

ANNUAL SURVEY

Introduction: The prehistory

The general body of Restitution in Irish law is in a curious state: many of the advances made recently in England were made quite some time ago in the Irish courts; however, a certain naivety often characterises the treatment of the issues in Restitution cases. First, the Supreme Court rejected the implied contract fallacy in 1978. In *East Cork Foods v O'Dwyer Steel* [1978] IR 103, the parties to this action had been co-defendants in a previous tort action, which they had lost at first instance. East Cork Foods paid over the full amount of the damages, intending to seek contribution from O'Dwyer for its share. However, on appeal in the tort action, it was held that O'Dwyer was 100% liable. In this action East Cork Foods claimed that it had in effect paid O'Dwyer's debt. In finding for the plaintiff, and approving *Moule v Garrett* (1872) LR 7 Ex 101, Henchy J held that a plaintiff succeeds in an action for Restitution:

"because, it is said, the law imputes to the debtor a promise to pay the debt. The historical reason for this fiction was to enable the claim to be brought as a form of *indebitatus assumpsit*. It was a pleader's stratagem. In most cases however, it is in the teeth of the facts to impute to the debtor a promise to pay. So long as the forms of action governed the course of litigation, it was necessary for the courts to go along with this transparent fiction. Nowadays, however, when the forms of action have long since been buried, the concept of implied contract is an unreal and outdated rationale... The real reason why the courts would uphold the claim is because it would be unjust and inequitable to allow the [recipient] to keep the money. To refuse the claim would mean that the [recipient] would be unjustly enriched" (at pp 110-111).

Secondly, the duty to repay *ultra vires* tax (cf. *Woolwich* §136) and a defence of change of position (cf. *Lipkin Gorman v Karpnale* [1991] 2 AC 548) were recognised in 1982. In *Murphy v A-G* [1982] IR 241, the Supreme Court found unconstitutional a tax provision which discriminated against married women, and held that the Government was *prima facie* liable to make restitution of the overpaid taxes. Henchy J held that in

"*Moses v Macferlan* [(1760) 2 Burr 1005, 1012] Lord Mansfield held that 'the gist of this type of action [for Restitution] is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.' Thus, he put the claim on the footing of equity, or unjust enrichment, rather than under the fiction of an implied promise to repay" ([1982] IR 241, 316; cf. at 331 *per* Griffin J and at 336 *per* Parke J; cf. Kenny J, partly dissenting, at pp 335-336)... It is one of the first principles of the law of restitution on the ground of

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unjust enrichment that the defendant should not be compelled to make restitution, or at least full restitution, when, after receiving the money in good faith, his circumstances have so changed that it would be inequitable to compel him to make full restitution" (at p 319).

Indeed, Henchy J took a step which has not yet been taken by the House of Lords, by expressly recognising that the defence applied not only to a common law action for money had and received, but also to "an equitable claim for restitution." His treatment of the defence thereafter is reminiscent of the special policy of fiscal chaos underpinning the decision of La Forest J in *Air Canada v British Columbia* (1989) 59 DLR (4th) 161, 191-194.

Thirdly, less spectacular, but no less important, is the decision in *House of Spring Gardens v Point Blank* [1984] IR 611. Here the plaintiff sought an account of profits for infringement of copyright. Griffin J held that the "basis on which such an account of profits should be ordered is that there should not be unjust enrichment on the part of the wrongdoer," which bears comparison with the much fuller treatment of the issue in the speech of Lord Goff in *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109. Furthermore, in *Surrey CC v Bredero Homes* §132, a majority of the English Court of Appeal was unwilling to recognise a jurisdiction to grant damages in the restitution measure for breach of contract (Dillon and Rose LJ), whilst Steyn LJ was prepared to recognise that jurisdiction only to a limited extent. On the other hand, the decision in *Hickey v Roches Stores* (1976) [1993] RLR 196 (HC: Finlay P.) allows recovery in the restitution measure to deny a *mala fides* contract breaker the profits of his wrongdoing.

