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BEYOND CORPORATE INCAPACITY,

OR:

HOW I LEARNED TO STOP WORRYING AND LOVE THE ULTRA VIRES DOCTRINE.

Ph.D. Thesis

Trinity College, University of Dublin

October 2008

Niamh Áine Connolly

Volume 2 of 2

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Summary

I. Summary of methods

The research contained in this thesis was conducted by employing the conventional techniques of academic legal research, drawing on a variety of primary and secondary legal materials. The law governing the principal topics addressed is primarily judicial in origin. The author therefore identified and studied relevant legal authorities, of which most were cases from the Republic of Ireland and the United Kingdom as well as authorities from a number of common law jurisdictions. She also researched the relatively small number of relevant statutory provisions in all the common law jurisdictions considered. In parallel, the author conducted a comprehensive search for relevant secondary materials. These materials included textbooks, edited collections, and journal articles from many jurisdictions. A number of theses held at other universities were located and considered. Official government reports on corporate capacity proved to be an important source. The research process was aided by the use of electronic databases, which facilitated access to domestic and international case law, statute and journals, as well as the materials available in the Berkeley Library of Trinity College Dublin.

II. Summary of findings

Limited capacity is neither a necessary nor an immutable feature of the corporate form. The determination in *Ashbury v. Riche* that registered companies should be subject to the ultra vires doctrine was not inevitable and reflects a mistrust of the corporate form due to historical circumstances. Since then, the application of the doctrine, as it evolved, provoked widespread criticism. Confusion arose from the conflation of the principles governing corporate capacity with other questions. The ultra vires doctrine relates solely to incapacity and must be clearly distinguished from other rules, in particular the law on directors' duties. The corporate benefit test, which was long used to control the intra vires exercise of corporate powers, is more appropriate for judging the valid exercise of directors' powers than for incapacity. The modern *Rolled Steel* approach is commendable for returning the appropriate emphasis to the contents of companies' objects clauses and simplifying the law on corporate capacity. It addresses many of the common criticisms of the doctrine. Unfortunately, *Rolled Steel* has not yet been fully and unambiguously applied in Irish law. Further important developments, especially in the field of remedies, have the effect that traditional concerns about the effect of the ultra vires doctrine on innocent outsiders are no longer warranted either. The statutory protection of the outsider to ultra vires transactions in

Irish law is unsatisfactory because it leaves many exceptions. However, a comprehensive system of remedies now ensures that incapacity does not cause injustice. The existence of a void contract no longer excludes a non-contractual restitutionary remedy. The modern Irish law of restitution is founded on the principle against unjust enrichment and is part of a wider evolution of the law in this area which is still taking place throughout the common law world. Cases arising out of transactions which are void for incapacity have made significant contributions to this development of the law of unjust enrichment. Restitution law will offer a remedy where property is transferred under a void contract even if both sides have fully performed under the non-existent contract. Failure of consideration is one relevant unjust factor. Failure of consideration need not be total, in particular when calculations can be made of net payments made. It is possible that it is absence of consideration rather than failure of consideration which operates in ultra vires cases. Furthermore, incapacity could legitimately constitute an unjust factor in restitution law but has not yet been recognised. Mistake is an alternative cause of action available. The mistake of law bar has no place in modern unjust enrichment law, though it has yet to be definitively removed in Ireland. In addition, the Irish courts are very willing to exercise their equitable jurisdiction to grant proprietary remedies. The remedial constructive trust is more appropriate as a remedial mechanism than the resulting trust. The *Belmont* institutional constructive trust offers a remedy in many ultra vires cases, as it applies wherever corporate property is misapplied in breach of fiduciary duty. Irish authorities demonstrate a willingness to impose remedial constructive trusts, without necessarily insisting on an unconscionability requirement. It would be preferable were they to exercise greater caution in awarding a proprietary remedy instead of a personal remedy. Due to the developments outlined in both substantive company law and the field of remedies, the principal arguments against limited capacity are no longer valid. Yet the pressure to abolish the doctrine remains strong. The ultra vires doctrine is viewed as inconsistent with modern perspectives on the corporation. Ultimately, the decision to give companies limited or full capacity is a policy choice open to the legislature. The recommendations of the Company Law Review Group that private companies should generally possess the full capacity of a natural person whereas public companies and other corporations will retain limited capacity are not necessarily desirable. They are not sufficiently straightforward and do not reform or clarify the doctrine for all the cases in which it will continue to apply. The abolition of objects eliminates a potentially worthwhile statement of business purposes. The modern conception of the company, influenced by stakeholder theory, would suggest that the ultra vires doctrine ought not prevent companies from acting altruistically. In conclusion, corporate objects ought to be retained as an internal discipline within companies.

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9. A QUESTION OF REMEDIES

9.1. THE NEED FOR A REMEDY WHERE A CONTRACT IS DEEMED VOID

9.1.1. Justice Demands More than a Declaration of Voidness

The doctrine of ultra vires declares offending contracts void *ab initio*. Legally, it is as if the contract never existed. This abstract legal perspective is not the only one; for the parties, the contract seemed real. Thus, in the everyday world of commercial transactions, the non-existent contract had consequences: depending on the circumstances, one side or both may have performed its non-existent obligations. This problem does not arise for executory contracts,[1] but many cases concern executed or partially-executed obligations.

Is it therefore a sufficient response to the parties in an ultra vires action to declare there was no contract, and to leave the matter there? Depending on the circumstances of the case, the loss may lie heavily where it falls. The potential for harsh and unjust results may seem to call into question the validity of the ultra vires doctrine itself. The lofty aims of rules developed to protect shareholders and those who do business with companies are undermined when, the courts having done their work, an innocent party to the putative contract is left at a loss. It would be "pernicious" if companies could profit from exceeding their capacity.[2] It is immaterial which party feels the brunt.[3]

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[1] "Where a contract is wholly executory [...] then clearly no court of law could compel or even permit one of the parties to implement his promise if by doing so it would exceed its statutory powers" - In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 357 (Murphy J.); "No court in the land will enforce a purely executory contract involving the exercise of unauthorized powers by either party" - J.D. Brady, "The Doctrine of Ultra Vires, Its Nature, Elements and Modern Application" (1920) 54 American Law Review 535, 548.

[2] In Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 183, 223 (per Fletcher Moulton LJ); E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 44: "it seems that

The practical effect of declaring a transaction void is of particular practical importance where a company has become insolvent. Insolvency makes more acute the competition between various claims to ownership of the company's assets. Many reported cases involve company liquidators seeking to invalidate an apparent contract for want of capacity, in order to recover a payment made by the company, and so swell the assets available to creditors, and if any residual assets remain, to shareholders.

Doing justice in the private law relations of legal persons must be a central objective of the law. This justice must exist in the real world, not merely at the intellectually satisfying level of legal theory.[4] The parties do not ask in a vacuum whether a contract is valid. They ask because an obligation or property is at stake. Though they formulate their action in the terms of legal doctrine, their pressing concern is not the objective law, but their subjective rights.[5]

Real justice therefore demands that the initial inquiry into contractual capacity be followed by a second stage, determining how the property in question between the parties should be allocated.[6] If one party has performed its non-existent obligations, for the courts to resile from touching the factual state of affairs which results stops

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the retention policy is being supplanted by a restitution policy even in the case of ultra vires receipts".

[3] S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 394: "the right to cheat is mutual".

[4] "I hope the object of the law is to seek and ensure justice." - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 320.

[5] Terminology reflecting the French concept of the fundamental distinction between "droit objectif" and "droits subjectifs"; see H. Kelsen (translated by. A. Wedberg), "General Theory of Law and State" (Lawbook Exchange, New Jersey, 1995), p. 78.

[6] "May one be pardon'd and retain the offence?" – W. Shakespeare, "Hamlet", Act 3, Scene 3; Determining that there is no contract "forms merely the starting point for the inquiry how justice may be done and unjust enrichment prevented" - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 307; see also E. O'Dell, "Incapacity" (Chapter 5), in P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000), pp. 113-167, at p. 120.

short of doing justice, and may on the contrary entrain real injustice. While remedial intervention requires justification, judicial inertia at this second stage is even harder to justify.[7]

The nature and scope of the remedies available to the courts may be more important in the quest for just outcomes than the initial application of the doctrine of ultra vires. The adequacy of potential non-contractual remedies is a vital question in evaluating the ultra vires doctrine. If there are not sufficient remedies available to avoid unjust practical outcomes, that must weigh heavily against the doctrine,[8] but if, on the other hand, it is possible to reconcile the uncompromising effects of the doctrine with the demands of justice, then the case against limited capacity diminishes.[9]

In ultra vires cases, the examination of remedies begins when the impugned contract is declared void. The remedy cannot be found in the contract, but must originate outside it.[10] Consideration of non-contractual remedies has sometimes elicited the objection that this equates to giving effect to the void contract, which is clearly impermissible.[11] For example, Polack suggests that if the company can make a

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[7] "That the Court should content itself with regarding possession only and should shut its eyes to all the mischief and injustice that would thus be made to follow from these bona fide mistakes - errors no doubt, but innocent errors as to legal status and powers--would, in my opinion, be a cowardly as well as a cruel policy" – In Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 183, 226 (per Fletcher Moulton LJ); it would be "shocking to the reason and conscience of mankind" if companies could retain benefits obtained ultra vires – Comstock J., Bissell v. Michigan Southern and Northern Indiana Railroad Companies (1860) 22 NY 258.

[8] A "monstrous injustice" would result - In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 351 (per Murphy J.).

[9] Cf G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 120; see below at 15.2.1.2: "The unjust effects issue".

[10] It "does not follow that because the plaintiff cannot sue "on the contract" he cannot sue dehors the contract for recovery of a payment in respect of which consideration has failed."- Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 47 (per Viscount Simon LC).

[11] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 37: "many subsequent

restitutionary claim for work done, this would involve an "anomalous result", permitting recovery for an act which could not be done.[12] Similarly, Gregory[13] argues that ultra vires transactions are not really void, since they can sometimes have legal consequences. Among other objections,[14] he cites the restitutionary action for money had and received as evidence that incapacity does not result in voidness.[15] Such objections are not pertinent if it is clearly understood that the remedies which may exist are completely separate from any contract which the parties may have attempted and failed to conclude.[16] The existence of either a non-contractual remedy or statutory protection[17] does not negate the common law voidness of the putative contract.

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cases simply set up a dichotomy between enforeability and non-enforceability of the ultra vires transaction, without asking whether there are any legal alternatives to enforceability."; see above at Chapter 4: "Defining Ultra Vires".

[12] K. Polack, "Company Law – Allegation that a Contract is Ultra Vires the Plaintiff" [1966] CLJ 28, 29: "the anomalous result that the company recovered in respect of something which, in the eyes of the law, it was utterly unable to do".

[13] R. Gregory, "Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation" (1985) 48 MLR 108, 111.

[14] See above at 4.2.3.2: "Severing the void element of a transaction and saving the rest"; also: "First, an *ultra vires* acquisition of property by the company vests at least a bare legal title [...] Secondly, the company can compel the directors to account for profits made from an *ultra vires* business carried on in its name and by the same token must allow for debts as an equity." - R. Gregory, "Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation" (1985) 48 MLR 108, 111.

[15] Ibid, at 111: "in transactions other than loans the payer has an action for money had and received."

[16] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 362; this distinction has been understood in some quarters since the nineteenth century: see Central Transportation Company v. Pullman's Palace Car Company (1891) 139 U.S. 24; see also E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123, 123; E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 46: "Retitution of an outstanding balance is very different from repayment according to the detailed repayment schedule and other terms of a contract."

[17] Section 8(1), Companies Act, 1963: this statutory protection of the outsider who deals with a company in good faith does not alter the fact that the consequence of corporate incapacity at common law is voidness.

A further, related concern is raised by a number of authors. This is that the grant of a remedy, allowing recovery of benefits transferred, undermines the public policy interest which motivated the initial voidness.[18] The issue here is not that a remedy is legally inconsistent with an excess of capacity, but that, if the hard edges of the doctrine are softened, it no longer serves its purpose. Birks alludes to the problem of "stultification", where the grant of a remedy undermines the purpose of the law in imposing the invalidity.[19] However, he denies that this problem should necessarily lead to the refusal of a remedy.[20] In particular, Birks observes that the grant of restitution in ultra vires cases is consistent with the policy which dictates the incapacity.[21]

Given that the doctrine, absent a remedy, may turn against the interests of the shareholders just as readily as those of the contracting partner, the answer must be to do justice, in the first place, and then assess the consequences for policy and the doctrine. Nor would a policy which sought always to maximise the property of the company be appropriate, notwithstanding the policy motivations which inspire the ultra vires doctrine so as to protect corporate assets.[22] The purpose of the ultra vires

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[18] G.W. Field, "Ultra Vires" (1879) 13 American Law Review 632, 647, 648: Field asks, "how is public policy or the interests of the public or the State subserved?"

[19] P. Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 TIL 155, 162: "if it is void or voidable for want of capacity, it is similarly true that restitution of value nonetheless transferred cannot be allowed in circumstances when it would make nonsense of the law's position in relation to the invalidated contract."

[20] Ibid, at 163; see also S. Arrowsmith, "Ineffective Transactions and Unjust Enrichment: a Framework for Analysis" (1989) 9 Legal Studies 121, 121.

[21] P. Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 TIL 155, 183: "There is no stultification defense because, though the reasons have never been explained in detail, the policy behind the ultra vires rule evidently is thought to require disgorgement, even when the plaintiff is not the incapax."; see also E. O'Dell, "Incapacity" (Chapter 5), in P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000), pp. 113-167, pp.162-167: "By allowing restitution, and unravelling of the transaction, it emphasises the void nature of the transaction by removing its effects".

[22] See E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 43-45;

doctrine is "to let societies keep their own money, not to appropriate other people's."[23] The underlying policy of protecting creditors would be ill-served by permitting the company to appropriate benefits received under invalid contracts.

Consequently, it is essential for the law to develop an adequate and principled approach[24] to the consequences of ultra vires, so as to avoid the twin temptations to misapply the doctrine of ultra vires itself[25] or devise extemporary rules which benefit the more attractive party in a particular case, but will not assist in other factual scenarios. In short, it is necessary to formulate, "some general rule that will apply in all cases as justly as possible."[26]

9.2. Traditional Approaches to Remedies and the Ultra Vires Doctrine

Accepting that a mere declaration of voidness serves a very imperfect justice,[27] and that further judicial intervention is desirable, it is necessary to investigate the extracontractual remedies which the law could offer. Potential remedies can be

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remedies should be available "whether the deficiency in capacity is that of the donor or the donee" – per Murphy J., In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 351.

[23] Sinclair v. Brougham [1914] AC 398, 438 (per Lord Dunedin).

[24] "It is not possible to deduce or infer the legal rights of citizens by reference to some broad principle of justice or fair play." - In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 362 (per Murphy J.).

[25] "The harshness of the rule and the lack of clear principles has led judges to create subtle distinctions to enable the parties (usually the third party) to escape the full rigour of the doctrine" - R.M. Temple, "Ultra Vires: The Dual Approach" 137 NLJ 1069, 1069.

[26] G.C. Gale, "The Doctrine of Ultra Vires, as Affecting the Rights and Obligations of a Corporation..." (1899) 48 Central Law Journal 231, 234.

[27] S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 387: "the judicial and professional conscience [...] could not forever endure a rule of law which enabled one party to a contract, perfectly innocent when made between natural persons, to keep the fruits of it and repudiate it because it had been made with an artificial person having no power to make it."

found in both the common law of restitution and equity,[28] in the form of either personal or proprietary rights. The foundation of these rights is not consent, but may be either unjust enrichment or wrongdoing. The capacity of the company to consent is thus irrelevant to these solutions.

Despite the importance of the issue, in practice relatively few authorities must face this challenge. They are necessarily limited to cases where the contract is found to be ultra vires, and has already been performed by at least one party, but excluding gratuitous dispositions, where the rejection of a claim does not leave the recipient at a loss.[29] Some cases, such as *In Re Introductions*,[30] simply end with a declaration that a transaction was ultra vires, without addressing what practical consequences this might have. This failure to discuss the possibility of a remedy may implicitly betray the assumption that the company's creditor will necessarily endure a loss on the void contract.[31] For a long time, the orthodox view was, in the words of Keane J. in *Northern Bank v. Quinn*,[32] that a party to a void contract "had no rights at all."[33]

Yet, some authorities did proceed from the finding of incapacity in search of practical resolutions. Various different approaches were canvassed in the earlier

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[28] All courts may employ either source of remedy - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 305.

[29] Eg In Re Lee, Behrens & Co Ltd [1932] 2 Ch. 46.

[30] In Re Introductions Ltd [1969] 1 AER 887.

[31] And also depends on counsel raising the issue of remedies: in Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221 the lender relied on statute and estoppel, but not extracontractual remedies; in Re Frederick Inns Ltd [1991] ILRM 582, 590, Lardner describes the defence submissions as "of notable brevity".

[32] Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221.

[33] Ibid, at 228; cf Murphy J., In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 351: "*all of the decided cases appear to be in agreement* on the proposition that where a transaction is successfully impugned on the grounds that it is ultra vires one or other of the parties to it, the party who has delivered property or monies to the other of them would be entitled to recover such property or monies from the donee" (italics added); see eg Byrne v. Rudd [1920 2 IR 12.

authorities, but generally there was no satisfactory, consistent response to the need for a remedy. Later, the well-known refusal of English and Irish courts to countenance restitutionary remedies dominated, until developments at the end of the twentieth century opened the door to new breakthroughs.

9.2.1.1. Some early cases contemplated remedies

Nineteenth century commentators and judges were alert to the need for remedies. Brice distinguished between the voidness of the contract and the retention of benefits by the company. Thus, incapacity did not inevitably mean that a company could simply retain any benefit it received.[34] Similarly, the United States Supreme Court did not hesitate to grant remedies independent of the void contract, including restitutionary implied contract principles, such as quantum meruit.[35] There, parties rescinding an ultra vires contract had an equitable obligation to restore benefits received, and could be compelled to account or treated as trustees of property received.[36] This approach contrasts with the refusal to contemplate remedies which later took hold in England and Ireland.

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[34] Green's Brice's "Ultra Vires", 618, cited by F.L. Cline, "Ultra Vires in the Law of Corporations" 5 (1879-1880) Southern Law Review N. S. 400, 411; similarly, in 1891 the US Supreme Court stated "the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties [...] on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain." – Gray J., Central Transportation Company v. Pullman's Palace Car Company (1891) 139 U.S. 24, 60.

[35] Central Transportation Company v. Pullman's Palace Car Company (1891) 139 US 24, 60-61; see S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 387-391; G.C. Gale, "The Doctrine of Ultra Vires, as Affecting the Rights and Obligations of a Corporation..." (1899) 48 Central Law Journal 231, 234-235.

[36] S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 389, citing New Castle Northern Railroad Company v. Simpson (1885) 23 Fed. 214; A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 88.

