2 H & N 564.

<sup>75</sup> *Shogun Finance Ltd v Hudson* [2003] UKHL 62; [2004] 1 AC 919 at [96].

<sup>76</sup> Compare, in the law of torts, *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10; [2011] 2 WLR 523.

Precisely the same “but for” test of causation applies in these cases. The impairment of the defendant’s intention must cause the change of position. Suppose a wealthy philanthropist naturalist makes a large donation to the WWF thinking it is the World Wildlife Federation, when in fact it is the World Wrestling Federation. The WWF, in anticipation of the receipt, disenriches itself by spending the money holding a wrestling spectacle which it would not otherwise have done. Assuming the philanthropist would not have given money to the wrestlers, then he is likely to be entitled to restitution because his mistake caused his payment.<sup>77</sup> So too, the WWF is also mistaken when it spends the money in anticipation of its receipt: it is mistaken about the fact that the philanthropist’s motivation was to support wrestling, and also mistaken about whether any receipt would be vulnerable to a claim for restitution. But for that mistake the WWF would not have made its expenditure. It has a change of position defence of £10,000.

- f. The equality of treatment analysis explains the approach taken by the courts to good faith and the reason why it is not merely bad faith that should operate as a bar to change of position. A mistaken claimant who pays in bad faith, illegally or contrary to public policy but makes a mistaken payment cannot recover.<sup>78</sup> Equally, a defendant who changes his position in bad faith, illegally or in a manner contrary to public policy cannot recover.<sup>79</sup> In these cases the law does not confer protection on the claimant or of the defendant.
- g. The answer to the question of why a careless defendant is entitled to the defence is also simple. The defendant’s is protected to the same extent as the claimant. Since the claimant is entitled to restitution of a mistaken payment made carelessly,<sup>80</sup> so too is a defendant entitled to a defence of change of position when the defendant is careless in losing the enrichment: “*if fault is to be taken into account at all, it would surely be unjust to take into account the fault of one party (the defendant) but to ignore fault on the part of the other (the plaintiff)*”.<sup>81</sup>
- h. The equality of treatment rationale also explains why ‘knowledge’ of a claim usually operates as a bar to change of position and the circumstances in which knowledge might extend to knowledge of a *possible* claim or a potential claim.<sup>82</sup>

In relation to actual knowledge, if a claimant makes an unconditional payment with knowledge of all the relevant facts, then in the absence of duress or undue influence there is no need to protect the claimant. The law of unjust enrichment does not do so. Equally, a defendant who

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<sup>77</sup> *Barclays Bank Ltd v. W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677 at 695.

<sup>78</sup> *Parkinson v College of Ambulance Ltd* [1925] 2 KB 1.

<sup>79</sup> *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2003] EWCA Civ 1446; [2004] QB 985 at [168]-[169].

<sup>80</sup> *Kelly v Solari* (1841) 9 M. & W. 54; 152 ER 24.

<sup>81</sup> *Dextra Bank & Trust Co. Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193 at [42].

<sup>82</sup> *Rose v AIB Group (UK) Plc* [2003] EWHC 1737 (Ch); [2003] 1 WLR 2791.

receives a payment with knowledge of the claimant's mistake, does not need protection. All the defendant needs to do is to undertake to hold the payment for the benefit of the claimant. This is as effective as a tender of restitution.<sup>83</sup>

In relation to constructive knowledge, a primary claim for mistake, the claim will fail if the claimant's knew sufficient facts for it to be concluded, objectively, that he had taken the risk of being mistaken.<sup>84</sup> Exactly the same risk-taking analysis is used in change of position cases to describe situations when a defendant might be denied the defence.<sup>85</sup> The risk-taking analysis, in both situations, can often be little more than a statement of a conclusion. In relation to the primary claim, the conclusion that a claimant, or defendant, has borne the risk should be deconstructed into a question of whether, but for the mistake, the claimant would probably have made the payment in any event; mere awareness of the possibility of mistake will not be sufficient to disentitle the claim.<sup>86</sup> In relation to the defence it should be asked whether but for the defendant's mistaken belief in an absence of any liability to repay, the defendant would probably have made the change of position expenditure in any event. Hence, a payment made by mistake, but to close a transaction will not be recoverable by a claimant.<sup>87</sup> And a defendant's mistake as to liability to repay will not permit a defence if the disenrichment was made for commercial reasons which probably would have caused it to be made in any event.<sup>88</sup> On the other hand, an awareness by a defendant of a general risk of mistake in transactions of this type will not usually be sufficient to infer that the defendant would have acted in the same way but-for the mistake about liability to repay.<sup>89</sup>