Fourthly, the leading Irish case on mistake is the decision of Budd J in *National Bank v O'Connor* (1969) 103 ILTR 73, 89-97. He held that the mistake "must be a fundamental mistake... It is not of course necessary in order to establish a mistake of fact to show that the fact supposed to be true was untrue, and that the money would not have been paid if it was known that the fact was untrue." It is clear from cases such as *Barclays Bank Ltd v W. J. Simms & Son* [1980] 1 QB 677 and *David Securities* (HCA: §11) that the law has moved away from the narrow (*Aiken v Short* (1856) 1 H & N 210, 215, Bramwell B) approach to "liability" mistakes (Birks, *Introduction to the Law of Restitution*, 149). The language of Budd J in *O'Connor*, especially the second line quoted above, suggests that in Ireland, as in Australia after *David Securities*, a mistake is fundamental if it is causative. Furthermore, a proprietary duty to make restitution in the *Simms* situation of a double-credit was imposed in *In Re Irish Shipping* [1986] ILRM 518, following *Chase Manhattan v Israel-British Bank* [1981] Ch 105.

Fifthly, the decline of the mistake of law bar has proceeded apace in Ireland. Cases such as *Dolan v Neligan* [1967] IR 247 and *Rogers v Louth CC* [1981] ILRM 144 showed an impatience with the rule and a desire to get

around or abrogate it. In *Dublin Corp. v Trinity College Dublin* [1985] ILRM 84 (HC: Hamilton J) [1985] ILRM 283 (HC: Hamilton J; SC) in an action to recover overpaid rates, Hamilton J in the High Court, relying inter alia on *Kiriri Cotton v Dewani* [1960] AC 192 allowed recovery of money paid under a mistake of law: "where money is paid, whether under a mistake of fact or law, justice requires that such money should be recoverable if the law so permits." The Supreme Court overruled Hamilton J on the interpretation of the relevant statute and did not reach the mistake issue. However, Henchy J in the Supreme Court in *Pine Valley v Minister for Environment* [1987] IR 23, 42 held that "so much of the purchase price as was attributable to the planning permission was paid under a mistake of law, but in my opinion it would be recoverable no less than if it had been paid under a mistake of fact".

As elsewhere in the Common Law world, there is still judicial reluctance and naivety. Scattered throughout these cases, and those discussed in this volume, there are dicta which would not be out of place in the decision of Scrutton LJ in *Holt v Markham* [1923] 1 KB 504. Thus, in *AG v Ryan's Car Hire* [1965] IR 642, 664, Kingsmill Moore J referred to "the somewhat vague brocards of unjust benefit or restitution or quasi contract." In some cases, the naivety cuts the other way. Thus, Lardner J in *Re Frederick Inns* [1991] ILRM 582 managed to interpret *Sinclair v Brougham* as supportive of an action for money had and received (arguably by quoting Haldane LC out of context) and imposed a constructive trust upon the Revenue to return overpaid tax.

Finally, a continuing problem is the perception that restitution requires a constructive trust. Though this is slowly changing, this was the automatic assumption made in some of the cases (in *Re Frederick Inns*, in *Murphy* and, with some justification, in *East Cork Foods*) and in some text-books. Thus, in *Keane Equity and the Law of Trusts in the Republic of Ireland* (London, 1986), *Moses v Macferlan*, supra, though an action for money had and received, is treated in the chapter on constructive trusts as a possible basis for a "new model constructive trust."

One major contrast to be drawn is between *Highland Finance v Sacred Heart College of Agriculture* §138 and *Jackson v Lombard & Ulster Bank* §163. Both cases are priority disputes in insolvency. In the former, Murphy J was prepared, in principle, to allow a proprietary remedy on failure of the personal one, by allowing subrogation to a lien. In the latter, Costello J rejected a *Quistclose* argument which would have had the same effect.

This year's cases

Of this year's cases, the one which is probably destined to have the most impact is *PMPA Garage* §168, which deals with the topical issue of remedies, including restitution, for ultra vires contracts. Not far behind it is *Highland Finance* §161, dealing with subrogation. Many of the cases are notable for the

fact that they raise issues which concern restitution lawyers but which were not analysed as such either by counsel or by the judges. This is especially true of the cases concerning the duty to pay interest on overpaid or ultra vires taxes (*Texaco v Murphy (No 2)* and (*No 3*) §169; *Mooney* §165) and of *HKN* §162, which concerned remedies for pre-incorporation contracts. Similarly, in *Jackson v Lombard* §163, the pleaded trust was clearly a *Quistclose* trust, though it was not put in those terms. Finally, in *Cotter v Minister for Agriculture* §160, although in the event the restitution claim was that upon which the plaintiff succeeded, it received a very cursory analysis.