A number of early Irish authorities championed the grant of personal remedies at common law or equity.[37] Two such cases grapple with the consequences of policies issued by the Irish Provident Insurance Company being discovered to be void because its objects excluded life insurance.[38] In *Flood v. Irish Provident Assurance Company*,[39] Lord Walker, rejecting estoppel,[40] considered whether the premiums paid could be recovered for lack of consideration, and whether interest might be due. The court opted for the failure of consideration solution, relying on authorities which directly supported failure of consideration to ground repayment of insurance premiums.[41] Thus, a personal common law restitutionary remedy was possible before the subsequent *Sinclair v. Brougham*[42] bar.[43] The straightforward remedy was safe from the criticisms which dogged the remedies issue in other cases because the return of premiums paid under a failed insurance contract is clearly distinguishable from performance.

The second case, *In Re Irish Provident Assurance Co Ltd*,[44] arose when a former director of the company entered an agreement with it, one element of which was his release of rights under the insurance policies which were later discovered to be ultra vires. The contract in its entirety being condemned due to its void elements, the director might have had to repay the entire consideration to the company. This

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[37] Other authorites also envisaged some limited right of recovery, eg In Re Guardian Permanent Benefit Building Society (1882) 23 Ch. D. 440; see below at 9.2.3.3: "Other rights: a claim on the surplus for ultra vires creditors".

[38] Flood v. Irish Provident Assurance Company 46 ILTR 214; [1912] 2 Ch. 597; In Re Irish Provident Assurance Co Ltd [1913] 1 IR Ch. 352.

[39] Flood v. Irish Provident Assurance Company 46 ILTR 214.

[40] Ibid, at 217.

[41] Ibid, at 217, 219; see also Byrne v. Rudd [1920] 2 IR 12, 26, where Campbell C. cites authorities for the return of insurance premiums paid under invalid policies entered due to misrepresentation.

[42] Sinclair v. Brougham [1914] AC 398.

[43] See below at 9.2.2: "The Rejection of Restitution".

[44] In Re Irish Provident Assurance Co Ltd [1913] 1 IR Ch. 352; see above at 4.2.3.2: "Severing the void element of a transaction and saving the rest".

possibility indicates the court's assumption that the loss would not lie where it fell under the void executed contract, but that the recipient of a benefit would have to return it. However, Palles CB went further, enunciating a general principle envisaging reciprocal equitable restitution in ultra vires cases. The party applying to have a transaction declared void must do equity by returning all that he received under it.[45] Palles CB was careful to refute the suggestion that this corresponds to "making a new agreement". Instead, the return of what he has received by the person to whom restitution will be made is "a condition for granting relief."[46] It followed that although the director should return the sum paid to him under the void agreement, he could set off the proportion of the total payment which had been made for lawful consideration.

By rejecting severance at law and declaring the entire contract void, yet also permitting recovery of the net sum transferred, this authority seems to be a hundred years ahead of its time.[47] Unfortunately, however, the hostile *Sinclair v. Brougham* authority would dominate English case law throughout the twentieth century. The orthodox consensus was that there could be no restitutionary remedy, and often, no remedy, where a contract was void for want of capacity.[48]

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[45] In Re Irish Provident Assurance Co Ltd [1913] 1 IR Ch. 352, 371 (per Palles CB): "when a Court of Equity is applied to to declare an agreement void as *ultra vires* the company, if the applicant has received anything under that void agreement, the Court will compel him to do equity, and, as far as possible, to bring back all that he has received under that agreement, either in specie or by making compensation to the extent of its value."

[46] Ibid, at 371 (per Palles CB).

[47] The swaps cases would allow net sums to be recovered where payments were made in both directions: see Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938; [1996] AC 669, [1996] 2 AER 961.

[48] See Sinclair v. Brougham [1914] AC 398; followed In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 352: "the court necessarily recognized that the monies could not be recovered on the basis of an action for debt".

9.2.2. The Rejection of Restitution

In *Baroness Wenlock v. River Dee Company*,[49] the House of Lords foreshadowed its impending hostility to granting remedies.[50] Baron Wenlock had lent large sums to the defendant statutory corporation in excess of the statutory limit on its borrowing power. At first instance, his executors were allowed to recover the money lent ultra vires, because the company had enjoyed the benefit of it and applied it to its purposes. However, the Court of Appeal, affirmed by the House of Lords, held that the only claim to recover the monies lent in excess of the statutory limit was that arising from subrogation. The lender could claim any part of the loan used to discharge lawful debts, but no more.[51]

Sinclair v. Brougham[52] interred hopes of restitution in ultra vires cases.[53] This House of Lords decision was for a long time a leading and influential authority.[54] Its reasoning, which "seemed unimpeachable at the time"[55] suggested that a law of restitution founded on implied contract could not avail where there was an attempt to conclude a contract but it was void due to incapacity.[56] The case concerned the distribution of the assets of a building society, which had carried on an ultra vires

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[49] Baroness Wenlock v. River Dee Company (No. 1) (1884-85) L.R. 10 App. Cas. 354; Baroness Wenlock v. River Dee Company (No. 2) 19 Q.B.D. 155.

[50] See *Notes*, (1887) 3 LQR 487.

[51] Baroness Wenlock v. River Dee Company (No. 1) (1884-85) L.R. 10 App. Cas. 354, 355; Baroness Wenlock v. River Dee Company (No. 2) 19 Q.B.D. 155.

[52] Sinclair v. Brougham [1914] AC 398.

[53] P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), p. 129.

[54] See: R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305; S.J. Stoljar, "Reexamining Sinclair v. Brougham" (1959) 22 Modern Law Review 21; E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28.

[55] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 32.

[56] Sinclair v. Brougham [1914] AC 398; see also In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 352-353; see below at 10.2.3.3: "Implied contract theory".

banking business, as between the depositors and its shareholders. The House of Lords rejected the depositors' action for monies had and received, ruling that, since the contract was void for lack of capacity, any implied contract by virtue of which quasi-contractual relief might be claimed was also void.[57] Ultra vires thus precluded its own remedy.[58] Lord Wright views the result as necessary, because allowing repayment "would be to sanction an evasion of the public policy forbidding ultra vires borrowing".[59]

On Lord Wright's interpretation, the case applied to "the special case of ultra vires borrowing", where recovery would indirectly uphold the void agreement,[60] but did not preclude recovery of money paid in other ultra vires transactions.[61] However, the case's general interpretation and effect were much broader.[62] *Sinclair v. Brougham*[63] had a chilling effect, seeming to exclude any remedies at equity or

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[57] Cf authorities permitting recovery for "infants, lunatics, drunkards" - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 319-320.

[58] Ultra vires "excludes from the law of England any claim in personam" – Sinclair v. Brougham [1914] AC 398, 414 (per Viscount Haldane LC).

[59] R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 306.

[60] Cf E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 32: "Restitution of an outstanding balance is very different from repayment according to the detailed repayment schedule and other terms of a contract."

[61] R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 314; O'Dell characterises Lord Wright's approach as one that "sought to limit the fallout" from Sinclair v. Brougham - E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 39; see also Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 64 (per Lord Wright); this was also the view of Lord Goff in Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669.

[62] In Leslie, Ltd v. Sheill [1914] 3 KB 607, it was applied to prevent extra contractual recovery of money lent to an incapable infant who had misrepresented his age.

[63] Sinclair v. Brougham [1914] AC 398.

common law[64] beyond a small number of recognised remedies which might avail in particular circumstances.[65] Burrows describes this as a flawed approach,[66] but it stood for the best part of a century, a roadblock to claims in ultra vires cases.[67]

In the Irish case of *In Re Cummins*,[68] Johnston J. indicated that an ultra vires transaction could in most cases have no remedy.[69] The case concerned a bank loan effectively made to a company to enable a shareholder to purchase the company from its previous owners. The purchaser had used the company's money to repay a personal loan which he used to buy the company, and the bank had notice of the "roundabout" series of transactions.[70] Johnston J. summarily declared the loan "clearly ultra vires", as its purpose "was not one of the objects of the company."[71] He then expounded a highly restrictive view on remedies. He stated that where there is an ultra vires transaction, "no debt, common law, equitable or otherwise, is thereby created".[72] Since the transaction is void, it cannot create any "legal rights or

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[64] Byrne v. Rudd [1920] 2 IR 12, 28; E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 37.

[65] See below at 9.2.3: "Traditionally Accepted Remedies: Tracing, Subrogation and Estoppel".

[66] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 397; see below at 10.2.3.4: "Reconsideration of implied contract theory".

[67] A small number of cases seem to ignore this ruling and approve of remedies in ultra vires cases. See: Linz v. Electric Wire Company of Palestine [1948] AC 371, 377; Craven Ellis v. Canons [1936] 2 KB 403, [1936] 2 AER 1066, cited by E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 40.

[68] In Re Cummins; Barton v. Bank of Ireland [1939] 1 IR 60.

[69] See also Byrne v. Rudd [1920] 2 IR 12, 18-19 (per Gibson J.): "money [...] melted into the corporate fund is protected by the doctrine of ultra vires. [...] Viewed as an ultra vires transaction, the payment cannot found any legal remedy."

[70] In Re Cummins; Barton v. Bank of Ireland [1939] 1 I.R. 60, 69.

[71] Ibid, at 64.

[72] Ibid, at 70.

claims".[73] This principle is a correct representation of the consequences of ultra vires, but its application to exclude non-contractual remedies is unnecessary and questionable. Johnston J. approves *Sinclair v. Brougham*[74] and its conclusion that subrogation or tracing might be possible in certain cases.[75] However, he distinguishes this case, reasoning that these remedies are only available in cases where the company retains a surplus after all the other creditors have been satisfied. In cases such as the present, where the company does not possess sufficient assets and the creditor from the ultra vires transaction would be competing with "genuine creditors", there can be no remedy.[76]

In Re Cummins[77] should no longer be regarded as good law, given recent developments in unjust enrichment.[78] Firstly, the case may more properly concern illegality than corporate capacity.[79] The transaction is summarily condemned, with little discussion of ultra vires or emphasis on the memorandum. Secondly, if it is a genuine ultra vires case in the *In Re David Payne*[80] mould, its restrictive approach to remedies deserves criticism. Johnston J. neglects the distinction between rights purporting to arise from the void contract, and other rights which might be created to remedy circumstances consequent on the contract failing. If Johnston J. were correct and a remedy could only be granted where the company in liquidation possessed a surplus of assets, this would exclude a remedy in the majority of

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[73] Ibid, at 70: "The theory of the law is that the whole transaction is null and void and can give rise to no legal rights or claims whatever."

[74] Sinclair v. Brougham [1914] AC 398.

[75] In Re Cummins; Barton v. Bank of Ireland [1939] 1 IR 60, 71-72.

[76] Ibid, at 72.

[77] Ibid, at 60.

[78] See below at 10.4.5: "Ultra Vires Transactions and Restitution".

[79] At the least, it seems to involve financial assistance for purchase of the company's own shares, now prohibited by Section 60, Companies Act, 1963 (see also Trevor v. Whitworth (1887) 12 AC 409), if not outright theft of company property.

[80] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

liquidations. With all its limitations, the case embodies a hostile approach to remedies in ultra vires cases which long held sway.[81]

9.2.2.1. Exceptions to the Sinclair v. Brougham approach

A number of authorities during the twentieth century did not subscribe to the *Sinclair v. Brougham*[82] orthodoxy. In *Craven-Ellis v. Canons Ltd.*[83] It was argued that where there was an attempt to conclude a contract, but this turned out to be void and null, there could be no recovery. Goddard J. accepted this logic at first instance by virtue of implied contract reasoning.[84] However, the Court of Appeal disagreed on the basis that the obligation to pay for services received arose by operation of law.[85] Furthermore, the decision of Mocatta J. in *Bell Houses v. City Wall Properties*[86] suggests that, notwithstanding the authority of *Sinclair v. Brougham*,[87] it might be possible "to fall back on quasi-contract to salvage something from the situation."[88] Mocatta J. points to *Brougham v. Dwyer*[89] which offered the opposite solution to the better known *Sinclair v. Brougham*.[90]

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[81] "At best the company's position in a claim for restitution is unclear." - G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 66.

[82] Sinclair v. Brougham [1914] AC 398.

[83] Craven-Ellis v. Canons Ltd [1936] 2 KB 403.

[84] Ibid, at 405: "such a cause of action depended on an implied request, and an express request negatived an implied request."

[85] Craven-Ellis v. Canons Ltd [1936] 2 KB 403, 410-411.

[86] Bell Houses Ltd v. City Wall Properties Ltd [1966] 1 QB 207, [1965] 3 All ER 427, [1965] 3 WLR 1065 (Mocatta J.).

[87] Sinclair v. Brougham [1914] AC 398.

[88] Bell Houses Ltd v. City Wall Properties Ltd [1966] 1 QB 207, 226 (per Mocatta J.); K. Polack, "Company Law – Allegation that a Contract is Ultra Vires the Plaintiff" [1966] CLJ 28, 29; G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 60 et seq.

[89] Brougham v. Dwyer (1913) 108 LT 504.

[90] Sinclair v. Brougham [1914] AC 398.

In Ireland, *O'Connell v. Listowel UDC*[91] provides a remedy, under the rubric of quantum meruit, to an engineer who had undertaken work for the defendant council but whose appointment turned out to be invalid. O Briain J. quoted from Cheshire and Fifoot, which situates quantum meruit as a liability outside of contract law to pay money on the ground of "unjust benefit", analogous to the action for money had and received, and adopted *Craven-Ellis v. Canons Ltd.*[92] Similarly, McWilliam J. in *Folens and Co Ltd v. Minister for Education*,[93] followed the authorities[94] which established that the parties' intention to create a contract did not negative the existence of an implied contract. These authorities may be viewed as exceptions or implicit challenges to the *Sinclair v. Brougham* approach which dominated until the 1990s.[95]

9.2.3. Traditionally Accepted Remedies: Tracing, Subrogation and Estoppel

Given the widespread rejection of restitutionary remedies, coupled with the evident desire in many cases to find a mechanism to redress the loss suffered by a performing party under the void contract, a number of alternative approaches were considered. These generally included tracing, subrogation and estoppel[96] as well as the identification of particular solutions in individual and readily distinguishable

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[91] O'Connell v. Listowel UDC [1957] Ir Jur Rep 43.

[92] Craven-Ellis v. Canons Ltd [1936] 2 KB 403, [1936] 1 AER 1066.

[93] Folens and Co Ltd v. Minister for Education [1984] ILRM 265.

[94] McWilliam J. relied on William Lacey Ltd v. Davis [1957] 2 AER 712 and Brewer Street Investments Ltd v. Barclay's Woollen Co Ltd [1953] 3 WLR 869.

[95] The cases which directly questioned the correctness of Sinclair v. Brougham and implied contract thinking are discussed below; see below at 10.2.3.4: "Reconsideration of implied contract theory".

[96] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 97; G.H. Treitel, "The Law of Contract" 11th ed., (Sweet & Maxwell, London, 2003), p. 565.

cases.[97] Ussher optimistically outlines a "rag bag of remedies", citing old authorities, though he concedes that they were "piecemeal and arbitrary".[98]

9.2.3.1. Tracing

Tracing at common law[99] was confirmed in *Re Birkbeck Permanent Benefit Building Society*.[100] The Court of Appeal accepted the proposition that if property transferred under a void agreement subsisted, untouched and readily identifiable, it could be reclaimed by the payer.[101] Thus, in *Re Jon Beauforte*,[102] a case which is often regarded as illustrative of the injustice done by the ultra vires doctrine, Roxburgh J. observes that creditors, who had constructed a factory and supplied materials and fuel to be used in an ultra vires enterprise, would be entitled to "tracing rights which might arise".[103] Tracing was confirmed in *Re PMPA Garage (Longmile) Ltd. (No.2)*[104] following *Sinclair v. Brougham*.[105] Tracing would allow a

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[97] "In view of the tenacity with which the English courts have adhered to the doctrine of ultra vires, it is interesting to notice the facility with which they also accept the doctrine of the right of recovery of money loaned or advanced to corporations on contracts ultra vires, and devise other means to avoid the hardships incident to that doctrine" - G.W. Field, "Ultra Vires" (1879) 13 American Law Review 632, 648-650, citing: In Re German Mining Company, Ex Parte Chippendale (1853) 4 De GM & G 19; 17 Jur. 745; Ex Parte Bignold, In Re Norwich Yarn Company (1856) 22 Beav 143; 52 Eng. Rep. 1062; In Re Electric Telegraph Company of Ireland (Troup's Case) (1860) 29 Beav 353; 7 Jur. (N.S.) 901; In Re Cork and Youghal Railway Company (1869) LR 4 Ch. App. 748.

[98] P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), pp. 129-130; he cites In Re Irish Provident Assurance Co Ltd [1913] 1 IR Ch. 352.

[99] Taylor v. Plumer (1815) 3 M. & S. 562; see below at 13.1: "Tracing".

[100] In Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 183.

[101] Ibid, at 208 (per Cozens-Hardy MR): "if the money of a lender was paid, say, in the shape of a bag of gold, still untouched in the society's safe, that bag of gold could be claimed by the customer as his money"; see also Taylor v. Plumer (1815) M. & S. 562, 575.

[102] In Re Jon Beauforte (London) Ltd [1953] 1 AER 634.

[103] Ibid, at 637.

[104] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 352.

party to identify their property as "actually existing assets" in the hands of the recipient or its agents.[106] It is a proprietary claim, based on the logic that, in equity, the owner had not really parted with his property.[107]

The major practical limitation of tracing principles is that it is almost always impossible to characterise a sum of money as distinct and identifiable.[108] Equitable tracing has therefore also been used to provide "a sort of rough justice"[109] despite the obstacle of admixture.[110] In *Sinclair v. Brougham*, [111] the money lent was not still identifiable, having been intermingled with other property. Nonetheless, equitable principles granted the return of that which remained of the ultra vires loan.[112] Tracing is still a valid technique,[113] though its importance is today reduced

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[105] Sinclair v. Brougham [1914] AC 398; though Sinclair v. Brougham was later overruled in Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, [1996] 2 AER 961; [1996] 2 WLR 802, see below at 10.2.3.4.3: "Step 3: The House of Lords rejects implied contract"; this does not negate the availability of tracing.

[106] Sinclair v. Brougham [1914] AC 398, 418.

[107] Ibid, at 418 (Viscount Haldane LC); the proprietary remedy in Sinclair v. Brougham may also be explained as a resulting trust; R. Grantham & C. Rickett, "Tracing and Property Rights: The Categorical Truth" (2000) 63 MLR 905; cf C. Rotherham, "The Metaphysics of Tracing: Substituted Title and Property Rhetoric" (1996) 34 Osgoode Hall L.J. 321.

[108] "Chattel property remaining in the defendants' possession might be recovered, but the position is not at all the same when we are dealing with currency which cannot be identified or followed" – per Gibson J., Byrne v. Rudd [1920] 2 IR 12, 17; "having got hold of property which does not belong to you, if only you are wise or lucky enough to change its form you may enjoy the proceeds unmolested" - Sinclair v. Brougham [1914] AC 398, 435 (per Lord Dunedin).

[109] R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 306.

[110] F.O.B. Babafemi, "Tracing Assets: a Case for the Fusion of Common Law and Equity in English Law" (1971) 34 MLR 12, 13.

[111] Sinclair v. Brougham [1914] AC 398.