- i. The equality of treatment approach clarifies when knowledge that something must be provided in exchange for the enrichment will bar the defence. This point was explained in detail above. When the claim is based on failure of consideration the claimant is entitled to restitution of a benefit conferred upon a condition which fails. Equally, if the defendant changes his position by making expenditure on a shared condition which fails then the defendant will be entitled to a defence. Thus, spending an advance payment in relation to a contract which is

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<sup>83</sup> *Portman Building Society v Hamlyn Taylor Neck (a firm)* [1998] 4 All ER 202. In *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 where the defendant did just this, a defence of change of position was allowed but Tipping J noticed that it had not been argued that the defendant was not enriched.

<sup>84</sup> *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558.

<sup>85</sup> *Rose v AIB Group (UK) Plc* [2003] EWHC 1737 (Ch); [2003] 1 WLR 2791 at [58].

<sup>86</sup> *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558.

<sup>87</sup> *Brennan v Bolt Burdon* [2005] QB 303.

<sup>88</sup> *Rose v AIB Group (UK) Plc* [2003] EWHC 1737 (Ch); [2003] 1 WLR 2791 at [58].

<sup>89</sup> *Abou Rahmah v Abacha* [2006] EWCA Civ 1492.

later frustrated will enliven the defence.<sup>90</sup> But spending the advance payment for some other purpose or condition, such as a holiday, will not.<sup>91</sup> In fact, as we have seen above, the defence will not apply even if the defendant labours under some separate and independent mistake in making this expenditure.

- j. We can understand what is meant by a “wrongdoer” from this paper’s analysis. Lord Goff’s reference to “wrongdoing” in *Lipkin Gorman*<sup>92</sup> was probably borrowed from the United States *Restatement of Restitution*<sup>93</sup> which was describing the law of civil wrongs.<sup>94</sup> As we have seen, restitution is a multi-causal remedy.<sup>95</sup> But the rationale for reversing an enrichment obtained by wrongdoing is not the protection of the intention of the claimant. Change of position does not apply. Hence, although a defendant, in principle, would be entitled to the defence of change of position to a claim for restitution of unjust enrichment which was caused by his duress of the claimant, the claimant could simply recharacterise the claim as restitution for the wrong of intimidation, which would bar the defence.<sup>96</sup> This explanation justifies the approach of the courts where, on the same facts, a claim for mistake can be subject to the change of position defence but a claim based on restitution for reasons of constitutional policy, which are not concerned with the claimant’s intention, cannot.<sup>97</sup> However, it is unnecessary to abuse the term “wrongdoer” in these cases. The simple point is that where the claim for restitution is not concerned with the intention of the claimant then the defendant will not have a defence of change of position. Restitution is not limited to claims for unjust enrichment and wrongdoing. It is not necessary to characterise the *Woolwich* claim as based on “wrongdoing”. Courts need only recognise that the policy-motivated restitutionary claim for restitution of a tax payment pursuant to government demand is not concerned with impairment of intention claim for restitution of unjust enrichment.<sup>98</sup>

## Conclusion

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<sup>90</sup> *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 804.

<sup>91</sup> *Goss v Chilcott* [1996] 1 AC 788; *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579.

<sup>92</sup> *Lipkin Gorman (A Firm) v Karpnale Ltd* [1990] 1 AC 548 at 580.

<sup>93</sup> American Law Institute *Restatement of Restitution* s141(2).

<sup>94</sup> *Western Areas Exploration Ltd v Streeter* (No 3) [2009] WASC 213 at [40]; J Edelman *Gain-based Damages* (2002) 96-97.

<sup>95</sup> See above note XX.

<sup>96</sup> For the explanation of the contemporary merging and historical common roots of the unjust factor of duress, the tort of intimidation and the crime of menaces see J Edelman ‘An Historical Essay on Duress, Intimidation and Menaces’ (2011) 1 JCACC 1.