CASES

158. Intellectual property - breach of copyright - restitution for wrongs.

Allied Discount Card v Bord Fáilte Eireann [1991] 2 IR 185 (HC: Lynch J).

In 1986, the plaintiff company had been hired by the defendant company, the Irish National Tourist Board, to canvass shops willing to provide discounts to tourists, and to design and produce booklets of vouchers which could be given to these tourists to obtain the discounts. The arrangement was not renewed, but the defendant included discount vouchers in its catalogues in 1987 and 1988 advertising campaigns, many of which were based on, or were copies of, the plaintiff's 1986 vouchers.

Held: "[T]he defendant [had] infringed the plaintiff's copyright in the vouchers reproduced in their brochures in 1987 and 1988 from the plaintiff's 1986 booklets of vouchers and the defendant certainly has had an unfair benefit in 1987 and 1988 from the plaintiff's work in canvassing traders in Autumn 1985 and preparing the booklets and printing them in January 1986, and the defendant [had] thus been unjustly enriched at the plaintiff's expense... [The] plaintiff [was therefore] entitled to compensation from the defendant whether it be regarded as damages from infringement of copyright, or for restitution for unjust enrichment."

159. Vitiating of consent - inequality - personal disadvantage.

Bank of Ireland v Smyth (26 March 1993) Unreported (HC: Geoghegan J).

The defendants were husband and wife. The bank had a charge over the defendants' property which it sought to enforce. By virtue of the Family Home Protection Act 1976, s.3, such charge would have been void in the absence of "a prior Consent in writing" by the wife.

Held: "[W]hile there was a document purporting to be a Consent in writing, there was in fact no Consent within the meaning of the 1976 Act," on the grounds: that the relationship between the defendants was one of the husband's

influence and the wife's reliance; that the bank manager should have realised that his advice to the wife was inadequate; that he did not take proper steps to ensure that she fully understood the transaction; and that he did not advise her to take independent advice (judgment of Scott LJ in *Barclays Bank v O'Brien* §117 approved and applied).

Geoghegan J: The plea of non est factum would not arise on the facts.

160. Inoperable contract - quantum meruit for services rendered - preparatory work - Partial failure of consideration.

Cotter v Minister for Agriculture (judgment delivered 15 November 1991, circulated March 1993) Unreported (HC: Murphy J); affd (1 April 1993) Unreported (SC: O'Flaherty, Egan and Denham JJ).

A group of farmers hired the plaintiff to drain a river, pursuant to a scheme whereby the Minister for Agriculture would pay up to 50% of the estimated costs. The contract allowed the plaintiff to submit a claim for additional payment in respect of "physical conditions... which could not reasonably have been foreseen by an experienced contractor" to the farmers' "Engineer," who was to decide whether the physical condition was in fact so unforeseeable. No such "Engineer" was validly appointed. The plaintiff encountered rock in much greater quantities than had been foreseen.

Held by Murphy J in finding in favour of the plaintiff: The farmers are liable in Contract to the plaintiff in respect of the rock encountered in the course of the works to the extent to which the same was "unforeseen." The plaintiff cannot be denied his right to payment for the works done in respect of those unforeseen circumstances solely by reason of his failure to comply with the conditions which were rendered impossible due to the absence of any person acting as Engineer for the purposes of the contract. All that can be done at the present stage is to compensate the plaintiff on a quantum meruit basis for the extra work which he did as a result of the unforeseen conditions. The liability under this heading is one of Contract or Quasi Contract falling on the Farmers.

Murphy J assessed "a commercial price" for the extra work done at £212,433. He allowed a claim for £5000 in respect of preparatory work on a site (the "canal") which was later abandoned, apparently on the assumption that the quantum meruit he had identified justifies this.

Other claims by the plaintiff for breach of contract by the farmers were successful. The plaintiff had also sued the farmers and the Department in tort, and the farmers had sued the Department in tort. The plaintiff failed against the Department and succeeded in part against the farmers, who in turn succeeded in part against the Department. The appeal to the Supreme Court essentially turned on the question of the Minister's liability in tort, and was substantially dismissed. On the contract/restitution point, O'Flaherty J did not disturb the

decision of the High Court that the farmers were liable in respect of the unforeseen rock:

Held (SC): (1) Since the Minister had in effect represented that the Department would pay 50% of the costs, "once people are allowed to proceed on the basis that they would be paid at a particular rate, they should be so paid. The Minister was liable for 50% of the cost of the extra rock that had to be excavated. (2) The liability in respect of the canal work "should be attributable to the Minister [not the farmers]... since the canal should never have been included" in the project in the first place, and thus constituted a breach of a tortious duty of care.