[112] Ibid, at 437; R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 306, but Lord Wright regards this "tracing" as an equitable lien, related to the constructive trust, ibid, 309-310; O'Dell affirms that "there is no justification for having two sets of identification rules." - E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 50.

given the availability of both straightforward personal remedies and other remedial proprietary remedies.[114]

9.2.3.2. Subrogation

Subrogation may offer a remedy in very limited cases; where ultra vires borrowing is used to pay legitimate creditors, so that the total liabilities of the borrower remain constant.[115] In this instance, the person who made the void loan may stand in the position of the valid creditors and claim their rights, though without the benefit of any security they may have had.[116] Subrogation was used to provide a remedy in *Re Lough Neagh Ship Company*[117] where a company borrowed money ultra vires to set up its business.[118] The lender was permitted to take the place of the original supplier in the liquidation. Traditionally, the basis for this concession was unclear.[119] Fry L.J. describes this mechanism as an equity which is based on a legal fiction devised

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[113] Though Westdeutsche Landesbank Girozentrale v. Islington LBC ([1996] AC 669) rejected the "tracing" used in Sinclair v. Brougham [1914] AC 398, traditional tracing rules survive.

[114] See below at 13.1: "Tracing".

[115] In Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 183, 231-232 (per Buckley LJ); In Re Cork and Youghal Railway Company (1869) LR 4 Ch. App. 748, 761; In Re Wrexham, Mold and Connah's Quay Railway Company [1899] 1 Ch. 440; Blackburn Building Society v. Cunliffe, Brooks & Company (1882) 22Ch. D. 61, 71; Baroness Wenlock v. River Dee Company 19 Q.B.D. 155; In Re Lough Neagh Ship Company; ex p. Workman [1895] 1 IR 533; see: Anonymous, *Notes* (1887) 3 LQR 487; Anonymous, *Notes* (1896) 46 LQR 110; S.J., "The Equitable Right of Subrogation" (1910) 30 Can. L.T. 247; see also P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), pp. 128-129; A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 104 et seq; C. Mitchell & S. Watterson, "Subrogation Law and Practice" (Oxford, 2007).

[116] See R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 310; S.J., "The Equitable Right of Subrogation" (1910) 30 Can. L.T. 247, 250.

[117] In Re Lough Neagh Ship Company; ex p. Workman [1895] 1 IR 533.

[118] See G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 115; see also: Blackburn Building Society v. Cunliffe, Brooks & Company (1882) 22Ch. D. 61; S.J., "The Equitable Right of Subrogation" (1910) 30 Can. L.T. 247, 248-249.

[119] C. Mitchell & S. Watterson, "Subrogation Law and Practice" (Oxford, 2007), p. 21.

in order to attain a just outcome.[120] The tacit acknowledgement is that subrogation is allowed, not on the ground of intellectual coherence, but in order to provide a much-needed remedy.[121] It is limited, and can do no more than "snatch a few brands from the burning".[122] In addition to its narrowly-defined scope, there can be practical evidentiary obstacles.[123] Like tracing, subrogation remains valid today, in the cases where it may apply, but is eclipsed by more general claims.[124] Modern analysis explains the mechanism as a manifestation of unjust enrichment principles.[125]

9.2.3.3. Other rights: a claim on the surplus for ultra vires creditors

In *Re Guardian Permanent Benefit Building Society*,[126] the court allowed the maker of an ultra vires loan to claim repayment after the society's other claims had been met.[127] The rationale was that it would be inequitable to permit the society to retain the benefit of the sums advanced on foot of a void loan.[128] In addition to the established grounds of subrogation and tracing, the Court of Appeal in *Re Birkbeck*

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[120] Baroness Wenlock v. River Dee Company (No. 2) 19 QBD 155, 164: "equity [..] based on a fiction, which, like all legal fictions, has been invented with a view to the furtherance of justice."

[121] Burrows, citing Goff and Jones, now views subrogation as based on unjust enrichment - A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 105; Banque Financière de la Cité v. Parc (Battersea) Ltd [1999] 1 AC 221, 231-232 (per Lord Hoffmann).

[122] Ibid, at 165.

[123] See R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 310: "in the inextricable flood of transactions no depositor could have shown that his money had been used to pay any particular debt".

[124] Banque Financière de la Cité v. Parc (Battersea) Ltd [1999] 1 AC 221

[125] See Banque Financière de la Cité v. Parc (Battersea) Ltd [1999] 1 AC 221, 231-232 (per Lord Hoffmann); C. Mitchell & S. Watterson, "Subrogation Law and Practice" (Oxford, 2007), pp. 3-4, 19.

[126] In Re Guardian Permanent Benefit Building Society (1882) 23 Ch. D. 440.

[127] Ibid, at 444, upheld on appeal by Jessel MR, Cotton and Bowen LJJ, at 452.

[128] In Re Guardian Permanent Benefit Building Society (1882) 23 Ch. D. 440, 444 (per Bristowe VC).

Permanent Benefit Building Society recognises this earlier authority[129] that, once all legitimate creditors and members were paid, the surplus could be divided proportionately among ultra vires creditors.[130] Buckley L.J. views the rule as difficult to justify, but as it is obiter, is not called on to reconsider it.[131] This claim is hard to reconcile with the principle that an ultra vires transaction is entirely void. In principle, the ultra vires lender consequently has no debt claim, either legal or equitable.[132] Today, this authority would most likely be discreetly abandoned or subsumed into the more general law on remedies.[133]

9.2.3.4. Estoppel

Estoppel has been advocated as a possible solution to the ultra vires problem at different times and in different jurisdictions, yet it poses grave theoretical difficulties. The idea is that one party would be estopped from claiming its full legal rights in the context where a contract should in principle be void for incapacity. Closer examination of the application of estoppel principles in the context of incapacity points to difficulties.

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[129] Ibid.

[130] In Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 183, 232 (Buckley LJ).

[131] "I confess myself unable to say what was the plain principle of equity to which Sir George Jessel referred [...] the lenders either are or are not creditors" - In Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 183, 234 (per Buckley LJ); "The decision of the court of Appeal was clearly illogical, though apparently based on authority binding that court." - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 308.

[132] Buckley LJ, In Re Birkbeck Permanent Benefit Building Society [1912] 2 Ch. 183, 232; see also S.J. Stoljar, "Reexamining Sinclair v. Brougham" (1959) 22 Modern Law Review 21, 23.

[133] It differs from straighforward restitution because the ultra vires creditor's claim was subordinated to other claims.

Promissory estoppel arises where one party makes a false representation of fact,[134] the other person relies on it, and the party which made the representation is subsequently estopped from pleading that that fact is untrue.[135] In Ireland, estoppel has been applied broadly, based on a test of unconscionability.[136] In the context of corporate capacity, estoppel could arise from the company representing to the contracting party that it had the capacity to engage in a transaction. It has been suggested that the company which engages in an ultra vires transaction might be estopped from relying on its own incapacity when sued on the contract. The estoppel argument has a superficial attraction[137] and has been used on occasion to produce fair, practical results.[138] Estoppel was also widely used in the United States in the early days of the ultra vires doctrine. There were divergences between

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[134] Murphy v. Attorney General [1982] 1 IR 241, 302 (per O'Higgins CJ): "it would require for its application both full knowledge of the true facts and conduct, representation or attitude inconsistent with that knowledge."

[135] J. Mee, "Lost in the Big House: Where Stands Irish Law on Equitable Estoppel?" (1998) 33 Ir. Jur. 187, 197; Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221, 231; see also G.C. Gale, "The Doctrine of Ultra Vires, as Affecting the Rights and Obligations of a Corporation…" (1899) 48 Central Law Journal 231, 232; but "This is a concept which is defined in many ways and which assumes many forms." –Murphy v. Attorney General [1982] 1 IR 241, 302 (per O'Higgins CJ).

[136] E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123, 134, citing: Revenue Commissioners v. Moroney [1972] IR 372; McMahon v. Kerry County Council [1981] ILRM 419; O'Reilly v. Granville [1985] IR 586; Doran v. Thompson [1978] IR 223; Traynor v. Fegan [1985] IR 586.

[137] Thompson prefers it to the US Supreme Court's award of extracontractual remedies, because it allows contractual security to be given effect: "other courts advanced more boldly and more directly to the real justice of the case" - S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 391.

[138] In Bradley v. Ballard (55 Ill. 413), "the rule undoubtedly wrought justice" - G.C. Gale, "The Doctrine of Ultra Vires, as Affecting the Rights and Obligations of a Corporation…" (1899) 48 Central Law Journal 231, 234.

individual states[139] and the federal courts, which rejected it, [140] but the "New York rule" relied on estoppel.[141]

However, it engenders various difficulties. Frey, supporting estoppel, identifies and seeks to rebut four arguments against permitting estoppel as a defence in ultra vires cases. These are that ultra vires acts purportedly effected by a company's officers cannot be imputed to the company, that it is paradoxical to permit recovery on a non-existent contract, that the contracting partner is fixed with constructive notice of the extent of the company's capacity, and that public policy militates against granting effect to ultra vires agreements.[142] Frey overcomes the first problem by pointing out the parallel with ultra vires torts, where tortious acts committed by a company's agents in excess of its capacity are imputed to it so as to ground tortious liability.[143] He suggests that the logical difficulties in attributing the act of the employee to the company which could not do the act should be surmounted in the interests of justice.[144] The other concerns are more persuasive.

A further difficulty relates to the nature of the representation. Promissory estoppel requires "something in the nature of a direct promise".[145] Can it be argued that the signing of a contract by the company equates to a representation that it has capacity? On the contrary, it is conceivable that the company might not have given consideration to the matter of its capacity. In *Northern Bank v. Quinn and Achates*

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[139] Alabama was the only state to deny any remedy, a position similar to that in Sinclair v. Brougham: A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 88.

[140] Central Transportation Company v. Pullman's Palace Car Company (1891) 139 US 24, 60; see A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 88.

[141] G.C. Gale, "The Doctrine of Ultra Vires, as Affecting the Rights and Obligations of a Corporation…" (1899) 48 Central Law Journal 231, 232.

[142] A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 90.

[143] Ibid, at 91.

[144] Ibid, at 92.

[145] J. Mee, "Lost in the Big House: Where Stands Irish Law on Equitable Estoppel?" (1998) 33 Ir. Jur. 187, 200.

Investment Company,[146] Keane J. rejects the suggestion that the company, by sending its memorandum and articles to the other contracting party, had represented that it had sufficient capacity. This act was instead an invitation for the party to satisfy itself.[147]

Furthermore, estoppel, requiring the other party's detrimental reliance on the company's representation, would seem to be trumped by the doctrine of constructive notice. The contracting party is expected to be aware of the scope of the company's capacity from its constitutional documents. Frey avoids the constructive notice objection by conceding that the prohibition on raising ultra vires as a defence to returning benefits received need not be termed "estoppel".[148] This concession admits that the prohibition suggested does not fit the definition of estoppel.

Another criticism of deeming the company to be estopped from raising the defence of incapacity is that it is unfair to shareholders, who are penalised for failing to repudiate a contract that they may not even be aware of. It is "absurd" that shareholders who are geographically dispersed and may not all be capable adults can be fixed with implied consent.[149] As Gale points out, the shareholders are often less well-positioned to object than the contracting party, who is at least a party to negotiations.[150] Furthermore, it is hard to suggest that persons who join the company after the contract's conclusion should be deemed to assent to it. On an English view, building on this logic, even if the members of the company were

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[146] Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221.

[147] Ibid, at 231.

[148] A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 93.

[149] G.C. Gale, "The Doctrine of Ultra Vires, as Affecting the Rights and Obligations of a Corporation…" (1899) 48 Central Law Journal 231, 233.

[150] Ibid, at 233.

estopped by their acquiescence from invoking the doctrine, this could not withstand any change in membership.[151] On this view, estoppel would become unworkable.

Estoppel, as presented so far, applies to the company, which represents the sufficiency of its capacity. It is an inherent limitation in the New York approach that it restricts only one party, the corporation, and so offers a wholly inadequate solution for the body of ultra vires cases.[152] Accepting the non-existence of the contract and implementing a just remedy, whichever party has performed, is a far more satisfactory solution than formulating a rule which binds only one party.

A distinct alternative means of employing estoppel might rely on the inaction of either the company or the other party during the execution by one or both sides of the bargained-for consideration. Specifically, having received an unreciprocated benefit, either party might be estopped from denying the contract. In the majority of American states, not just the company, but any party which received benefit under a void contract was "estopped" from raising ultra vires as a defence to an action by the party which had performed.[153] Here the estoppel arises not from a pre-contractual representation, but by virtue of the receipt and retention of the other party's performance. This position is stronger, but still faces other challenges.

The principal objection to the estoppel defence is that the ultra vires contract is void, or non-existent, and yet proponents of the defence would somehow give it effect.[154] This fact should defeat any estoppel or "estoppel-like" defence. How can any act on the part of the company arrogate to it capacity beyond that conferred by

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[151] H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 7: "the *persona* of the company is a thing apart, and so soon as it comes to include any individual not estopped, he can at once complain."

[152] G.C. Gale, "The Doctrine of Ultra Vires, as Affecting the Rights and Obligations of a Corporation…" (1899) 48 Central Law Journal 231, 232.

[153] A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 90.

[154] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 362 (per Murphy J.): "the simple cogent proposition that a body corporate cannot enforce a contract which it never had the capacity to make".

its objects, especially given that the express and unanimous decision of shareholders does not have the power to create such capacity? If the shareholders of the company cannot expressly ratify a void contract, nor can they or the company's agents impliedly validate it by conduct.[155] There may have been "confusion found in the older cases of ratification",[156] but *Ashbury*[157] banished it.[158] As Miller J. affirmed, "nothing which has been done under it, nor the action of the court, can infuse any vitality into" a void contract.[159] By logical application, "an ultra vires agreement could not become intra vires by reason of estoppel, lapse of time, ratification, acquiescence or delay".[160]

The founding principle of corporate capacity is that anything done in excess of capacity does not exist. A subsidiary point is that this fact also negates another element of estoppel: pointing to an incapacity is not so much a question of "enforcing strict legal rights",[161] as indicating a state of affairs.[162] Since the ultra

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[155] See above at 4.2.3.1: "Ratification not possible".

[156] Taylor v. Chichester and Midhurst Railway Company (1867) LR 2 Ex 356, 378 (per Blackburn J.), quoted in H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 6: "the shareholder may waive any right which is given to him for his own protection only; and if he has either expressly or tacitly done so, he can no longer object; and neither a stranger nor the body corporate itself can raise such an objection to a contract made by the corporation if no shareholders choose to raise it for themselves."

[157] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[158] H.A. Street, "A Treatise on the Doctrine of Ultra Vires" (Sweet & Maxwell, London, 1930), p. 7.

[159] Pennsylvania Railroad v. St. Louis Railroad (1886) 118 US 290, 317 (per Miller J.).

[160] York Corporation v. Henry Leetham & Sons Ltd [1924] 1 Ch. 557, 583 (per Russell J); "the defences of estoppel, laches, acquiescence etc are wholly out of place and unsustainable." – per Overend J., Hennessy v. National Agricultural and Industrial Development Authority [1947] 1 IR 159, 191, 203.

[161] J. Mee, "Lost in the Big House: Where Stands Irish Law on Equitable Estoppel?" (1998) 33 Ir. Jur. 187, 202.

[162] Cf In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 363-364 (per Murphy J.): "I see no difficulty in reconciling the proposition that a particular state of facts or law may exist but that a party may in particular circumstances be precluded from relying on them."

vires contract is void and non-existent, principle insists that its ghost cannot come into being through estoppel. Frey responds to this argument by deducing that, estoppel being permissible, it is inaccurate to describe the contract as "void".[163] However, this contradicts the fundamental logic of the ultra vires doctrine, as reiterated through the authorities. Voidness is no mere accident of words, but the heart of the law on corporate capacity.[164]

Frey's answer to the argument that the State's policy requires companies to be restricted to the exercise of their capacity is that there is no public policy justifying the State intervening in private law matters.[165] This argument is more than a defence of estoppel in ultra vires cases, it is a direct attack on the rationale for limited capacity in the first place. Similarly, Thompson favours estoppel over non-contractual remedies, because it allows contractual terms, such as security, to be implemented.[166] It seems that frequently espousal of estoppel in corporate capacity cases boils down to hostility to the doctrine itself.[167] Such opposition to the doctrine may warrant radical reform or abolition, but estoppel should not be used as an ill-justified means to avoid the doctrine's effects.

9.2.3.4.1. Estoppel in the case law

Although it may be repudiated on principle, estoppel has often been considered in the authorities. A number of cases addressed the scenario where a creditor on an ultra vires agreement had obtained a judgment against the company before it was

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[163] A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 92.

[164] See above at Chapter 4: "Defining Ultra Vires".

[165] Ibid, at 93-95.

[166] S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 392.

[167] Thompson later expresses his view that "the doctrine of ultra vires has no proper place in the law of private corporations" - S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 398.

determined that the contract was void.[168] In these cases, it was asked whether the judgment constituted an estoppel. The Privy Council in *Great North-West Central Railway Company v. Charlebois*[169] held that a consent judgment "cannot be of more validity than the invalid contract on which it was founded".[170] In *Re Jon Beauforte*,[171] Roxburgh J. interpreted this to mean that no court decision in which the question of capacity had not been addressed could be a bar to a subsequent claim of ultra vires.[172]

Similarly, in *Flood v. Irish Provident Assurance Company*,[173] Lord Walker rejected the idea that there could be an estoppel which would lead to void insurance policies binding the company's shareholders.[174] In *Northern Bank v. Quinn and Achates Investment Company*,[175] Keane J. rejects the bank's contention that the company was estopped from claiming that it was ultra vires, on the ground that the bank had not relied to its detriment on any representation that the transaction was intra vires. The estoppel argument in that case circumvented the general theoretical obstacle by conceding that "estoppel could not enable the company validly to perform an act which was ultra vires".[176] However, it proposed that since the company had altered its objects to extend its capacity and acknowledged the contract after increasing its capacity, that acknowledgement could suffice. It was argued that the bank relied on

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[168] See In Re Jon Beauforte (London) Ltd [1953] 1 AER 634, 636, citing Great North-West Central Railway Company v. Charlebois [1899] AC 114.

[169] Great North-West Central Railway Company v. Charlebois [1899] AC 114.

[170] Ibid, at 123; this endorsed the reasoning of the Chancellor of Ontario, who stated that "the incapacity to do the act involves the incapacity to consent that it be treated as valid" – ibid, at 116.

[171] In Re Jon Beauforte (London) Ltd [1953] 1 AER 634.

[172] Ibid, at 637.

[173] Flood v. Irish Provident Assurance Company 46 ILTR 214.

[174] Ibid, at 217.

[175] Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221.

[176] Ibid, at 230.

this representation to its detriment by not calling in the loan. However, Keane J. found no evidence, even if the letter from the company was a representation, that the bank acted in reliance on it.