<sup>97</sup> *Littlewoods v HMRC* [2010] EWHC 1071 (Ch) at [101], [105]-[109]; *The Test Claimants in the FII Group Litigation v The Commissioners for Her Majesty’s Revenue & Customs* [2008] EWHC 2893 (Ch) at [337].

<sup>98</sup> Although the government might commit a breach of statutory duty under the *European Communities Act 1972*, the bar to change of position in these cases of restitution for constitutional reasons does not require the government to be described as a wrongdoer.

The purpose of this paper was to elucidate the rationale of the defence of change of position and to emancipate that rationale from very high level statements in English law, and in the Restatement, that the basis for the defence is ‘inequity’. This article used the proliferation of English cases since 1991 to illuminate the rationale and to show that ‘inequity’ is not an invitation to apply idiosyncratic discretion.

In England, from Lord Goff’s statement of the essence of the defence in 1991 to the application of those words by the Court of Appeal in 2010, there has been an insistence that the defence balance the injustice in relation to the claimant with the injustice in relation to the defendant. The principles by which defence operates in English law has developed by reference to this principle. The injustice with which the law is concerned for the claimant—ie the reason for allowing a claim—means that a claimant must prove the existence of an established unjust factor. An unjust factor, such as mistake, duress, or failure of consideration protects the claimant’s intention in circumstances in which a defendant is enriched. The defence of change of position provides the same protection for a defendant who receives the enrichment. As Rix LJ explained laconically, unjust enrichment<sup>99</sup> “reflects the moral consciousness that a defendant who has been unjustly enriched at another’s expense must, subject to defences which are part and parcel of that same moral consciousness, such as change of position, return what he has received.”

A claimant must prove that a defendant has been enriched. Conversely, a defendant must prove that she has been disenriched. A claimant must also prove that the defendant’s enrichment was caused by some unjust factor. Conversely, a defendant must prove that the disenrichment was caused by some unjust factor. In other words, for the defence to apply, disenrichment is not enough. A defendant will not be entitled to the defence unless he or she was *unjustly* disenriched. The meaning of ‘inequity’ in the defence deconstructs into the same requirement for an unjust factor as the primary claim for unjust enrichment. For this reason, the English law description of the defence of change of position as a defence of disenrichment is not entirely accurate. It should be a defence of unjust disenrichment.

A core case of unjust enrichment is that of a claimant whose enrichment of a defendant is caused by the claimant’s mistaken belief in a non-existent debt. From this core case of mistake we can generalise to other situations in which claims in unjust enrichment arise. Similarly a core case of change of position will be that of a defendant whose *disenrichment* is caused by a mistaken belief that there is no liability to the claimant. From this core case of change of position we can generalise to other situations in which a defence based on disenrichment will arise. In both instances—unjust enrichment and unjust disenrichment—the law is concerned to protect, respectively, the wealth of the claimant and the wealth of the defendant from imperfections in their intentions.

We saw that this rationale not only explains the existing principles but also provides a coherent and principled path for development of the defence of change of position through a maze of difficult questions which the courts may encounter in the future. It also explains one large puzzle which arises as a result of the application of the defence in the very case which recognised it in English law: *Lipkin Gorman v*

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<sup>99</sup> *Haugesund Kommune v Depfa ACS Bank* [2011] EWCA Civ 33 at [72].

*Karpnale Ltd.*<sup>100</sup> In that case the question was whether the casino was entitled to a defence of change of position in relation to its receipt of money for losing bets by a fraudulent solicitor which was traceable to the claimant law firm's assets. The casino asserted a defence of change of position in relation to *winning* bets which it had paid out to the solicitor. The House of Lords recognised the defence. This case has baffled commentators who have struggled to explain why the payment by the casino on the winning bets was a defence to claims based on independent betting transactions from the losing receipts. By understanding the rationale of the defence as protection of the autonomy of the casino, the reason can be simply explained: but for its mistaken belief that it was entitled to retain the receipts from the losing bets, the casino would never have entered into the winning bet transactions.<sup>101</sup>

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<sup>100</sup> [1991] 2 AC 548.

<sup>101</sup> This is very close to the explanation provided by Lord Goff at [1991] 2 AC 548 at 582.