Comment: The basis of liability in contract is unclear. The basis of liability in Restitution is even more unclear. The contract was valid but, in respect of the extra work, inoperable. (1) The existence of a valid contract governing the particular relationship between the parties is a bar to restitution. (2) Nevertheless, the decision in *Cotter* seems to turn on the assumption that, because an important portion of the contract in respect of payment is inoperable, that is a sufficient basis for a quantum meruit. However, justifying this runs into the same difficulties as justifying the quantum meruit on the facts of *Miles v Wakefield MDC* [1987] AC 539 (see Birks, *supra*, 305; Sales (1988) 8 OJLS 301; Mead (1991) 11 Legal Studies 172). (3) At best, the inoperability could be described as a partial failure of consideration; but it has recently been affirmed that failure of consideration must be total to constitute a ground for restitution: *The Mikhail Lermontov* §8. Furthermore, the finding in the High Court that the farmers were liable in respect of the preparatory work for the canal is also unreasoned; the leading Irish case on the issue, *Folens v Minister for Education* [1984] ILRM 265 (which approved *William Lacey (Hounslow) v Davis* [1957] 1 WLR 932 and *Brewer Street Investments v Barclay's Woollen Co Ltd* [1954] 1 QB 428) was not cited. Nor again is it clear why this liability was imposed despite the existence of a valid contract.

161. Subrogation - whether restitutionary - when lost.

Highland Finance Ireland Ltd v Sacred Heart College of Agriculture [1992] 1 IR 472; [1993] ILRM 260 (HC: Murphy J).

In 1984, the College obtained a loan from the Bank of Ireland ("the Bank") secured by a charge on all its assets. In 1988, the College purchased two milk quotas from a local Co-Operative, financed by two loans from Highland Finance. The application forms set out in detail the dates and manner in which the two loans together with interest were to be repaid. The College repaid the loans in accordance with these terms for two years until the Bank appointed a receiver pursuant to its debenture. Highland claimed that the loans, "having been provided for the purpose of discharging the purchase price of the milk

quotas and having been used for that purpose, it, Highland, is entitled to stand in the shoes of the co-operative and to enjoy the same rights which the co-operative would have enjoyed as an unpaid vendor if the purchase price had not been discharged."

Held: The contention of the plaintiff was correct as a proposition of law; but "the unique and complex provisions for the repayment of the debt plus interest over a lengthy period by a third party who will or should have in his hands monies from the borrower derived from the very property which was acquired with the loan is inconsistent with a security which could have been realised forthwith [*viz* the lien to which the plaintiff claimed to be subrogated]. Accordingly, the appropriate inference is that the parties did not intend the preservation of the vendor's lien."

Comment: Murphy J's treatment of *Thurstan v Nottingham Permanent Building Soc.* [1903] AC 6 seems to suggest that he interprets *Orakpo v Manson Investments* [1978] AC 95 in a manner less hostile to an unjust enrichment analysis than many commentators have in the past. Furthermore, if subrogation is restitutionary (see Mitchell §147), then it must observe the basic rule that it is a bar to restitution if "the plaintiff conferred the benefit... in pursuance of a valid common law... obligation, [as where] he contracted... to confer the benefit" (Goff & Jones, *The Law of Restitution*, 3rd ed, 30-31). That the existence of a valid contract governing the relationship is a bar to restitution should have been an end to the matter. Moreover, by allowing subrogation to a lien in principle, Murphy J's decision had the effect of elevating a personal right into a proprietary right, which is exactly the step the Supreme Court was not prepared to take in *Re Barrett Apartments* [1985] IR 350; [1985] ILRM 679.

In *Space Investments v Canadian Imperial Bank of Commerce Trust* [1986] 1 WLR 1072, 1074, Lord Templeman held that the priority on the facts was "conferred because the... unsecured creditors voluntarily accepted the risk" of the insolvency. Here, by not taking an effective security, the contractual arrangements entered into indicate that the plaintiffs took the risk of the College's insolvency. That being so, and in the absence of identifiable "unconscionable" conduct on the part of the College (*Napier and Ettrick v Hunter* §128), there is no convincing reason to allow the plaintiffs a proprietary remedy on the failure of their personal one.