In Re PMPA Garage (Longmile) Ltd. (No.2)[177] is a problematic authority on the other side of the estoppel argument. Murphy J. decided that assets invalidly disposed of could be recovered by a personal or proprietary action, but that another alternative also exists, which is "something akin to an estoppel" preventing a person who has acquired assets in a void transaction from invoking the ultra vires doctrine to avoid their return.[178] According to Murphy J., the weight of authority prohibited a creditor from invoking incapacity to unjust effect.[179] This posits a very broad principle, because in Murphy J.'s view, justice is not sufficiently served by the acknowledged existence of personal and proprietary extracontractual remedies, but requires giving effect to the void contract.[180] The broad formulation of this "something akin to an estoppel" facilitated a claim against the guarantor companies which, unlike the borrower, did not receive the assets of the incapable lender.[181] Murphy J. invokes the fact that the lender could not have survived and so had "the opportunity to take the substantial sums of money by way of deposit from members of the public" without the guarantees as a reason to hold the guarantor companies liable on the non-existent agreement.[182]

Thus, the High Court ruled that even though the agreements were ultra vires the lender, they could still be enforced by it, and the other parties could not object on

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[177] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349.

[178] Ibid, at 362.

[179] Ibid, at 363: "the overwhelming body of judicial opinion is to the effect that the borrower is precluded from taking the point that the transaction was ultra vires where this would result in an injustice."

[180] Ibid, at 363.

[181] Ibid, at 363.

[182] Ibid, at 363.

the basis of its incapacity.[183] The "estoppel" in this case operates against the outside party, preventing him from invoking the company's incapacity in order to deny the company repayment.[184] This was not regarded as a material distinction.[185] The endorsement of estoppel as a means to implement a void agreement is highly problematic at the level of principle.[186] It seems that Murphy J. was determined to achieve a preordained "just" result regardless of the legal intricacies. Since the operation of estoppel in this manner would put in question the central tenet of the doctrine of ultra vires, it is to be hoped that this decision will not be followed in future.[187]

9.2.3.4.2. Estoppel as a cause of action

However, there is a final relevance which estoppel may have, which should be distinguished from its problematic proposal as a means to uphold a void agreement. O'Dell[188] supports the estoppel in *Re PMPA Garage (Longmile) Ltd. (No.2)*,[189] viewing it not as a defence, but as a cause of action under the modern *High Trees*[190] line of authority.[191] Estoppel is here viewed as an extracontractual remedy, not a

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[183] Ibid, at 363-364.

[184] Ibid, at 363.

[185] Ibid, at 351.

[186] Cf O'Dell who explains In Re PMPA Garage (Longmile) Ltd. (No.2) on the basis of estoppel as an extracontractual cause of action: E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123; see below at 9.2.3.4.2: "Estoppel as a cause of action".

[187] The question is tied to the issue of whether any party can raise the want of capacity, which is considered above: see above at 4.3: "Who Can Plead Ultra Vires?".

[188] E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123, 133-140.

[189] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349.

[190] Central London Property Trust v. High Trees House [1947] KB 130.

[191] E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123, 138; citing: Cullen v. Cullen [1962] IR 268, 291-292; Revenue Commissioners v. Moroney [1972] IR 372; Crabb v. Arun DC [1976] Ch. 179, 187; Smith v. Ireland [1983] ILRM 300; Traynor v. Fegan [1985] IR 586.

means of giving effect to a contract. For O'Dell, estoppel is an alternative to the constructive trust, based on unconscionability.[192] Despite arguing that the authorities used to support the estoppel analysis can be better explained as restitutionary remedies,[193] O'Dell therefore supports the outcome in *Re PMPA Garage (Longmile) Ltd. (No.2)*.[194]

The theoretical objection to this is that the company which lacks capacity cannot make the promise which grounds such an action. However, O'Dell argues that the fact that "the company had no power to make the representation does not alter the fact that it was made", since the emphasis is on the promisee and its detrimental reliance.[195] This view is consistent with authorities such as *Byrne v. Rudd*,[196] which fix the company with responsibility for an agent's misrepresentation despite the false statement being one which the company would not have the capacity to make, and the tortious liability of companies for ultra vires acts. In all these cases, the protection of the outsider in a non-contractual action prevents the company from disclaiming the act of its agent, even though on a strict theoretical reading, the company, and therefore its agent, lacked the capacity to do the act which creates the liability.

9.3. MODERN REMEDIES IN ULTRA VIRES CASES

Twentieth century authorities show that the voidness of the agreement was often the end of the matter. There were no coherent principles offering a remedy to a party which would lose out, and there was strong authority against one. Since then, there has been a seismic shift in relation to the availability of restitutionary and equitable remedies. It is now clear that there will usually be a remedy where one party has performed its side of an ultra vires contract, and that this is a separate inquiry which

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[192] E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123, 138.

[193] Ibid, at 129-133.

[194] Ibid, at 133.

[195] Ibid, at 138-139.

[196] Byrne v. Rudd [1920] 2 IR 12.

is begun after the contract is found to have been void. In *Re PMPA Garage (Longmile) Ltd. (No.2)*,[197] Murphy J. observes that counsel did not attempt to make the "audacious proposition" that there should be no means to recover the property transferred, and that all the authorities agreed that there should be some remedy.[198] There is a striking contrast between the traditional view, which generally denied a remedy,[199] or struggled to find one, and the panoply of remedies available to prevent injustice today. The dramatic changes in the law governing the availability of remedies over the past quarter century have profound implications for the law on corporate capacity.[200]

It is regrettable that remedies were for so long constricted. A well-developed law of remedies permits the courts to focus on the principled merits of claims in contract and other substantive areas without fearing that applying the rules will entail harsh and unjust consequences for the parties. The healthy development of remedies benefits the substantive law, by preventing it being distorted in attempts to prevent injustice.[201] That the absence of a vigorous law of remedies can endanger the health of the substantive rules is typified in the area of corporate incapacity. Patently unjust outcomes in a small number of cases brought the doctrine of ultra vires into disrepute.[202] The sentiment that ultra vires no longer offered genuine protection for

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[197] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349.

[198] Ibid, at 351.

[199] Sinclair v. Brougham [1914] AC 398.

[200] See Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938, [1994] 4 AER 890 for an outline of the development of restitution.

[201] Westdeutsche Landesbank Girozentrale v. Islington BC [1996] AC 669, 685, [1996] 2 WLR 802, 810 (per Lord Goff): "in deciding a question of law in any particular case, the courts are much influenced by considerations of practical justice, and especially by the results which would flow from the recognition of a particular claim on the facts of the case before the court."

[202] See In Re Jon Beauforte (London) Ltd [1953] 1 AER 634, in which creditors who had supplied fuel and veneer to the company which was carrying on business as veneer panel manufacturers ultra vires its objects were left unpaid; "an incapacitated party to whom money had been paid or property transferred might be unjustly enriched at the expense of the other" - J. Beatson, "Anson's Law of Contract" 28th ed., (Oxford, 2002), p. 207.

shareholders and creditors, but instead simply acted as a trap for the unwary[203] led ultimately to calls for its abolition.[204] If appropriate remedies were available to aid parties who had transferred benefits under a void contract, those criticisms of ultra vires would have been addressed from the start.

The subsequent flowering of the law of remedies has a positive effect at a number of levels. Its benefits will be felt far beyond the law on corporate capacity, though some of the cases which played a part arose in this context.[205] It puts the ultra vires doctrine in a new light, by taking the sting out of the law on corporate capacity. This fact is important in the context of continuing calls for reform.[206] Furthermore, the application of remedial principles will continue to be of real practical importance in the ultra vires cases which will inevitably continue to arise in relation to those corporations which are not to be granted full capacity.[207]

9.3.1. Classifying the Remedies

The arsenal of remedies may be classed according to their source: whether common law or equitable; causative event: be it unjust enrichment or a wrong; or nature: personal or proprietary. In the English and Irish legal systems, both the common law and equity respond to the need for remedies. Lord Wright's formulation in the

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[203] "Cohen Committee Report", Report of the Committee on Company Law Amendment (1945) Cmd. 6659/45, para. 12.

[204] Company Law Review Group, First Report (Dublin, 2001), para. 10.9.2.

[205] See eg Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733; Westdeutsche Landesbank Girozentrale v. Islington BC [1996] AC 669; Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349; Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558.

[206] See the Companies Bill at http://www.clrg.org/companiesbill/default.asp; see also Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27.

[207] See eg Attorney General at the relation of O.F. Fishing Ltd v. Port of Waterford Company [2007] 2 IR 156; Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1.

seminal *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd*[208] refers explicitly to unjust enrichment, the central principle of restitution, but also evokes the equitable concept of "good conscience".[209] The parallel remedies offered by restitution and equity[210] may be availed of by a plaintiff depending on the circumstances and whether their respective tests are met.[211] Instead of a common law personal remedy founded on unjust enrichment, a plaintiff may instead pursue a discretionary equitable remedy,[212] either personal or proprietary, in order to satisfy his claim.[213] Common law and equity have shared aims, but different techniques.

There are a number of important distinctions between the responses of the common law of restitution and equity.[214] For example, the common law generally offers a personal right of recovery,[215] whereas equity readily grants proprietary interests in property alongside personal remedies.[216] At common law, the plaintiff generally

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[208] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 61 (per Lord Wright).

[209] Ibid, at 61 (per Lord Wright).

[210] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 16; In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 362.

[211] Restitution (in the form of an action for money had and received) is confirmed as available against corporations since Hall v. Swansea Corporation (1844) 5 QB 526; Sanders v. St Neot's Union Guardians (1846) 8 QB 810; 10 Jur. 566; Doe d. Pennington v. Taniere (1848) 12 QB 998; 116 Eng. Rep. 1144.

[212] R. Gregory, "Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation" (1985) 48 MLR 108, 110: "discovering an ultra vires taint is not the stopping, but the starting point for equitable inquiry".

[213] In Re Frederick Inns Ltd [1991] ILRM 582, 593-594; Murphy v. Attorney General [1982] 1 IR 241, 316; see below at 13.3: "A Personal or a Proprietary Remedy?"

[214] Cf Lord Wright: "since every court is now bound in the same proceeding to apply either law or equity or both as the circumstances may require, the distinction between law and equity is now only important in the sense that the differences in method and rules must be observed." - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 305.

[215] Except for common law tracing: see below at 13.1.1: "Common Law Tracing".

[216] See below at 13.2: "Resulting and Constructive Trusts".

seeks the award of a sum of money representing "fair and just compensation for the benefit"[217] that he has transferred to the defendant, whether it was a monetary payment, the transfer of goods, or the performance of services. Another important distinction is that common law remedies are granted as a matter of right, once the legal criteria are met, whereas the court always exercises its discretion at equity.[218] That common law restitutionary remedies are not discretionary and may only be refused according to legal principle and recognised defences is emphasised by Lord Goff in *Lipkin Gorman v. Karpnale.*[219]

Birks emphasises the causative event as the means of categorising rights in both the law of obligations and the law of property.[220] This distinguishes between the legal rights which arise from the consent of the parties, from the commission of a wrong, and from unjust enrichment. Birks argues that the law of restitution includes remedies to both wrong-based and unjust enrichment scenarios, and that these can only be regarded as united because of the object of the response.[221] Though Birks emphasises that a restitutionary response can arise from a wrongful act or from contract,[222] the more traditional view is that the law of restitution is based on unjust enrichment.[223]

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[217] Pavey and Matthews Pty Ltd v. Paul [1986] 162 CLR 221, 262 (per Deane J.).

[218] Cf Roxborough v. Rothmans of Pall Mall Australia Ltd (2001) 185 ALR 335; 208 CLR 516; see R. Grantham, "Restitutionary Recovery ex Aequo et Bono" (2002) Sing. JLS 388, 396.

[219] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 71 (per Lord Wright); Lipkin Gorman v. Karpnale [1991] 2 AC 548, 578 (per Lord Goff); Westdeutsche Landesbank Girozentrale v. Islington LBC [1994] 4 AER 890, 912 (per Hobhouse J.).

[220] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), pp. 4-10, 22.

[221] Ibid, pp. 40-41.

[222] Ibid, pp. 25-29.

[223] See below at 10.3: "Restitution's Modern Theoretical Foundation: The Principle against Unjust Enrichment".

It is tempting to regard the distinction between common law and equitable remedies as decisive, but it does not mirror precisely the more fundamental distinction between personal and proprietary rights. While the common law only grants personal rights, with the lone exception of tracing, equity can create both personal and proprietary rights.[224] The personal right is one which can be claimed as against another person, whereas the proprietary right is a direct right to a particular item of property, and it thus a right that may be invoked against a person only in so far as that person possesses the item of property.[225] The Irish courts recognise personal and proprietary actions as equal and parallel.[226] Henchy J. describes the constructive trust as "the counterpart in equity" of the common law action for money had and received.[227] The contrasting remedies complement each other.[228]

The obtention of a proprietary remedy has a number of advantages for the plaintiff over personal remedies. For example, in *Westdeutsche Landesbank Girozentrale v. Islington BC*,[229] it was sought as a means to obtain the award of compound interest.[230] Trust property can be traced in equity and the proprietary interest is

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[224] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 10.

[225] Ibid, p. 9.

[226] See Murphy v. Attorney General [1982] 1 IR 241, 316 (Henchy J.); Bank of Ireland Trust Services Ltd v. Revenue Commissioners [2002] 4 IR 178, 185 (Kelly J); In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105, 202 (Murray CJ).

[227] Murphy v. Attorney General [1982] 1 IR 241, 316 (Henchy J.); but "equity does not stop where the law must do" - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 310.

[228] R. Keane, "Equity and the Law of Trusts in the Republic of Ireland" (Butterworths, Dublin, 1988), p. 187: "sometimes the restoration of the benefit can only be achieved by giving the plaintiff an interest in property.", quoted with approval by Barr J. in John Kelly v. Nellie Cahill and Michael Cahill Junior [2001] 2 ILRM 205, 210 .

[229] Westdeutsche Landesbank Girozentrale v. Islington Borough Council [1996] AC 669; noted by G. Jones at (1996) 55 CLJ 432.

[230] This distinction is less important since the House of Lords decided in Sempra Metals Ltd v. Inland Revenue Commissioners [2008] 1 AC 561 that compound interest could be granted in a claim for restitution at common law.

enforceable against third parties except purchasers for value of the legal interest without notice.[231] In many cases, which involve insolvent companies, the difference in position between an unsecured personal creditor and a person with an equitable interest in specific property is of very real significance.[232] It circumvents the general rule in insolvency that unsecured creditors share equally and proportionately in the assets available to satisfy the company's debts.[233] Debts other than taxes and wages[234] in principle rank equally, and creditors must share in the remaining assets.[235] In a large majority of cases, there are no assets to be shared among the general unsecured creditors after preferential and secured creditors are satisfied.[236] The limited appeal of a right to compete with other unsecured creditors enhances the attraction of proprietary remedies. Trust property is not subject to the pari passu principle because it does not truly belong to the company.[237]

In the search for a legal remedy to compensate for a loss due to the conclusion of a void contract, there are other options in addition to seeking direct repayment by the recipient of a benefit. There may be personal wrong-based liability on the part of persons such as the company directors responsible for the invalid transaction, either in tort or more frequently in equity, for the breach of their fiduciary duties.[238] Action against such persons is usually secondary to actions designed to recover what has been lost, but may prove useful in some circumstances.

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[231] Ibid, at 703-4 (per Browne-Wilkinson LJ).

[232] Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), p. 109.

[233] See R. J. Mokal, "Priority as Pathology: The Pari Passu Myth" (2001) 60 CLJ 581.

[234] Section 285, Companies Act, 1963 (Ireland) provides that the Revenue Commissioners and employees are preferential creditors, ranking in priority over other creditors in a winding up.

[235] See R. J. Mokal, "Priority as Pathology: The Pari Passu Myth" (2001) 60 CLJ 581.

[236] Ibid, at 588; "If the net assets had been sufficient to repay all these claimants, the matter would have been simple. But there had been a loss." - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 308.

[237] R. J. Mokal, "Priority as Pathology: The Pari Passu Myth" (2001) 60 CLJ 581, 585.

[238] See below at 14: "Remedies against an Individual for Wrongful Conduct".

9.3.2. Recent Growth in the Availability of Remedies

The past fifteen or twenty years have seen dramatic developments in the fields of both unjust enrichment and the constructive trust. Taken together, these developments, which all tend in the direction of expansion, have radically altered the landscape of the law of remedies. They provide new and powerful tools for the judiciary and a real prospect for parties to void transactions to recover benefits they have transferred.[239] Restitution has overcome a number of obstacles to recovery of payments made under void contracts, including the rejection of the implied contract theory which obstructed remedies in the past and the mistake of law bar.[240] The same timeframe has seen dramatic growth in the area of the constructive trust in this jurisdiction. Unlike their counterparts in the United Kingdom, members of the Irish judiciary have embraced the "new model" constructive trust.[241] If a number of leading cases[242] correctly represent the law, Irish law has gone so far as no longer to require that the legal owner's conduct be unconscionable in order to impose it.[243] This is a radical expansion of the doctrine which would make the proprietary remedy readily available in this jurisdiction.

The details of the legal principles concerned require close analysis, but the general trend is welcome in the interests of justice. As Lord Wright attests, it is imperative for a "civilised system of law" to offer remedies against unconscionable and unjust enrichment.[244] If the existence of non-contractual remedies is undoubtedly a good

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[239] "English judges and jurists [...] at this stage are constantly experimenting with law through the lens of unjust enrichment." - B. Fitzgerald, "Ultra Vires as an Unjust Factor in the Law of Unjust Enrichment" 2 (1993) Griffith Law Review 1, 4.

[240] See A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 388.

[241] John Kelly v. Nellie (otherwise Ellen) Cahill and Michael Cahill Junior [2001] 2 ILRM 205, 211.

[242] HKN Invest OY v. Incotrade PVT Ltd. [1993] 3 IR 152, John Kelly v. Nellie (otherwise Ellen) Cahill and Michael Cahill Junior [2001] 2 ILRM 205, 210 (per Barr J.).

[243] See below at 13.2.3.2: "The "new model" or remedial constructive trust".

[244] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 61 (per Lord Wright): "any civilized system of law is bound to provide remedies for cases of what has been called

thing, the principles developed may also be measured according to a number of criteria. The application of legal and equitable remedies should firstly be fair in theory. It must also respect the coherence of the law, underlying principles and the rules of precedent.[245] The proposed remedies must be related to the facts and their practical effect worked out to verify that their use produces a fair outcome on the facts. This is Lord Goff's "practical justice".[246] The danger of failing to relate the remedy to the facts is illustrated by the refusal of Harman J. in *Rover International Ltd v. Cannon Film Sales Ltd (No. 3)*[247] to allow a quantum meruit to one side when allowing restitution to the other: the defendants in that case would be overcompensated whereas the plaintiff would not recoup their expenses.[248]

Thus, if the observation at the most general level must be that great progress has been made so that non-contractual remedies are now far more available than ever before, this must also be accompanied by more focused examination. Firstly, the current law governing personal and proprietary remedies may be evaluated at a more technical level to judge how well it works to serve the needs which have inspired it. The other question which must be addressed is concrete and practical: to what extent does this new body of law provide suitable and sufficient remedies in ultra vires cases? On this answer to this question might hang the destiny of the ultra vires doctrine.

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unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep."

[245] "Precedent must come first, recognized rules of law and equity must be reagards, otherwise all certainty of law would disappear. But the underlying purpose is justice." - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 321.

[246] Westdeutsche Landesbank Girozentrale v. Islington BC [1996] AC 669, 685 (per Lord Goff).

[247] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423.

[248] Ibid, at 431 (per Kerr LJ).

10. RESTITUTION AND UNJUST ENRICHMENT LAW

10.1. THE CONCEPT OF PERSONAL REMEDIES AT COMMON LAW

Many factual scenarios see one person possess the property of another without legal justification. A small subset comprises cases where the parties sought to conclude a contract and failed. The challenge of developing a set of legal principles to provide just remedies where one person has, without fault, but equally, without legal justification, received property or other benefits which rightfully belong to another is universal.[1]

At common law, the law of restitution addresses this problem.[2] This branch of the common law is young, at least in so far as it is recognised as a full and independent branch of the law of obligations, alongside contract and tort.[3] It was stifled by the traditional bipartite classification of obligations as arising either from consent or a

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[1] Wright L.J. asserts that every "civilized system of law" faces the challenge of responding "to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep."- Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 61 (per Lord Wright).

[2] A. Burrows, "Understanding the Law of Restitution: a Map through the Thicket" (1994-1995) 18 U Queensland L.J. 149.

[3] "[T]he law of England really recognises [...] only actions of two classes, those founded on contract and those founded on tort" - Sinclair v. Brougham [1914] AC 398, 415 (per Viscount Haldane LC); "at one time during last century it was said that there were only two classes of action known to the common law, contract and tort" - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 314; "Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."- Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 61 (per Lord Wright); "unjust enrichment exists as a distinctive legal concept, separate from both contract and tort" - Dublin Corporation v. Building and Allied Trade Union [1996] 1 IR 468 (Keane J.); L. Smith, "Unravelling Proprietary Restitution" (2004) 40 CBLJ 317,323 ;R. Grantham, "Restitutionary Recovery ex Aequo et Bono" (2002) Sing. JLS 388, 388: "As a coherent body of law it is of remarkably recent origin"; see also see E. O'Dell, "The Principle against Unjust Enrichment" (1993) 15 DULJ 27.

wrong.[4] There have also been deep-rooted fears that the imposition of non-consensual legal obligations based on an amorphous concept of unjust enrichment would be dangerously subjective and interfere with personal liberty.[5] Like the other branches of the law of obligations, restitution law creates a personal right which one person can enforce against another.[6]

This branch of the common law is known as restitution, but there is room for ambiguity. In general speech, a restitutionary response is simply one which ordains the return of a benefit. Birks argues that restitution is not the appropriate name for this field, that it is the law of unjust enrichment which complements contract and tort.[7] This is because causative events ground a better distinction between branches of law than the object to be achieved in recognising the right[8] and because restitutionary responses can arise from consent or a wrong as well as unjust enrichment.[9] He therefore argues for a law of unjust enrichment to replace the law

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[4] D.W. Logan , "Restatement on Restitution" (1938) 2 MLR 153, 156: "the "dichotomy which has received the approval of generations of lawyers" must be abandoned in favour of a trinity"; Birks dates this omission to Gaius' "Institutes" 3.89 - P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 8.

[5] "Such a criterion is said to give the go-by to precedent and to reduce everything to the liberum arbitrium of the particular judge, and promote a sloppiness of thought" - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 320.

[6] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 7.

[7] Ibid, at pp. 18-22; P. Birks, "Failure of Consideration and its Place on the Map" (2002) 2 OUCLJ 1, 11; cp D.W. Logan , "Restatement on Restitution" (1938) 2 MLR 153, 154; cf Lord Wright, regarding "restitution" as a useful term borrowed from America - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 305; A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), pp. 5-6; cf G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 18.

[8] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 19.

[9] Ibid, at p. 20.

of restitution.[10] While terminology and the theory of restitution law are still the focus of fertile debate, its existence is no longer in doubt. Keane J. affirmed the fully-fledged status which restitution has now attained in *Dublin Corporation v. Building and Allied Trade Union.*[11]

10.1.1. The Absence of Contractual Obligations

Restitution does not depend on the validity of any consent-based obligation between the parties. On the contrary, it operates where there is a lacuna. It does not set aside valid legal obligations.[12] Lord Scott in *Deutsche Morgan Grenfell Group Plc v. Inland Revenue*[13] emphasises that restitution only acts where the transfer was not made by virtue of a valid legal or contractual obligation.[14] Any contract in existence must be set aside before restitutionary principles can be applied.[15] In cases of corporate incapacity, this requirement has already been met by the determination that the putative contract is void.

Resistance to granting a restitutionary remedy for fear that this resembles giving effect to the void agreement is misconceived. While a payment dictated by restitutionary principles may turn out to be similar to that envisaged by a void

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[10] See ibid.

[11] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547, 558 (per Keane J.), relying on East Cork Foods Ltd v. O'Dwyer Steel Co Ltd [1978] IR 103 and Murphy v. Attorney General [1982] IR 241; E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 41.

[12] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547 (per Keane J); "The commercial problems that would result from restitution upsetting contracts still on foot are obvious, and are but one reason why restitution has a subsidiary, gap-filling role in the law of obligations." - B. Kremer, "Restitution and Unconscientiousness: Another View" (2003) LQR 188, 192.

[13] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558.

[14] Ibid, at 590-591 (per Lord Scott).

[15] Cf Roxborough v. Rothmans of Pall Mall Australia Ltd (2001) 185 ALR 335; 208 CLR 516, where the contract was not set aside.

contract, in law, it is not the same thing.[16] The restitutionary obligation cannot be governed by terms of the void agreement. It is subject to restitutionary defences,[17] but not contractual ones. It is mere coincidence if the recoverable sum approximates that which would have been due under the void contract.[18]

Given that any purported contract has been declared inexistent before restitution law intervenes, it is theoretically impossible to refer to any alleged contract. The defendants in *Rover International Ltd v. Cannon Film Sales Ltd (No. 3)*[19] argued that the remuneration payable to compensate the plaintiffs for their work in preparing films for distribution should be capped at the maximum they might have earned under the invalid contract.[20] Kerr L.J. rejected this argument on grounds of principle: the quantum meruit was being considered because there was no contract, so the court could not have reference to the failed agreement.[21] Similarly, O Briain J. in *O'Connell v. Listowel UDC*[22] ruled that the worth of the services to be remunerated under a quantum meruit should not be determined by reference to any purported contract between the parties.[23]

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[16] Barker applies the distinction between primary and secondary rights in contract and tort to the distinction between enforcing the void agreement and providing a remedy - K. Barker, "Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right" (1998) 57 CLJ 301, 321.

[17] Westdeutsche Landesbank Girozentrale v. Islington BC [1996] AC 669, 688 (per Lord Goff).

[18] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 46-47.

[19] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423.

[20] Ibid, at 432 (per Kerr LJ).

[21] It would be incorrect to allow "the application of provisions of a void contract to the assessment of a quantum meruit which only arises due to the non-existence of the supposed contract." Ibid, at 436 (per Kerr LJ); see G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 103.

[22] O'Connell v. Listowel UDC [1957] Ir Jur Rep 43.

[23] Ibid, at 48 (per O Briain J.).

However, a separate aspect of *Rover International Ltd v. Cannon Film Sales Ltd (No. 3)*[24] casts doubt on the absolute irrelevance of the failed contract, suggesting it may be considered in the context of failure of consideration.[25] If the contract is deemed not to exist, how then can a court have reference to it to verify whether any benefit in fact transferred to the plaintiff constituted the consideration prescribed in the non-existent contract? This problem arises in relation to failure of consideration claims following a void contract, and requires careful consideration in that context.[26] This difficulty within the law on failure of consideration does not negate the essential principle that restitution operates because the contract is void.

10.2. The Ascent of Restitution Law

The modern law of restitution speaks in terms of unjust enrichment,[27] and the examination of unjust factors.[28] While avoiding a "historical disquisition",[29] it is important to take stock of the obstacles which historically stood between void contracts and common law remedies, and the changes which have occurred, before

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[24] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423.

[25] Ibid, at 433 (per Kerr LJ): "The test is whether or not the party claiming total failure of consideration has in fact received any part of the benefit bargained for under the contract or purported contract."

[26] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 4 All ER 890, [1994] 1 WLR 938 (QB, CA);[1996] AC 669, [1996] 2 All ER 961, [1996] 2 WLR 802 (HL); Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215; C. Mitchell & S. Watterson, "Subrogation Law and Practice" (Oxford, 2007), p. 124; see below at 11.2: "Failure of Consideration in Ultra Vires Cases".

[27] Cf Reading v. Attorney-General [1951] AC 507, 513 (per Lord Porter): "the exact status of unjust enrichment is not yet assured [...] it forms no part of the law of England and [...] would be too widely stated."

[28] See Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, 710 (per Lord Browne-Wilkinson); Kleinwort Benson Ltd. v. Glasgow City Council [1997] 3 WLR 923, 931 (per Lord Goff).

[29] R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 316.

exposing the modern principles which offer a common law remedy in ultra vires cases.[30]

Traditionally, the common law recognised various disparate restitutionary actions. It granted recovery under particular precedents, but these actions were not viewed as a cohesive body of law that might ground actions beyond the well-established cases.[31] All the authorities in which remedies were granted could be characterised as exceptions, limited to their facts, and the courts were reluctant to extend the idea of restitution beyond them.[32] Insofar as there was an underlying principle manifested through the various precedents, the legal remedies which were granted were explained as based on a fictional implied contract between the parties.[33] This approach was historically attributable to the old forms of action[34] and support derived from an ambiguous statement in *Moses v. Macferlan*.[35] Until recently, it was firmly established, in particular through *Sinclair v. Brougham*.[36]

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[30] See Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), p. 38 et seq.

[31] Notwithstanding Mansfield CJ's articulation of a common rationale in Moses v. Macferlan (1760) 2 Burr. 1005.

[32] For example, an old line of authorities provides for recovery in quasi-contract where a contract is void for not being made under seal but the invalid contract has already been executed - see C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), pp. 61-62; Hall v. Swansea Corporation (1844) 5 QB 526; Sanders v. St Neot's Union Guardians (1846) 8 QB 810; 10 Jur. 566; Doe d. Pennington v. Taniere (1848) 12 QB 998; 116 Eng. Rep. 1144; Clark v. Cuckfield Union (1852) 31 L.J. QB 349Lawford v. Billericay Rural District Council (1903) 1 KB 722.

[33] Cf B. Kremer, "Restitution and Unconscientiousness: Another View" (2003) LQR 188, identifying unconscionability as the factor underlying the authorities.

[34] R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 317: "the fiction of the contract implied in law was adopted for procedural reasons of convenience".

[35] Moses v. Macferlan (1760) 2 Burr. 1005 (per Mansfield CJ): "the law implies a debt and gives this action [...] founded in the equity of the plaintiff's case, as it were, upon a contract ('quasi ex contractu' as the Roman law expresses it)."

[36] Sinclair v. Brougham [1914] AC 398; though Lord Wright shows a historical body of authority not endorsing implied contract: R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 317-320;

Historically, the focus was primarily on the actions used.[37] These were the actions for money had and received, for money paid to the account of another, quantum meruit and quantum valebant.[38] In a sense, these were "magic formulas".[39] The older decisions turn in many cases on these qualifications and on the success of counsel in establishing that the facts of a case came within prior judicial precedent for that action. The designation of the actions subjected them to particular rules depending on the form of the enrichment. Today, those decisions which hold that an action for money had and received or a quantum meruit is available in a particular set of circumstances must be re-examined through the prism of modern analysis, although the decisions themselves do not articulate it.[40] Lord Wright criticises continued use of the old terms as troublesome "legal antiquarianism".[41]

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see also E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28.

[37] "[W]hile the forms of action existed the appropriate form applicable to a claim for money had and received or quasi-contract was, since about 1700, the *indebitatus assumpsit*." - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 316.

[38] See J.B. Ames, "The History of Assumpsit (II) – Implied Assumpsit" (1888) 2 Harv LR 53.

[39] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 13.

[40] See P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 14: the action for money had and received "serves as a peg but gives no guidance"; many cases "are couched in terms which are confusing and at times ridiculous" - B. Fitzgerald, "Ultra Vires as an Unjust Factor in the Law of Unjust Enrichment" 2 (1993) Griffith Law Review 1, 2; "The essential similarity of the restitutionary patterns which both cases followed was obscured by the language in which the judges had expressed themselves." - E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123, 131; A. Burrows, "Understanding the Law of Restitution: a Map through the Thicket" (1994-1995) 18 U Queensland L.J. 149, 151.

[41] R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 315 (commenting on Sinclair v. Brougham).

10.2.1. Resistance

Despite the centuries-old recognition of remedies in particular cases, restitution law only matured in the twentieth century.[42] Moreover, its development gained momentum in the last decade of the century. Lord Goff reminds us that until then, "the existence of a systematic law of restitution, founded upon the principle of unjust enrichment, had not been recognised in English law."[43]

Stagnation occurred due to the courts' reluctance to move beyond those authorities which recognised the existence of non-contractual obligations and to allow them to coalesce into a branch of the law unified by general principles. Typically, Hamilton L.J. denounced the idea of "vague jurisprudence which is sometimes attractively styled 'justice as between man and man'."[44] While the primary source of restraint was concerns about judicial subjectivity,[45] contract's individualist philosophy may also have impeded extracontractual remedies.[46] Non-contractual intervention by the

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[42] See Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 372 (per Lord Goff); see J. Beatson & W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149, 183-185.

[43] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 697 (per Lord Goff).

[44] Baylis v. Bishop of London [1913] 1 Ch. 127, 140: "we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'."; see also Sinclair v. Brougham [1914] AC 398, 454-456 (per Lord Sumner): "There is no ground left for suggesting as a recognisable "equity" the right to recover money in personam merely because it would be the right and fair thing that it should be refunded to the payer."; "the whole history of this particular form of action has been what I may call a history of well-meaning sloppiness of thought." – Holt v. Markham [1923] 1 KB 504, 513 (per Scrutton LJ).

[45] Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), p. 51.

[46] Peel Regional Municipality v. Canada (1992) 98 DLR (4th) 140, 152 (per McLachlin J), cited by Budd J., in his review of Canadian authorities in Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), pp. 67-68.

courts also runs counter to the policy which favours the security of receipts.[47] In the particular case of void contracts these concerns were coupled with an added fear that restitution would approximate giving effect to the void agreement.[48]

10.2.2. Restitution in Other Legal Systems

Resistance to developing restitutionary principles was more marked in England and Ireland than in many other jurisdictions.[49] These principles are very well established in civil law.[50] Even Scotland's civil law is more receptive.[51] In contrast, the approach of the English courts in this area typifies the common law. Based on the doctrine of precedent, they permitted repayment in the particular circumstances established in case law, but did not unite these isolated heads by means of the development of an overarching theory. Other common law jurisdictions showed their willingness to extend the law of restitution further and sooner than England

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[47] S. Arrowsmith, "Ineffective Transactions and Unjust Enrichment: a Framework for Analysis" (1989) 9 Legal Studies 121, 123.

[48] See Sinclair v. Brougham [1914] AC 398.

[49] See Holt v. Markham [1923] 1 KBD 504, 523 (per Scrutton LJ); Reading v. Attorney General [1951] 1 AC 507, 513 (per Lord Porter); Attorney General v. Ryan's Car Hire Ltd [1965] IR 642 (per Kingsmill Moore J), all cited by Budd J., Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.).

[50] Many European countries, which derived their quasi-contract law from Roman law, permit restitution as a general principle - see eg Article 1376 of the French Civil Code: « Celui qui reçoit par erreur ou sciemment ce qui ne lui est pas dû s'oblige à le restituer à celui de qui il l'a indûment reçu. »; B. Dickson "Unjust Enrichment Claims: A Comparative Overview" (1995) 54 CLJ 100; E. O'Dell, "The Principle against Unjust Enrichment" (1993) 15 DULJ 27, 54-57; P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 6.

[51] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 55 (per Lord Wright): "The Scots law derives from the Roman law a different view, founded on the doctrine of restitutio, which has no place in English law, and which it is not open to us to import into the law of England."

and Ireland. Consequently, the area is better developed in many other common law jurisdictions, including the United States,[52] Canada and Australia.[53]

10.2.3. The Restitution Revolution

In recent years, restitution law has undergone a dramatic transformation.[54] A new underlying principle has been identified, a coherent structure is being developed to accommodate all the disparate cases where recovery was permitted,[55] and exceptions and technical restrictions are being swept away. Unjust enrichment is the underlying principle which today ties together all the diverse applications found in the case law.[56] O'Dell describes it as "an idea whose time has come."[57] Birks identifies unjust enrichment as the sixth successive explanation for recovery for mistake, the others being the action for money had and received, implied contract, quasi-contract, an involuntary trust and restitution.[58] He asserts that these foundations were all unsatisfactory, though only implied contract theory has been rejected.[59]

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[52] See D.W. Logan , "Restatement on Restitution" (1938) 2 MLR 153

[53] See the review of Australian and Canadian authorities by Budd J., Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.); cf R. Grantham, "Restitutionary Recovery ex Aequo et Bono" (2002) Sing. JLS 388, 388, who highlights the essential similarity of restitution law in common law jurisdictions; A. Burrows, "Restitution for Mistake in Australia" (1993) 13 OJLS 584, 584.

[54] A. Burrows, "Restitution for Mistake in Australia" (1993) 13 OJLS 584, 584: "their Lordships have broken free from more than a century of blinkered conservatism".

[55] P. Birks, "Failure of Consideration and its Place on the Map" (2002) 2 OUCLJ 1, 12: "Intellectual order is indispensable and has been hard won."

[56] E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123, 126.

[57] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 48.

[58] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), pp. 12-22.

[59] Ibid, at pp. 12-13.

10.2.3.1. Landmark cases: the engine of change

Change came in England through a number of landmark decisions during the 1990s. Lord Walker identifies four leading cases in this renaissance of restitution.[60] These are *Lipkin Gorman v. Karpnale*,[61] *Woolwich Equitable Building Society v Inland Revenue Commissioners*,[62] *Westdeutsche Landesbank Girozentrale v. Islington LBC*[63] and *Kleinwort Benson Ltd v. Lincoln City Council*.[64] The Irish courts enthusiastically endorsed these developments, particularly in *Dublin Corporation v. Building and Allied Trade Union*.[65] Lord Goff had a particularly influential role in this process.[66]

Lipkin Gorman v. Karpnale[67] is credited as the moment of the birth of restitution as a distinct branch of the law of obligations, founded on the guiding principle that the law should offer a remedy for unjust enrichment.[68] The decision permitted a solicitors' firm to recover from a casino money which had been stolen from it by a partner and lost gambling. The new approach has consistently been reinforced since.

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[60] Deutsche Morgan Grenfell Group plc v. Inland Revenue Commissioners [2007] 1 AC 558, 613 (per Lord Walker).

[61] Lipkin Gorman v. Karpnale [1991] 2 AC 548.

[62] Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] AC 70.

[63] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, [1996] 2 WLR 802 (HL); [1994] 4 AER 890 (CA).

[64] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349; [1998] 4 All ER 513, [1998] 3 WLR 1095, [1999] RVR 315, [1999] LGR 1.

[65] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547.

[66] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 613 (per Lord Walker).

[67] Lipkin Gorman v. Karpnale [1991] 2 AC 548.

[68] See K. Barker, "Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right" (1998) 57 CLJ 301.