Appeal: This case is under appeal to the Supreme Court.

162. Constructive trusts - pre-incorporation contracts - fiduciary relationships.

HKN Invest Oy v Incotrade Pvt Ltd (2 October 1992) Unreported (HC: Costello J).

Incotrade was in liquidation. Its three principals had, through it, run a fraudulent loan brokerage business. The plaintiffs had obtained judgment against the principals in respect of commissions advanced on bogus loan agreements, and sought to execute it against two bank accounts and cars which they claimed were the personal property of the principals. The liquidator claimed that the accounts and cars were the property of the company, and were thus not available to the plaintiffs. For part of the period, Incotrade was not in fact incorporated. Both accounts, each in the name of one of the principals, contained only fraudulently obtained commissions, on pre- and post-incorporation contracts. Withdrawals from one account were used to purchase three expensive cars.

Held: The plaintiffs were not entitled to claim the money or the cars and the liquidator is entitled to the monies in the accounts as assets of the company: (1) Pre-incorporation contracts are a nullity but the Companies Act 1963, s.37 allows a company after incorporation to ratify a pre-incorporation contract. This had not occurred before liquidation, but the liquidator could do so. (2) As to the beneficial ownership of the money paid before incorporation, (a) "it would be straining past breaking point the concept of a fiduciary relationship to hold that such a relationship existed [between the principals and the company] at a time prior to the incorporation of the company"; nonetheless, (b) the principals received the commissions as constructive trustees for the company; it was thus not available to the plaintiffs. (3) As to the beneficial ownership of the money paid after incorporation, the principals received either as directors or as agents and, thus, in both cases as fiduciaries, and so held the commissions as constructive trustees for the company.

Comment: (1) There was no mention of the action for money had and received at common law to mitigate the rigours of the nullity of pre-incorporation contracts (cf. *Rover International Ltd v Canon Film Sales Ltd (No 3)* [1989] 1 WLR 912), although a debt at common law was not in the end an adequate remedy so far as the plaintiffs were concerned. (2) As a matter of logic, it is difficult to see how the principals could be constructive trustees for a company which does not exist. No doubt, Birks would see in this case confirmation of his view that the language of trusts in such situations obscures and distorts (see Chap. 8 of McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford, 1992), 149). Despite its demise in England, the "equity and good conscience" constructive trust persists in Irish law: see e.g. *NAD v TD* [1985] ILRM 153, 160; *Re Irish Shipping* [1986] ILRM 518, 522. (3) The facts are reminiscent of *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Millett J), [1991] Ch 437 (CA) and *Lipkin Gorman v Karpnale* [1991] 2 AC 548. The plaintiffs here did not seek to attempt to trace. The bank account never became a mixed fund, and the substitutions were clean. It should have been possible, therefore, for the plaintiffs to trace at law. (4) There are at least

three further possible arguments open to the plaintiffs: (a) They may have been able to succeed in an action based on knowing receipt. (b) They may have been able to take advantage of the constructive trust which arises by virtue of the separation of ownership and possession identified in *East Cork Foods v O'Dwyer, supra*, p.140. (c) More speculatively, if a personal action for money had and received on the basis of *Rover v Canon, supra*, could successfully be made out, the plaintiffs could have sought to elevate it to a proprietary one by analogy with *Napier v Hunter* §128 on the basis of the principals' undoubted "unconscionability".

Appeal: The case is under appeal to the Supreme Court.

163. Failure of basis - *Quistclose* trust.

Jackson v Lombard & Ulster Bank [1992] 1 IR 94 (HC: Costello J).

A firm, through its brokers, borrowed money from the defendant bank, in 1989, expressly and exclusively to pay insurance premiums. The brokers paid the premiums. Financial difficulties arose. The policies were cancelled and a partial refund was paid to the brokers. In the meantime, the plaintiff had been appointed receiver of the firm, pursuant to a 1985 debenture, and sought the repaid premiums in priority to the defendant bank.

Held: The duty on the insurance companies to pay the refund was a "debt" which was caught by a fixed charge over "book debts and other debts" in the 1985 debenture.