Woolwich Equitable Building Society v Inland Revenue Commissioners[69] establishes the right to recovery on policy grounds of overpaid taxes. In addition, the "swaps cases" [70] are a series of important decisions, which address the consequences of substantial payments made between banks and local authorities under agreements which were held to be ultra vires.[71] Many English local authorities had entered into swaps agreements with commercial banks in the hope of generating profits.[72] As statutory corporations their contractual capacity was limited to the objects set out in their statutes.[73] A string of cases teased out the consequences of the nullity.[74] These authorities are pivotal in the recent development of restitution law, and also directly relate to the availability of remedies where a contract is deemed void for want of capacity.

The Irish courts, including the Supreme Court, have shown themselves very willing to develop this area of the law along modern lines where the opportunity presented

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[69] Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] AC 70, followed in O'Rourke v. Revenue Commissioners [1996] 2 IR 1.

[70] See, inter alia: Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733; Westdeutsche Landesbank Girozentrale v. Islington BC [1996] AC 669; Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349.

[71] Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1; see S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759, 769 et seq.; P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000).

[72] The two parties to the deal would invent a notional sum of money. One would pay the other interest on this sum at a fixed rate of interest, whereas the other would, at the same time, pay the first interest on the notional sum at a variable rate. Thus, it was betting on the interest rates, and who came out with a profit depended on whether the actual interest rates turned out to be higher or lower than the agreed fixed rate; see the description given by Lord Goff, Westdeutsche Landesbank Girozentrale v. Islington BC [1996] 2 WLR 802, 964.

[73] Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1.

[74] Eg Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, Westdeutsche Landesbank Girozentrale v. Islington BC [1996] AC 669, [1996] 2 WLR 802, Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, [1998] 4 All ER 513, [1998] 3 WLR 1095, [1999] RVR 315, [1999] LGR 1.

itself,[75] though not, perhaps, without any missteps.[76] In particular, *Dublin Corporation v. Building and Allied Trade Union*[77] adopted as Irish law the modern view, including the general principle of unjust enrichment.[78] In this case, Keane J. recognised that previous Irish authorities, including *East Cork Foods Ltd v. O'Dwyer Steel Co Ltd*[79] and *Murphy v. Attorney General*,[80] established as a part of Irish law the modern view, "that unjust enrichment exists as a distinctive legal concept, separate from both contract and tort".[81]

These cases and others have seen unjust enrichment displacing the implied contract theory[82] which was long viewed as the basis of non-contractual remedies.[83] Other important changes include the removal of the rule that payments made under a mistake of law, unlike a mistake of fact, cannot be recovered,[84] and the development of defences to unjust enrichment.[85] These recent advances are all interconnected.

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[75] See eg the decision of Keane J. in Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547.

[76] In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105.

[77] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547.

[78] See also Bank of Ireland Trust Services Ltd v. Revenue Commissioners [2002] 4 IR 178.

[79] East Cork Foods Ltd v. O'Dwyer Steel Co Ltd [1978] IR 103, 111.

[80] Murphy v. Attorney General [1982] IR 241.

[81] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547, 558 (per Keane J); echoing Lord Wright, in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 61.

[82] As evidenced by its alternative name, quasi-contract.

[83] Lipkin Gorman v. Karpnale [1991] 2 AC 548, Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] 2 WLR 802.

[84] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349; see also below at 12.2.3: "Has the Mistake of Law Bar been Abolished in Ireland?"

[85] See Lipkin Gorman v. Karpnale [1991] 2 AC 548, Kleinwort Benson v. South Tyneside Borough Council [1994] 4 AER 972, Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733,

The development of the general principle of unjust enrichment logically required that recovery be permitted in cases of mistake as to the law and that a similarly cohesive set of defences be developed, so that all aspects of the law reflect the underlying principle based on justice.[86] The construction of modern restitution law is a work in progress.

10.2.3.2. Academic discourse and the construction of restitution law

The relatively small number of cases which have effected such dramatic change in the law have been accompanied by vigorous academic discussion and the active search for unifying principles.[87] Lord Walker refers to the guiding principle of "the need for coherence in the development of the English law of unjust enrichment."[88] Lord Goff adverts to "the blossoming of scholarly interest in the development of a coherent law of restitution" which has assisted the courts in recent decades.[89] The search is for a clear structure based on principle. There has been a trend towards simplification, as in the context of mistake, where a historical approach based on a multiplicity of rules, restrictions and exceptions has been steadily expunged.[90]

Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547, Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349.

[86] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 372-373 (per Lord Goff).

[87] See B. Dickson "Unjust Enrichment Claims: A Comparative Overview" (1995) 54 CLJ 100, 105; S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759, 759-760; A. Burrows, "Understanding the Law of Restitution: a Map through the Thicket" (1994-1995) 18 U Queensland L.J. 149, 150, credits Goff & Jones, "The Law of Restitution" (London, Sweet & Maxwell, 1966) as the watershed.

[88] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 605 (per Lord Walker).

[89] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 372-373.

[90] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 577 (per Lord Hope): "English law has been moving step by step towards a principled statement of the law of restitution. The carving out of exceptions which are not clearly based on principle would risk reversing this process"; A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 8.

Restitution scholars are currently experiencing the excitement of constructing and elaborating the fundamental structure of the subject. This academic debate may mould the development of the law through the cases.[91] However, this early state of development and the lively debate in the field can also engender uncertainty. There are active controversies in many areas, and adopting a stance on many doctrinal questions may imply a particular viewpoint or understanding of the field as a whole. It is difficult to predict which of the competing voices of today will become the orthodoxy of tomorrow.

10.2.3.3. Implied contract theory

Historically, restitution was generally thought to be founded on the idea of an implied contract. This view was espoused by Blackstone[92] and adopted in the influential early twentieth century case of *Sinclair v. Brougham*.[93] In the pedigree of modern restitution law, quasi-contract and implied contract thinking can be traced back to Mansfield C.J.'s statement of the law in *Moses v. Macferlan*.[94] Lord Wright describes this judgment as "the basis of the modern law of quasi-contract, notwithstanding the criticisms which have been levelled at it."[95] Having listed a number of cases where an action for money had and received would lie, including mistake and failure of consideration, Mansfield C.J. states that the rationale is that justice requires the repayment of the money in such cases. Mansfield C.J. then explains that this is because,

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[91] A. Burrows, "Restitution for Mistake in Australia" (1993) 13 OJLS 584, 586: "Our Law Lords, with the notable exception of Lord Goff, have much to learn from this Australian practice of developing the common law from a bedrock of scholarly analysis."

[92] Blackstone 3 Commentaries 158, 161-162, cited by P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 15.

[93] Sinclair v. Brougham [1914] AC 398, 415-417 (per Viscount Haldane LC); ibid, 432-434 (per Lord Dunedin); cf Lord Wright, who defends a view of Sinclair v. Brougham which does not exclude unjust enrichment - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305.

[94] Moses v. Macferlan (1760) 2 Burr. 1005.

[95] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 62 (per Lord Wright).

> "the law implies a debt and gives this action [...] founded in the equity of the plaintiff's case, as it were, upon a contract ('quasi ex contractu' as the Roman law expresses it)."[96]

The term "quasi-contract" seems to imply the connection between restitution and implied contract. However, Birks distinguishes between the terms "implied contract" and "quasi-contract",[97] on the ground that Gaius coined the latter phrase to mean "as though from a contract" but its usage evolved to mean "sort-of-contract", so that "implied contract" and "quasi-contract" seem often to have been used interchangeably.[98] However, the expression "quasi-contract" does not provide any explanation for recovery, if it is not identified with implied contract theory.[99]

The endorsement of a particularly unyielding understanding of implied contract theory[100] by the House of Lords in *Sinclair v. Brougham*[101] entrenched the belief that restitution relied on an implied contract between the parties throughout much of the twentieth century.[102] This view, as enunciated in *Sinclair v. Brougham*,[103] was a bar to restitution in ultra vires cases.[104] The attempt to contract excluded the

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[96] Moses v. Macferlan (1760) 2 Burr. 1005.

[97] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), pp. 14-16.

[98] See Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), p. 20.

[99] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 16.

[100] Described as "the reification of the implied contract fiction" - E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 36.

[101] Sinclair v. Brougham [1914] AC 398.

[102] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), pp. 14-15.

[103] Sinclair v. Brougham [1914] AC 398.

[104] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), pp. 28-63, 37.

possibility of an implied contract, and if the company lacked the capacity to contract, it could not then be deemed to be party to an implied contract. Furthermore, there were fears that allowing a remedy would give some effect to the void contract. Taking the *Sinclair v. Brougham*[105] line further, it was also argued that where there was an attempt to conclude a contract, there could be no recovery, as an express request negatived an implied request,[106] though the Irish High Court ultimately held that the parties' intention to create a contract did not negative the existence of an implied contract.[107]

That this thinking precluded restitution from offering a personal remedy in a particular scenario where it was clearly needed should itself be a ground for criticism.[108] As a fictional basis, implied contract also posed theoretical difficulties in other cases. The artificiality of this approach leads to unnecessary difficulties, such as in the case of frustration by impossibility.[109] The rejection of any implied contract in the context of the division of property between contributing spouses led to such cases being determined according to trust law instead of restitution.[110]

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[105] Sinclair v. Brougham [1914] AC 398.

[106] Craven-Ellis v. Canons Ltd. [1936] 2 KB 403 (per Goddard J.), reversed on appeal to the Court of Appeal.

[107] Folens and Co Ltd v. Minister for Education [1984] ILRM 265 (per McWilliam J.), relying on William Lacey Ltd v. Davis [1957] 2 AER 712 and Brewer Street Investments Ltd v. Barclay's Woollen Co Ltd [1953] 3 WLR 869.

[108] D.W. Logan , "Restatement on Restitution" (1938) 2 MLR 153, 158: "The criterion afforded by the implied contract theory is a purely negative one which arbitrarily rules out relief in certain cases [...] the fiction is both useless and harmful".

[109] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 70 (per Lord Wright): "constructing a hypothetical contract by supposing what terms the parties would have arrived at if they contemplated the future impossibility", criticising the decision of Collins MR in Chandler v. Webster [1904] 1 KB 493.

[110] Heavey v. Heavey (1977) 111 ILTR 1, 3 (per Kenny J.), as cited per Barron J., N.A.D. v. T.D. [1985] ILRM 153, 159.

The implied contract approach came to be subjected to heavy criticism, including by Goff and Jones in their landmark textbook on restitution.[111] Birks calls implied contract theory a "heresy" and a "falsehood", which was accepted simply for want of a better explanation.[112] Lord Wright warns against taking legal fictions too literally.[113] O'Dell refers to the "reification" of the implied contract fiction.[114] Lord Browne-Wilkinson summarises the criticisms levelled against *Sinclair v. Brougham*,[115] describing it as "a bewildering authority".[116] He points to the variety of reasons invoked in support of its proposition and suggests that all are doubtful.[117]

10.2.3.4. Reconsideration of implied contract theory

10.2.3.4.1. Step 1: Lord Wright challenges implied contract

The first major assault on implied contract was launched by Lord Wright[118] in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*[119] His speech

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[111] R. Goff & G. Jones, "The Law of Restitution", 1st ed. (Sweet & Maxwell, London, 1966), pp. 5-11.

[112] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 15.

[113] "The old common lawyers were a robust people, and if a fiction was convenient under the old rigid forms of pleading they did not worry about its correspondence to reality or to juristic concepts. But it does not follow that they did not realize the true nature of the concept." - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 317; see also S. Arrowsmith, "Ineffective Transactions and Unjust Enrichment: a Framework for Analysis" (1989) 9 Legal Studies 121, 135.

[114] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 36.

[115] Sinclair v. Brougham [1914] AC 398.

[116] Westdeutsche Landesbank Girozentrale v. Islington BC [1996] AC 669, 713 (per Lord Browne-Wilkinson).

[117] Ibid, at 713 (per Lord Browne-Wilkinson): "no single ratio decidendi can be detected; all the reasoning is open to serious objection".

[118] Lord Wright had urged an unjust enrichment approach instead of any reference to implied contract in 1938 - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 312; see also D.W. Logan , "Restatement on Restitution" (1938) 2 MLR 153, 158-159.

strongly challenged implied contract and sought to refound restitution law on unjust enrichment. Firstly, he objects to the idea that a relic of long-abandoned procedural rules[120] should continue to affect the substantive law.[121] He argues that the dictum of Mansfield C.J. in *Moses v. Macferlan*[122] has been misunderstood, underlining that it is the obligation which is implied, not a promise.[123] Thus, while restitution is closer to contract than to tort, it is not dependent on any form of consent, even implied.

Lord Wright is not the only member of the House in *Fibrosa*[124] to exhibit doubts about the implied contract theory. The Lord Chancellor, Viscount Simons, implicitly criticises this approach when he accompanies it with a more modern view as an alternative. Thus, he refers to the implication of a fictional promise alongside the alternative justification of an obligation arising from the circumstances.[125] This formulation removes the difficulty in allowing restitution of money advanced under a frustrated contract. The view established in binding authority at the time founded

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[119] See Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 62-64 (per Lord Wright), relying on Atkin L.J. in United Australia v. Barclays Bank [1941] AC 1, 29.

[120] Rules which required the formulation of suits in the writ of indebitatus assumpsit as if they were based on an implied contract; See J.B. Ames, "The History of Assumpsit (II) – Implied Assumpsit" (1888) 2 Harv LR 53. The Common Law Procedure Act, 1852 simplified procedures.

[121] See also R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305.

[122] Moses v. Macferlan (1760) 2 Burr. 1005.

[123] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 62 (per Lord Wright): "Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort."

[124] Ibid.

[125] Ibid, at 47 (per Viscount Simon LC): "the action to recover money for a consideration that has wholly failed rests, not on a contractual bargain between the parties, but, as Lord Summer said in Sinclair v. Brougham, "upon a notional or imputed promise to repay", *or (if it is preferred to omit reference to a fictitious promise) upon an obligation to repay arising from the circumstances*".

repayment under the doctrine of failure of consideration on an implied promise. That Viscount Simon L.C. does not let the matter rest there implies that his preference is to move beyond reliance on the fiction of an implied contract and accept that repayment is simply an obligation imposed by law.

Lord Wright asserts that the historical, procedural context behind treating restitution as if it were a contract[126] had been forgotten. As a result, jurists mistakenly came to think that it was in fact based on an implied promise or implied contract.[127] In reality, the restrictive rules governing forms of action explained the artificial formulation of suits as if they were based on an implied contract. However, the Common Law Procedure Act, 1852 simplified procedures with the effect that the fictitious assumpsit was thereafter omitted from claims.[128] Lord Wright quotes from the speech of Lord Atkin in *United Australia v. Barclay's Bank*,[129] that "fantastic resemblances of contracts" which were devised for practical reasons related to obsolete forms of action, should not "be allowed to affect actual rights."[130] Turning

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[126] "The writ of indebitatus assumpsit involved at least two averments, the debt or obligation and the assumpsit. The former was the basis of the claim and was the real cause of action. The latter was merely fictitious and could not be traversed, but was necessary to enable the convenient and liberal form of action to be used in such cases." – Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 63 (per Lord Wright).

[127] "[S]ome confusion seems to have arisen though perhaps only in recent times when the true nature of the forms of action have become obscured by want of user." - Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 63 (per Lord Wright).

[128] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 63 (per Lord Wright).

[129] United Australia v. Barclays Bank [1941] AC 1.

[130] Ibid, at 29 (per Lord Atkin): "fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights", cited by Lord Wright, in Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 63; Lord Wright adds, at 64, "Yet the ghosts of the forms of action have been allowed at times to intrude in the ways of the living and impede vital functions of the law."

to *Sinclair v. Brougham*,[131] Lord Wright challenges Lord Sumner's statement of the implied contract theory[132] as obiter dictum,[133] but also deems it compatible with the House's view in *Fibrosa* that restitution arises by operation of law.[134] In his view, it was a mistaken interpretation of *Sinclair v. Brougham*[135] to view it as authority that restitution could only occur where a promise to repay could be implied.[136] Lord Wright professes bafflement that it should have been perceived as excluding a principle against unjust enrichment.[137]

The House of Lords in *Fibrosa*[138] advances the view that both the frustration of the contract and the subsequent restitution of the money advanced due to failure of consideration arise automatically by operation of law. Implied contract theory was a hindrance rather than a help.

10.2.3.4.2. Step 2: the decline of implied contract in the Irish courts

A number of influential Irish decisions began to push against implied contract and its effects for void contracts even before it was finally defeated in England.[139]

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[131] Sinclair v. Brougham [1914] AC 398.

[132] They "now rest, and have long rested, upon a notional or imputed promise to repay." - Sinclair v. Brougham [1914] AC 398, 452 (per Lord Sumner).

[133] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 64 (per Lord Wright).

[134] Ibid, at 64 (per Lord Wright).

[135] Sinclair v. Brougham [1914] AC 398.

[136] Though O'Dell describes this view, expressed extrajudically as "a large measure of wishful thinking" - E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 29.

[137] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 64 (per Lord Wright): "serious legal writers have seemed to say that those words of the great judge in Sinclair v. Brougham closed the door to any theory of unjust enrichment in English law."

[138] Ibid.

[139] Though the cases in the early 1990s were contemporaneous with Lipkin Gorman v. Karpnale [1991] 2 AC 548.

O'Dell describes the Irish cases as "harbingers" of *Sinclair v. Brougham's* imminent downfall.[140] The move away from implied contract thinking is evident in 1978's *East Cork Foods v O'Dwyer Steel*,[141] which foreshadowed modern developments. In this case, the claimant and respondent had previously been held jointly liable in tort, and had both paid compensation to the victim, when the Supreme Court overruled the High Court, finding that the respondent was not liable. The respondent sought to recover its payment. Henchy J. describes implied contract as an outdated "pleader's stratagem" and "transparent fiction".[142] He suggests that founding the claim for repayment on an implied promise would be "an affront to truth and reality".[143] Instead, he states, the real reason to permit recovery was that it would be "unjust and inequitable" to allow the claimant to be "unjustly enriched".[144]

Similarly, the seminal *Murphy v. Attorney-General*[145] rejects implied contract thinking in granting a remedy to the plaintiff taxpayers for taxes elicited under a void unconstitutional law.[146] Though *Murphy*[147] predates the English revolution

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[140] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 42; Budd J. cites: East Cork Foods v. O'Dwyer Steel [1978] IR 103; Murphy v. Attorney General [1982] 1 IR 241; Rogers v. Louth County Council [1981] IR 265 and In Re Frederick Inns Ltd [1991] ILRM 582 in Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.).

[141] East Cork Foods v. O'Dwyer Steel [1978] IR 103, 111 (per Henchy J.); cited in Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 353.

[142] East Cork Foods Ltd v. O'Dwyer Steel Co Ltd [1978] IR 103, 110.

[143] Ibid, at 110 (per Henchy J.): "it would be an affront to truth and reality to say that the basis of that cause of action is an implied promise to repay the money."

[144] Ibid, at 110.

[145] Murphy v. Attorney General [1982] 1 IR 241.

[146] Griffin J. concurs fully with Henchy J. on remedies, Murphy v. Attorney General [1982] 1 IR 241, 331; Parke J. concurs generally, ibid, 336; Kenny J. also recognises an action for money had and received, ibid, 335; see E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123, 126, citing also House of Spring Gardens v. Point Blank [1984] IR 611, 707 where Griffin J. relies on "unjust enrichment".

effected through cases such as *Lipkin Gorman*,[148] Henchy J. looks to commonwealth authorities, mentions unjust enrichment, and denies that implied contract is the foundation of *Moses v. Macferlan*.[149] Henchy J. quotes Lord Mansfield in *Moses v. Macferlan*,[150] as founding the obligation in that case on "the ties of natural justice and equity."[151] For Henchy J., this makes *Moses v. Macferlan*[152] authority for the proposition that the restitutionary claim is based on "equity, or unjust enrichment".[153] However, it is a weakness in Henchy J.'s decision that he does not distinguish clearly between common law and equity, or restitution and the constructive trust.

Later, Lardner J., in *Re Frederick Inns*,[154] distinguishes *Sinclair v. Brougham*[155] and is willing to grant an unjust enrichment based remedy.[156] *In Re PMPA Garage (Longmile) Ltd. (No.2)*[157] also pre-empts the English volte-face. Murphy J. had already decided that the impugned loans, in excess of three million pounds, were

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[147] Murphy v. Attorney General [1982] 1 IR 241.

[148] Lipkin Gorman v. Karpnale [1991] 2 AC 548.

[149] Moses v. Macferlan (1760) 2 Burr. 1005.

[150] Ibid.

[151] Ibid, at 1012.

[152] Ibid.

[153] Murphy v. Attorney General [1982] 1 IR 241, 316: "the footing of equity, or unjust enrichment, rather than under the fiction of an implied promise to repay money had and received"; this is obiter, since Henchy J. identifies the claim here as "an equitable one" at 317.

[154] In Re Frederick Inns Ltd [1991] ILRM 582.

[155] Sinclair v. Brougham [1914] AC 398.

[156] In Re Frederick Inns Ltd [1991] ILRM 582, 593; though he also proposes a constructive trust without drawing clear distinctions between the alternative remedies - In Re Frederick Inns Ltd [1991] ILRM 582, 591-592.

[157] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349.

ultra vires the lender.[158] Discussing remedies, he regards *Sinclair v. Brougham*[159] as having "necessarily recognized that the monies could not be recovered on the basis of an action for debt",[160] citing with approval Viscount Haldane L.C.'s assertion that a personal remedy would "strike at the root of the doctrine of ultra vires".[161] Nonetheless, without directly challenging the correctness of *Sinclair v. Brougham*,[162] Murphy J. feels justified by the evolution in unjust enrichment law[163] to demolish the obstacle which the landmark case erected to recovery in ultra vires cases.[164] Thus, a personal remedy was available, including some non-contractual measure of interest to compensate for the unjustified possession of the money for a period of years.[165]

The Irish rejection of implied contract was confirmed by the Supreme Court in *Dublin Corporation v. Building and Allied Trade Union.*[166] In *Bank of Ireland Trust Services v. Revenue Commissioners*,[167] Kelly J. points to *Murphy v. Attorney*

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[158] In Re PMPA Garage (Longmile) Ltd. [1992] ILRM 337; In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 351.

[159] Sinclair v. Brougham [1914] AC 398.

[160] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 352.

[161] Sinclair v. Brougham [1914] AC 398, 414.

[162] Ibid.

[163] Murphy J. cites Henchy J. in East Cork Foods Ltd v. O'Dwyer Steel Co Ltd [1978] IR 103.

[164] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 354 (per Murphy J.): "by eliminating the need for an express or imputed promise to pay as an ingredient of the action for money had and received it overcomes the problem faced by the House of Lords in Sinclair v. Brougham. If it is not necessary to infer some hypothetical or fictitious promise to pay then 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."

[165] Ibid, at 354; interest is also awarded by Lardner J. in Re Frederick Inns Ltd [1991] ILRM 582: "together with interest thereon at the statutory rate" – In Re Frederick Inns Ltd [1994] 1 ILRM 387, 392.

[166] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547 (per Keane J.).

[167] Bank of Ireland Trust Services Ltd v. Revenue Commissioners [2002] 4 IR 178.

General[168] and *Dublin Corporation v. Building and Allied Trade Union*[169] as definitively establishing "a doctrine of unjust enrichment" in Irish law.

10.2.3.4.3. Step 3: The House of Lords rejects implied contract[170]

In 1996, the House of Lords "unequivocally and finally"[171] rejected the implied contract approach, which was the source of so much criticism and judicial discomfort, in favour of the "firmer footing"[172] of unjust enrichment. This clear rejection occurred in *Westdeutsche Landesbank Girozentrale v. Islington LBC*,[173] building on foundations laid in *Lipkin Gorman v. Karpnale*.[174] *Westdeutsche*[175] was a swaps test case. At the time that it emerged that swaps agreements were ultra vires the local authorities,[176] the plaintiff bank had made an initial payment of £2.5 million to the council, and had received £1.35 million back from it in payments under the swaps contract. The council stopped making payments and the bank sued for the balance of its initial payment, with interest.

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[168] Murphy v. Attorney General [1982] 1 IR 241.

[169] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547.

[170] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, [1996] 2 WLR 802, noted by Jones at (1996) 55 CLJ 432; described by O'Dell as Sinclair v. Brougham's "comeuppance" - E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 29.

[171] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, 710; [1996] 2 WLR 802, 833-4 (per Lord Browne-Wilkinson).

[172] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 29.

[173] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, [1996] 2 WLR 802, noted by Jones at (1996) 55 CLJ 432.

[174] Lipkin Gorman v. Karpnale [1991] 2 AC 548, 578.

[175] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, [1996] 2 WLR 802, noted by Jones at (1996) 55 CLJ 432.

[176] Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1.

Lord Goff identified three potential obstacles to recovery in this case. One of these was the implied contract theory as propounded in *Sinclair v. Brougham*.[177] The House of Lords faced this issue directly and overruled *Sinclair v. Brougham*, disclaiming the conception of restitution as founded on an implied contract.[178] The speech of Lord Browne-Wilkinson makes it clear that restitution is founded, not on implied contract, but on unjust enrichment. He states unequivocally that the old "reasoning is no longer sound." Instead, he affirms,

> "The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay" [179]

This rejection of implied contract is more than a matter of revised terminology; it reflects a significant shift.[180] There is now a new understanding of the foundation of the law of restitution, which permits its development along more satisfactory lines. It is no longer to be viewed as some sort of shadow of a contract, but rather as an independent source of obligations in its own right, and remedies are no longer refused where the implied contract logic may have created obstacles in the past.

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[177] The other challenges were the requirement that failure of consideration be total and difficulties in relation to the awarding of interest; Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, 682.

[178] Ibid, at 710 (per Lord Browne-Wilkinson).

[179] Ibid, at 710 (per Lord Browne-Wilkinson).

[180] O'Dell states that the overruling "had an aura of inevitability about it" - E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 42.

10.3. RESTITUTION'S MODERN THEORETICAL FOUNDATION: THE PRINCIPLE AGAINST UNJUST ENRICHMENT

10.3.1. The Fundamental Principle underlying Restitution

The modern view is that the law of restitution is founded on a principle which precludes permitting one person to remain unjustly enriched at the expense of another.[181] Acceptance of the true nature of the principle underpinning the law of restitution eliminates the first obstacle to the award of a remedy in ultra vires cases.[182] This opens the door to considering what is required to make out a successful case according to the rules which give effect to the general principle.

The principle against unjust enrichment prescribes that where one person has been unjustly enriched at the expense of another, he should return that by which he has been enriched. This reasoning can be detected in *Moses v. Macferlan*[183] and is expressly enunciated in the American Law Institute's 1937 Restatement on Restitution.[184] Under the principle against unjust enrichment, the duty to repay the sum received is not related to the commission of a wrong, and arises even when the facts "fall far short of being a wrong".[185] This is the underlying principle which

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[181] Hedley, however, argues that "this emphasis on the *theory* of "unjust enrichment" has gone much too far." - S. Hedley, "Unjust Enrichment" (1995) 54 CLJ 578, 578; cp G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 7; cf Roxborough v. Rothmans of Pall Mall Australia Ltd (2001) 185 ALR 335; 208 CLR 516, discussed in R. Grantham, "Restitutionary Recovery ex Aequo et Bono" (2002) Sing. JLS 388.

[182] Sinclair v. Brougham [1914] AC 398.

[183] Moses v. Macferlan (1760) 2 Burr. 1005 (per Mansfield CJ): "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money".

[184] "A person who has been unjustly enriched at the expense of another is required to make restitution to the other", as cited in Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 745 (per Morritt LJ); see D.W. Logan , "Restatement on Restitution" (1938) 2 MLR 153.

[185] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 41; G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 37.

today ties together the many diverse applications found in the case law.[186] Lord Goff regards recognition of the principle as the source of a coherent law of restitution as an inevitable consequence of scholarly analysis.[187] For Birks, restitution is the cocoon from which the law of unjust enrichment will emerge.[188] For the moment, the orthodox view is that unjust enrichment is the unifying principle,[189] but that the law of restitution expresses this value through the categories of action recognised by precedent.[190]

The recognition of a general principle of unjust enrichment may provoke fears about the potential for judicial subjectivity and the imposition of legal obligations on foot of vague conceptions of justice.[191] Unjust enrichment allows less scope for judicial discretion or subjectivity than might be feared from its name.[192] Evans L.J. emphasises in *Kleinwort Benson Ltd. v. Birmingham City Council*,[193] that unjust enrichment law is far removed from an idea that judges may freely interfere in

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[186] "Although the unjust enrichment principle has been subject to rigorous criticism over the years, it retains a vital function in explaining disparate areas of the law in a principled and logically coherent way." - G.J. Virgo & J. Beatson, "Contract, Unjust Enrichment and Unconscionability" (2002) LQR 352, 352.

[187] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 373 (per Lord Goff); see also E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 48.

[188] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 1.

[189] Cf B. Kremer, who argues that unconscionability is the real unifying factor, B. Kremer, "Restitution and Unconscientiousness: Another View" (2003) LQR 188, 190, citing Gummow J., Roxborough v. Rothmans of Pall Mall Australia Ltd (2001) 185 ALR 335.

[190] See E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101; cf P.Birks, advocating subordination of the unjust factors to an overarching concept of failure of basis, see P. Birks, "Unjust Enrichment" 2nd ed. (2005); see below at 10.3.3: "Perspectives on the Future of the Law of Unjust Enrichment".

[191] Baylis v. Bishop of London [1913] 1 Ch. 127, 140.

[192] D.W. Logan , "Restatement on Restitution" (1938) 2 MLR 153, 153-154.

[193] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733.

parties' affairs to give effect to their own conceptions of justice.[194] Compliance with the conditions established by law creates a right, as opposed to judicial discretion.[195] As a corollary, the principle against unjust enrichment cannot operate unless those conditions are met. It does not permit sweeping interventions by the court. While the motivating sentiment is one that aims to do justice, this sentiment finds expression only through the established rules.[196]

Kremer reminds us that equity has avoided excessive subjectivity through precedent and sound principle;[197] the common law can also. On the other hand, Birks suggests that the law of unjust enrichment is vulnerable to the risk of judges leaping to intuitive applications of the general principle, "because it has not yet settled down".[198] These concerns explain why the doctrine of precedent is particularly strong in this area. In the past, it constrained its development, preventing the extension of remedies to cases where it was not clearly prescribed by existing authorities. Precedent continues to guide the search to define those cases in which a

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[194] Ibid, at 737 (per Evans LJ): "Notwithstanding its roots in natural justice and equity, the principle does not give the courts a discretionary power to order repayment whenever it seems in the circumstance of the particular case just and equitable to do so."

[195] "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." - Lipkin Gorman v. Karpnale [1991] 2 AC 548, 578 (per Lord Goff); see also Westdeutsche Landesbank Girozentrale v. Islington LBC [1994] 4 AER 890, at 912 (per Lord Goff).

[196] See E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101.

[197] "Those principles have been articulated over a long period of time to govern what may appear, on its face, to be at large, and form the substantive body of equitable jurisprudence" - B. Kremer, "Restitution and Unconscientiousness: Another View" (2003) LQR 188, 191.

[198] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 48.

remedy should be available.[199] Budd J. explains the need for caution in "less well charted waters", describing precedents as "judicial marker buoys".[200] The careful elaboration of the law, supported by firm authority and principled analysis,[201] should permit the satisfactory future development of restitutionary principles without fear of judicial eccentricity. Kremer recalls that judges can exercise their discretion within the framework of principle without acting "capriciously or arbitrarily".[202]

10.3.2. Recognised Causes of Action as Unjust Factors

No matter how unjust he feels his situation to be, the impoverished plaintiff must come within the established rules to get a remedy. In *Dublin Corporation v. Building and Allied Trade Union*,[203] Keane J. underlines that the law has avoided subjectivity or "palm tree justice" by determining whether each case belongs to a

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[199] See Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 737 (Evans LJ), see also Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), pp. 52-59, relying on Deane J., in Pavey and Matthews Pty Ltd v. Paul [1986] 162 CLR 221.

[200] Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), p. 21: "my preference is to have established firm bearings from known judicial marker buoys lest I encounter and am unwittingly enticed by "the siren song of unjust enrichment" or lest I run aground upon the shoals of palm tree justice".

[201] Virgo and Beatson criticise Roxborough v. Rothmans of Pall Mall Australia Ltd (2001) 185 ALR 335; 208 CLR 516 for lack of clarity, stating that it, "emphasises the need for clear, well-defined principles, such as the unjust enrichment principle, to underpin the law of restitution" - G.J. Virgo & J. Beatson, "Contract, Unjust Enrichment and Unconscionability" (2002) LQR 352, 352.

[202] B. Kremer, "Restitution and Unconscientiousness: Another View" (2003) LQR 188, 191-192: "Recognising that a judge has a normative discretion - albeit one which is constrained by principle - is the sign of a mature jurisprudence which does not assume that judges will act capriciously or arbitrarily."

[203] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547.

category which renders it unjust.[204] *Moses v. Macferlan*[205] adopted the "two-tier" approach retained today. Thus, at the first, broad level, the causative event is an enrichment "which ought not in justice to be kept", but more specifically, the enrichment is one which falls within a recognised class.[206]

This second step is required because "generic statements cannot possibly be directly applied"[207] and the application of a general principle of unjust enrichment without a firm scaffold would be intolerably vague and subjective. Instead, a qualification of unjust enrichment is dependent on the existence of recognised "unjust factors".[208] The need for plaintiffs to establish that the circumstances of the case fall within one of "the categories which the law recognizes as sufficient to make retention by the recipient unjust"[209] is reaffirmed by Lord Hoffmann in *Deutsche Morgan Grenfell Group Plc v. Inland Revenue*.[210] Lord Goff set out these categories of action in *Woolwich Equitable Building Society v Inland Revenue Commissioners*.[211] Similarly, Keane J. in *Dublin Corporation v. Building and Allied Trade Union*,[212] enumerates the recognised categories of unjust enrichment as including "money

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[204] Ibid, at 558 (per Keane J.): "the law, as it has developed, has avoided the dangers of 'palm tree justice' by identifying whether the case belongs in a specific category which justifies so describing the enrichment".

[205] Moses v. Macferlan (1760) 2 Burr. 1005.

[206] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), pp. 48-49.

[207] Ibid, at p. 50.

[208] E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101, 108: ""unjust" is, therefore, merely an adjective which states the conclusion that there is such a cause of action".

[209] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 569 (per Lord Hoffmann).

[210] Ibid.

[211] Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] AC 70, 164-165 (per Lord Goff).

[212] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547.

paid under duress or as a mistake of fact or law or accompanied by total failure of consideration."[213]

These grounds can be explained on the basis of the absence or impairment of consent.[214] The lack of consent makes retention of the benefit unjust. The shift of focus to the question of consent makes it possible to streamline the grant of a remedy within each cause of action, eliminating old technicalities and restrictions. Now supplemented by a general principle of unjust enrichment, the established causes of action have continued to evolve. Failure of consideration and mistake (of fact or of law) have both witnessed important changes which contribute to the overall expansion of the availability of remedies.[215] Precedent and academic analysis work together to ensure that the law providing for remedies against unjust enrichment develops prudently and in a principled manner.

In principle, courts will almost always stick to the well-established causes of action, such as mistake or failure of consideration. Evans L.J. emphasises the importance of binding precedent in this area.[216] However, *Woolwich Equitable Building Society v Inland Revenue Commissioners*[217] shows that new grounds for recovery can still be created.[218] Evans L.J. cites *Lipkin Gorman*[219] and *Woolwich*[220] as demonstrating that

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[213] Ibid, at 558 (per Keane J.).

[214] "[T]here is the single thread that the plaintiff had no real intention to enrich the defendant, so that the enrichment was unintended, non-consensual or involuntary." - E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101, 108.

[215] See below at Chapter 11: "Failure of Consideration" and at Chapter 12: "Mistake".

[216] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 737 (per Evans LJ): "the search for rules defining the circumstances in which the general principle gives a remedy continues, and it is subject as always to the binding authority of previous decisions."

[217] Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] AC 70; [1992] 3 AER 737.

[218] The "categories of unjust enrichment are not closed" – per Nicholls VC, CTN Cash and Carry v. Gallagher [1994] 4 AER 714, 720; see E. O'Dell, "Incapacity" (Chapter 5), in P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000), pp. 113-167, at pp.115-116.

[219] Lipkin Gorman v. Karpnale [1991] 2 AC 548; [1992] 4 AER 512.

this area of the law is open to evolution. Consequently, "the courts should be ready to apply the general principle when it is appropriate and consistent with authority to do so."[221] Keane J.'s enumeration of possible causes of action[222] is authoritative, but not exhaustive. The principle of unjust enrichment may, if necessary, allow recovery in circumstances which fall outside the established subheadings.[223] The established causes of action form the basic structure of the law but no longer act as fetters restraining its progress.

Judicial willingness to extend recovery on restitutionary grounds has, appropriately, been accompanied by an equal openness to the development of defences.[224] If the function of the rules is to remedy what is unjust, then this must also take into account the position of the defendant.[225] The expansion of causes of action to more principled grounds beyond the restrictions found in long-established case law must be mirrored by a similarly expansive and principled reconsideration of defences, if the common law of restitution is not to become imbalanced at the expense of the defendant. In *Kleinwort Benson Ltd. v. Birmingham City Council*,[226] the Court of Appeal, when asked to recognise a previously unrecognised defence of passing on to a claim for unjust enrichment, carefully examined the authorities and the principles to consider the possibility of recognising a new defence, but ultimately

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[220] Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] AC 70; [1992] 3 AER 737.

[221] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 737 (per Evans LJ).

[222] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547, 558 (per Keane J.).

[223] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 737 (per Evans LJ), citing Lipkin Gorman v. Karpnale Ltd [1992] 4 AER 512, [1991] 2 AC 548 and Woolwich Equitable Building Society v. Inland Revenue Commissioners [1992] 3 AER 737, [1993] AC 70.

[224] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 737 (per Evans LJ).

[225] Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), p. 74: "Fairness must embrace not only the situation of the claimant, but also the position of those from whom payment is claimed.", discussing Peel Regional Municipality v. Canada (1992) 98 DLR (4th) 140; [1992] SCR 762.