Comment: It was argued that the defendant paid the monies to the brokers for a specific purpose, that, whilst it had divested itself of the right to the monies once they were paid, it had not divested itself of the right to any part of the premiums which might be refunded; therefore the subsequent agreements to refund did not constitute a debt in favour of the firm. This in effect is an argument that the refunded premiums were subject to a *Quistclose* trust (see *Barclay's Bank Ltd v Quistclose Investments Ltd* [1970] AC 567). Costello J rejected the argument on the grounds that, when "the defendant transferred funds to the brokers [to pay the premiums], it did not have any property rights in the actual monies which were transferred. When the insurance companies agreed to refund to [the firm] part of the premiums, new debts and new choses in action arose."

164. Restitution for wrongs.

In Re Martin Glynn [1992] 1 IR 361(SC).

The SC affirmed the principle that no person should profit from wrongdoing, by refusing to allow the murderer of the deceased to act as executor of the deceased's estate. The court ordered that administration with

the will annexed be granted to the Chief State Solicitor.

165. Restitution of ultra vires taxes - whether interest payable - appropriate basis of calculation.

Mooney v Ó Coindealbhóin (No 2) [1992] 2 IR 23 (HC: Barr J).

The plaintiff had been charged to tax under Sched E since 1978. In *Mooney v Ó Coindealbhóin (No 1)* [1990] 1 IR 422, Blayney J held that Sched D was the appropriate basis for the plaintiff's assessment. The Revenue repaid the overpaid taxes for the years 1978-1988. Although *Mooney (No 1)* only related to the period 1978-1982, the parties had impliedly agreed that the subsequent years would be treated in the same way as these years. On an application for interest on the overpaid tax:

Held: The plaintiff was entitled to interest on the amounts overpaid to the Revenue and repaid by them: (a) for the years 1978-1982, the Finance Act 1976, s.30(4) provides that, "where an overpayment of tax is to be repaid under subsection 3, the overpayment shall carry interest at the rate or rates in force by virtue of section 550(1) of the Income Tax Act 1967"; (b) for the remaining years, the implied agreement that these years would be treated in the same way governed the issue of interest as well as the issue of liability to tax.

Comment: The Revenue sought to argue both that the conditions precedent to s.30(4) were not satisfied and that the implied agreement did not extend to the issue of interest. If either argument had been successful, the *Woolwich/Murphy* argument would have been available to the plaintiff taxpayer, though it was not pleaded.

166. Proprietary estoppel.

O'Callaghan v Ballincollig Holdings (31 March 1993) Unreported (HC: Blayney J).

The plaintiffs were tenants of the defendants. When the premises were damaged by fire in 1981 and 1983, the plaintiffs repaired the premises, spending £27,000 and £16,000 respectively. The plaintiffs claimed a lien over the property in the amount of £43,000.

Decision: Neither "proprietary estoppel" nor "unjust enrichment" provided a basis for the lien.

Held: (1) The relationship of landlord and tenant existed at all times between the parties. The plaintiff had exclusive possession and could have carried out any repairs they liked. The defendants had no right to stop them. It was thus not a case of the defendants standing idly by. (2) On the "unjust enrichment" claim, counsel for the plaintiff cited *Rogers v Louth CC* [1981] ILRM 144 (concerning restitution of money paid under a mistake of law to a

local authority) and *O'Connell v Listowel UDC* (1957) Ir Jur Rep 43 (concerning a quantum meruit for services rendered under a void contract). Neither supported the plaintiffs' claim.

Comment: Cf. the rather more elaborate *Carabin v Offman* (1989) 55 DLR (4th) 135 (NSCA).

167. Common mistake in contract.

O'Neill v Ryan (No 3) [1992] 1 IR 166 (HC: Costello J); [1992] 1 IR 193 (SC).

In an action to set aside, for mutual mistake, a contract in settlement of an action, Costello J embarked on an analysis of mutual mistake and common mistake, observing (*obiter*) in relation to the latter the more recent reluctance to hold contracts void together with the equitable jurisdiction to set aside an agreement not avoided by shared common mistake. The appeal to the SC was dismissed *ex tempore* but the decision of Costello J was expressly approved.

Comment: This is almost (but not quite) the Irish *Associated Japanese Bank v Crédit du Nord SA* [1989] 1 WLR 255. Whilst it does not expressly take sides on the proper interpretation of *Bell v Lever Bros Ltd* [1932] AC 161, the tenor of the judgment is more in line with the broader interpretation of *Bell* (see e.g. Birks, *supra*, 160 *et seq.*, 454) than the narrower (see e.g. Cheshire, Fifoot & Furmston, *Law of Contract*, 12th ed (London, 1991), 231 *et seq.*).

168. Ultra vires contracts - appropriate remedies - whether restitution available - tracing - estoppel.

In re P.M.P.A. Garage (Longmile) Ltd (No 2) [1992] 1 IR 332, [1992] ILRM 349 (HC: Murphy J). Noted Byrne and Binchy *Annual Review of Irish Law 1991* (Dublin, 1993), 48-51; O'Dell (1992) 14 Dublin U LJ 123.

Some companies in the PMPA Group of companies ("the Group") received loans from the PMPS ("the Society"), a provident society which was a member of the Group. Every company in the Group became party to an agreement to guarantee these loans. The Group collapsed and the Society sought to be admitted as a creditor of PMPA Garage (Longmile) Ltd ("the Company"), a Group company which had joined in the execution of the guarantee but did not receive any loan. In previous proceedings, it had been held that the borrowings and the guarantee were *intra vires* the various members of the Group but that the loan agreements were *ultra vires* the Society (*In re P.M.P.A. Garage (Longmile) Ltd (No 1)* [1992] 1 IR 315; [1992] ILRM 337).

Held: The Group companies were estopped from denying the validity of the guarantee; therefore, the Society could enforce it against the Company.

Murphy J canvassed four possible solutions to the problems faced by the

Society: (i) That the borrowers could retain the loans, a solution which he characterised as leading to "monstrous injustice" and which he rejected. (ii) That the Society could trace the money lent, approving the *in rem* remedy found in *Sinclair v Brougham* [1914] AC 398. (iii) That the Society could recover the money lent in an action for money had and received. He regarded the rejection in *East Cork Foods v Dwyer Steel* [1978] IR 103 of the need to rely on a hypothetical or fictitious promise to pay as overcoming the problem faced by HL in *Sinclair*, so that there is no impediment in availing of that remedy against a corporate body to recover monies received by it as a result of a transaction which was outside its corporate powers. However, since the Company had not been lent any money, neither remedy (ii) nor remedy (iii) was appropriate on the facts. (iv) That the Company was estopped from denying the validity of the guarantee, and thus that the Society could rely on it as against the Company.

Comment: This is a difficult and important case, especially in the light of *Westdeutsche* §135. The problems with the estoppel remedy are analysed in O'Dell, *supra*, where it is argued that, although the cases cited by Murphy J do not readily support the conclusion reached, it can nevertheless be justified. The major difficulty with the decision is that the ground for restitution, the "unjust" factor, is not articulated. The judgment seems to proceed from the (controversial) assumption that the absence of contract is itself such a ground. However, the judgment has the merit of facing *Sinclair v Brougham* head on, which, arguably, Hobhouse J fails to do in *Westdeutsche*.

169. Restitution of ultra vires taxes - whether interest payable - appropriate basis of calculation.

Texaco (Ireland) Ltd v Murphy (No 2) [1992] 1 IR 399 (SC).

Texaco (Ireland) Ltd v Murphy (No 3) [1992] 2 IR 300 (SC).

The SC had held in 1982 that, where a taxing statute was unconstitutional, the government was unjustly enriched by the amount of taxes so levied and ought to make restitution in that amount, subject to a defence of change of position (*Murphy v AG* [1982] IR 241; cf. *Re Frederick Inns*, [1991] ILRM 582). In *Texaco v Murphy (No 1)* [1991] 2 IR 449; [1992] ILRM 304, the Revenue had sought to levy corporation tax on Texaco, on activities in respect of which Texaco claimed manufacturing relief. The SC held that Texaco were entitled to the relief. In *Texaco v Murphy (No 2)*, the matter was re-entered before the SC, which held that the Revenue were under a duty to repay the tax levied in respect of which Texaco successfully claimed relief and that interest should be calculated and added to the sums to be repaid. In *Texaco v Murphy (No 3)*, the matter was again re-entered before the SC, which held that the Income Tax Act 1967, s.428(9)(a) provides that "the amount overpaid shall be

refunded with such interest, if any, as the Court may allow", thereby leaving the calculation of interest, if any, within the discretion of the Court. Held that the Court should apply the rate under the Courts Act 1981.

Comment: The contrast with the detailed treatment of this issue in *Woolwich* §136 is stark, and the question of how the statutory discretion inter-relates with the common law duty to make restitution identified in *Murphy v AG* and *Woolwich* has not been explored.

ARTICLES

170. O'Dell, E, (1992) 14 *Dublin Univ LJ* 205.

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