[226] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733.

concluded that it was not appropriate. Lord Goff in *Lipkin Gorman v. Karpnale*[227] indicates that the usual principles governing the incremental development of a body of law through the case law should apply in the field of unjust enrichment law.[228]

10.3.3. Perspectives on the Future of the Law of Unjust Enrichment

In his later writings, Birks advances the idea that restitution law, and the principle of unjust enrichment, should afford a right of recovery in all cases where a payment has been made without foundation.[229] He bases such a right of recovery on the civilian-style concept of absence of basis,[230] proposing simply that the lack of an "explanatory basis" constitutes unjust enrichment.[231] Depending on context, the missing explanatory basis could be an objectively invalid obligation or subjectively failed purpose or entirely non-consensual transfer.[232]

As presented by Lord Hoffman, Birks' thesis is that the "categories were now superfluous", because absence of basis subsumes them.[233] However, Baloch observes that unjust factors remain relevant as reasons for invalidity which explain

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[227] Lipkin Gorman v. Karpnale [1991] 2 AC 548.

[228] Lipkin Gorman v. Karpnale [1992] 4 AER 512, 534 (per Lord Goff): "I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way.", cited by Evans L.J. in Kleinwort Benson v. Birmingham, [1996] 4 AER 733, 737.

[229] P. Birks, "Unjust Enrichment" 2nd ed., (Oxford, 2005), Chapter 5; see T.A. Baloch, "The Unjust Enrichment Pyramid" (2007) 123 LQR 636; S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759.

[230] In particular on German law - T.A. Baloch, "The Unjust Enrichment Pyramid" (2007) 123 LQR 636, 639.

[231] P. Birks, "Unjust Enrichment" 2nd ed. (2005), p. 116: "an enrichment at the expense of another is unjust when it is received without explanatory basis."

[232] T.A. Baloch, "The Unjust Enrichment Pyramid" (2007) 123 LQR 636, 639.

[233] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 569 (per Lord Hoffmann): "The absence of a basis for the payment is a ground which generalises and subsumes all the separate categories of situation in which a payment of money not due was recoverable."

absence of basis.[234] Birks presents unjust enrichment as a pyramid, with absence of basis founded on reasons for invalidity at the base.[235] The absence of basis analysis supplements the inquiry into unjust factors as "an external controlling principle".[236] This approach would have particular application to void contract cases, because it could found restitution on the invalidity itself, rather than an intent-based unjust factor.[237]

Birks' absence of basis approach has found favour in Canada,[238] but not in England or Ireland. The House of Lords considers Birks' theory in *Deutsche Morgan Grenfell*, though it is not necessary to decide the case, which turns on mistake.[239] Lord Walker pays tribute to Birks' influence on the law of restitution.[240] He points out that other academics and commentators adopted his views on the centrality of unjust factors, before Birks changed his view of the subject, moving towards "the civilian concept of "lack of basis""[241] According to Lord Walker, Birks' epiphany was attributable generally to the evolution of case law and academic analysis and specifically in large part to the swaps cases[242] and *Kleinwort Benson*,[243] which he

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[234] T.A. Baloch, "The Unjust Enrichment Pyramid" (2007) 123 LQR 636, 638, 641; cp C. Mitchell & S. Watterson, "Subrogation Law and Practice" (Oxford, 2007), pp. 20-21.

[235] T.A. Baloch, "The Unjust Enrichment Pyramid" (2007) 123 LQR 636, 644.

[236] Ibid, 645.

[237] Ibid, 646; see also below at 11.3.1: "Incapacity as an Unjust Factor".

[238] Pettkus v. Becker [1980] 2 SCR 834, 848; cf M. McInnes, "Juristic Reasons and Unjust Factors in the Supreme Court of Canada" (2004) 120 LQR 554, 554-555: "That shift was, however, far more apparent than real. Semantics aside, Canadian courts generally continued to analyse claims in terms of unjust factors."

[239] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 569 (per Lord Hoffmann).

[240] Ibid, at 611 (per Lord Walker).

[241] Ibid, at 611 (per Lord Walker).

[242] See J.F. Marshall & K.R. Kapner, "Understanding Swaps" (John Wiley & Sons, Inc., New York, 1993), p. 1: "Swaps are one of the most important classes of what have come to be known as derivative instruments [...] Swaps are now used by industrial corporations, financial corporations,

viewed as a tacit step towards a *condictio indebiti*.[244] Lord Hoffmann affirms the need to establish whether the payment was due to a mistake. He counters a hypothetical challenge to this analysis, founded on the idea that the law of restitution confers a general right to recover any payment made without legal basis, denying that English law recognises a general principle of absence of basis.[245] Lord Walker posits that "English law may be at something of a crossroads".[246] As an alternative to the current view of unjust enrichment as dependent on the establishment of recognised "unjust factors", it is conceivable that in future, the law could adopt a test of "absence of basis".[247] Lord Hoffman also leaves open the possibility that the law might in future develop in this direction. However, Lord Walker concedes that this choice is "at a high level of abstraction" and might rarely make a practical difference to the outcome of cases.[248]

Lord Walker expresses the view that the common law develops incrementally, and that attempts to formulate simple general principles to govern future cases have sometimes turned out to be misguided. For this reason, he favours a period of further consideration of Birks' ideas, as they are new and have not yet been fully

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thrifts, banks, insurance companies, pension funds, world organizations and sovereign governments"... but local authorities do not always have the requisite capacity to participate - Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1.

[243] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349.

[244] P. Birks, Chapter One, "Lessons of the Swap Litigation" (ed Birks & Rose) (2000), at p. 14, cited by Lord Walker, in Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 611; S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759, 769.

[245] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 569 (per Lord Hoffmann): "The answer, at any rate for the moment, is that unlike civilian systems, English law has no general principle that to retain money paid without any legal basis (such as debt, gift, compromise, etc) is unjust enrichment."

[246] Ibid, at 612 (per Lord Walker).

[247] Ibid, at 612 (per Lord Walker).

[248] Ibid, at 612 (per Lord Walker); the issue was also discussed by Lord Hope in Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349.

tested. Nonetheless, he expresses his own "tentative inclination" for English law to move closer to the civilian absence of basis model.[249] The law in this jurisdiction has not yet taken the step of adopting Birks' analysis, and, for the moment, the overwhelming orthodox view is that a remedy is dependent on the existence of unjust enrichment, as manifested through one of the recognised unjust factors.[250]

10.4. ANALYSING THE PRINCIPLE AGAINST UNJUST ENRICHMENT

Having superseded implied contract theory, the unjustified enrichment of the defendant by the plaintiff is now the basis of restitutionary remedies at common law.[251] Crucially in the context of corporate capacity, a view of restitution founded on unjust enrichment does not suggest that ultra vires cases form a discrete category, in which a remedy is problematic.[252] On the other hand, English and Irish restitution law differs from the German civilian law in that the invalidity does not directly entrain restitution.[253] The established view is that each ultra vires case in which a transfer has been effected on foot of the void contract requires a systematic inquiry into unjust enrichment, which turns on the presence of a valid unjust factor to justify recovery.

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[249] "[R]ecognition of "no basis" as a single unifying principle would preserve what Lord Hope refers to as the purity of the principle on which unjust enrichment is founded, without in any way removing (as this case illustrates) the need for careful analysis of the content of particular "unjust factors" such as mistake." - Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 613 (per Lord Walker).

[250] G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 119.

[251] "[U]njust enrichment has no relation as a juristic conception with contract at all" - R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 314; see E. O'Dell, "The Principle against Unjust Enrichment" (1993) 15 DULJ 27.

[252] R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 313; E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 41-42; In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349, 352.

[253] T.A. Baloch, "The Unjust Enrichment Pyramid" (2007) 123 LQR 636, 642.

The essence of unjust enrichment is that, arising from "a single event, the plaintiff suffers a loss and the defendant reaps a gain. Those two events inextricably are tied".[254] This direct relationship between one person's loss and another's gain is what justifies the requirement that the person who has made the unjustified gain return it to the other person. Without this relationship arising from the single interaction, there would be no recourse for a person who happened to find himself unjustly deprived, or claim against the person unjustifiably enriched. As analysed by academic commentators and judges, the principle of unjust enrichment comprises three elements.[255] These are: the receipt of a benefit; this enrichment occurring at the plaintiff's expense; and, the unjust character of retention of the benefit.[256] In addition, there may be defences available to a person who has been unjustly enriched, which adds a fourth element for analysis.[257] Keane J. describes this factor as a necessary inquiry into "whether there are any reasons why, even where it can be regarded as 'unjust', restitution should nevertheless be denied to the plaintiff."[258]

On the other hand, Hedley describes attempts to define unjust enrichment in this way as "a straightjacket which cannot accommodate all the various species of liability"[259] and challenges the view that judges are beginning to use this means of approaching the subject. On the contrary, he argues, while they may refer to "unjust

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[254] M. McInnes, "At the Plaintiff's Expense: Quantifying Restitutionary Relief" (1998) 57 CLJ 472, 474.

[255] Peel Regional Municipality v. Canada (1992) 98 DLR (4th) 140, 151 (per McLachlin J.), cited by Budd J., Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), pp. 65-74; A. Burrows, "Understanding the Law of Restitution: a Map through the Thicket" (1994-1995) 18 U Queensland L.J. 149, 157-161; There are arguably some problematic cases in which a remedy is granted without all three elements being present - B. Dickson "Unjust Enrichment Claims: A Comparative Overview" (1995) 54 CLJ 100, 106.

[256] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 15.

[257] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547, 558 (per Keane J.).

[258] Ibid, at 558 (per Keane J.).

[259] S. Hedley, "Unjust Enrichment" (1995) 54 CLJ 578, 578; A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), pp. 13-15.

enrichment", the emphasis remains on coming with the "recognised heads" of restitution.[260] Nonetheless, it is useful to outline the various theoretical components of an unjust enrichment claim before analysing the detail of a claim under the various recognised unjust factors.[261]

10.4.1. The Receipt of a Benefit

Enrichment is, perhaps self-evidently, a necessary condition for the grant of a restitutionary remedy. As a corollary, this means that the correct plaintiff is the recipient of the unjustified transfer. In *Re PMPA Garage (Longmile) Ltd. (No.2)*,[262] restitution did not provide a remedy against those companies which, though a party to the invalid guarantee, had not received a loan or benefit.[263] They had not been enriched.

The focus is firmly on the enrichment of the recipient as opposed to the loss of the person who pays.[264] It was argued in *Kleinwort Benson Ltd. v. Birmingham City Council*[265] that the local authority could not be required to return to the bank the profits from their void swaps agreement because the bank had had corresponding hedging agreements with third parties which compensated for the sums it gave the local authority. Saville L.J. emphasised the principled objection that the foundation of the action in restitution was not the *unjust impoverishment* of the plaintiff, but the *unjust enrichment* of the defendant. Thus it was immaterial whether the plaintiff was left out of pocket or recouped his loss elsewhere.[266] While there is usually a

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[260] S. Hedley, "Unjust Enrichment" (1995) 54 CLJ 578, 580.

[261] See below at Chapter 11: "Failure of Consideration" and at Chapter 12 "Mistake".

[262] In Re PMPA Garage (Longmile) Ltd. (No.2) [1992] ILRM 349.

[263] E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123, 127.

[264] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 744 (per Saville LJ).

[265] Ibid.

[266] Ibid, at 744 (per Saville LJ): "whether the payer is out of pocket or has recouped his outlay from other sources is entirely irrelevant. The payee has been unjustly enriched by receiving and retaining money he has received from the payer and to which he has no right."

matrix of direct and corresponding impoverishment and enrichment, it is the enrichment, and the justice of allowing the recipient to retain it, which is central.[267] Consequently, Morritt L.J. did not accept the logic that the defendant should retain the benefit if repaying it would give the plaintiff a "windfall".[268]

Enrichment can take the form of cash or of other goods or services which constitute a benefit to the recipient.[269] However, there may be circumstances in which the performance of services does not enrich the recipient, or the subjective value of that benefit to the recipient is difficult to assess. There may be a discrepancy between the objective value of the work performed and the subjective benefit which the recipient feels has been conferred on him.[270] Modern principles diverge from the old actions, such as quantum meruit, in that the focus should no longer be on the form of the enrichment, once it is determined that an enrichment has occurred. Practical difficulties in assessing the extent of different forms of benefit do not mean that they need to form a distinct category of action.[271] It should be possible to combine a variety of unjust factors with any form of enrichment in order to establish a cause of action.

O'Callaghan v. Ballincollig Holdings Ltd[272] illustrates the potential for difficulty in showing enrichment. The plaintiffs, whose claim to have acquired a house by adverse possession had failed, sought reimbursement of the money they had spent in

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[267] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 10-11.

[268] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 750 (per Morritt LJ): if "the defendant has been unjustly enriched by the payment by the plaintiff it seems to me that the plaintiff has a better title than the defendant to any "windfall" available, not least so as to be in a position to satisfy any claim made against him by those from whom "the windfall" was ultimately derived."

[269] S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759, 761: "The number of variants on the basic core theme is fairly substantial."

[270] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 18.

[271] G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 139.

[272] O'Callaghan v. Ballincollig Holdings Ltd (High Court, Unreported, 31 March 1993, Blayney J.).

reinstating the house after it was damaged by fire.[273] Blayney J. rejected their unjust enrichment claim on the basis that the plaintiff had paid no money to the defendants.[274] It seems this claim of unjust enrichment was summarily rejected on the basis that there was no direct payment from the plaintiff to the defendant. While the plaintiffs in this case may have been unmeritorious, for Blayney J. to imply that there could never be a benefit to the recipient of a service for which the payer has paid a third party is highly questionable. The transfer in such a case may be indirect but nonetheless real.

Another problematic authority allowed restitution in the absence what one might consider the essential element, the enrichment of the defendant.[275] This occurred in *Folens v. Minister for Education.*[276] The parties had been engaged in pre-contractual negotiations about the production of an encyclopaedia by the plaintiff, to be subsidised by the defendant. The project fell through, and the plaintiff claimed the sums it had already spent on preliminary work. McWilliam J. addressed the claim on restitutionary, or "quasi contract", grounds. He held that on the facts of this case, the work done had been approved, or even directed, by the defendant and was done "for the benefit" of the defendant,[277] notwithstanding that, as the proposed encyclopaedia had never been published, no real benefit had ever accrued to the

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[273] Under French law, such a hypothesis would give rise to the reimbursement of the expenses, under the "théorie des impenses". This approach distinguishes between necessary, useful, and cosmetic improvements to the property of another, and where the repairs are deemed to have been necessary to the conservation of the property, the person who has undertaken them is entitled to full reimbursement.

[274] "[N]o monies were paid by the plaintiffs to the defendants so the claim is not a claim to recover monies alleged to have been paid but monies alleged to have been expended on reinstating the house." - O'Callaghan v. Ballincollig Holdings Ltd (High Court, Unreported, 31 March 1993, Blayney J.), p. 7 (002536).

[275] "This is significant since it breaks the requirement to show benefit to the defendant." - R.J. Friel, "Negotiating Liabilities without Benefit: the Pre-Contractual Liability Trap" (2000) 7(8) CLP 188.

[276] Folens and Co Ltd v. Minister for Education [1984] ILRM 265.

[277] Ibid, at 270 (per McWilliam J).

defendant.[278] Hedley questions whether the components of unjust enrichment are always necessary to ground a claim.[279] Nonetheless, outlying cases such as this should not be perceived as a serious assault on the modern structure of unjust enrichment.

10.4.2. "At the Plaintiff's Expense"

Formulations of the principle of unjust enrichment have generally stated that the unjust enrichment of the defendant must have occurred at the plaintiff's expense,[280] though its first express recognition by the English courts seems to have been in the speech of Lord Goff in *Lipkin Gorman (a firm) v. Karpnale Ltd* in 1991.[281] Lord Goff articulated the essential condition, that the plaintiff solicitors in the case must show that the club was unjustly enriched at their expense.[282] Evans L.J. subsequently affirmed that "the phrase 'at the expense of' forms part of the definition of a restitutionary claim"[283] The benefit of one party at the expense of the other creates the relationship between two persons necessary to impose a legal obligation between them.

The scope and effect of the requirement is examined by the Court of Appeal in its rejection of the proposed defence of "passing on" in *Kleinwort Benson Ltd. v.*

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[278] Now perhaps promissory estoppel under the High Trees principle (Central London Property Trust v. High Trees House [1947] KB 130) might avail in such a case: E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123; cf R.J. Friel, "Negotiating Liabilities without Benefit: the Pre-Contractual Liability Trap" (2000) 7(8) CLP 188.

[279] S. Hedley, "Unjust Enrichment" (1995) 54 CLJ 578, 578.

[280] See J.B. Ames, "The History of Assumpsit (II) – Implied Assumpsit" (1888) 2 Harv LR 53, 64: "Quasi-contracts are founded [...] upon the fundamental principle of justice that no one ought unjustly to enrich himself atthe expense of another."; see also Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 742 (per Evans LJ).

[281] Lipkin Gorman (a firm) v. Karpnale Ltd. [1994] 4 AER 512, 532, [1991] 2 AC 548, 578 (per Lord Goff).

[282] Ibid, at 578 (per Lord Goff).

[283] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 742 (per Evans LJ).

Birmingham City Council.[284] The kernel of this defence was that, since the bank had, presumably, concluded hedging agreements with third parties, it would have received compensation from those third parties for the payments it was obliged to make to the local authority. Therefore, it was argued, the bank had passed on its loss to the third party, did not in fact suffer financial loss itself, and the requirement of the claim for unjust enrichment that the defendant have been enriched at the expense of the plaintiff was not fulfilled.[285] Evans L.J. dismissed the proposition that a wider network of related transactions could be taken into account. The expression "at the plaintiff's expense" refers to the relationship between the payer and the recipient alone and its purpose is simply to identify the person by whom the payment was made and who is therefore the correct plaintiff to claim its return.[286] The common law does not require "impoverishment as a correlative of enrichment"[287] in every action for unjust enrichment. The court firmly rejected the idea of "the importation of concepts of loss or damage with their attendant concepts of mitigation" into unjust enrichment law.[288] The purpose of the principle is not to compensate for loss[289] and therefore it is irrelevant whether the payer has somehow made up for his expense in making the payment.

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[284] Ibid; it had previously been rejected by Hobhouse J. in Kleinwort Benson Ltd. v. South Tyneside Metropolitan BC [1994] 4 AER 972; see below at 10.4.6.2: "The "passing on" defence is rejected".

[285] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 742 (per Evans LJ).

[286] Ibid, at 742 (per Evans LJ).

[287] Mason v. NSW (1959) 102 CLR 108, 146 (per Windeyer J), approved by Mason CJ, Commissioner of State Revenue v. Royal Insurance Australia Ltd. (1994) 126 ALR 1.

[288] "[W]hat the expression does not justify is the importation of concepts of loss or damage with their attendant concepts of mitigation, for these have nothing whatever to do with the reason why our law imposes an obligation on the payee to repay to the payer what he has no right to retain." - Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 744 (per Saville LJ).

[289] Commissioner of State Revenue v. Royal Insurance Australia Ltd. (1994) 126 ALR 1, 15 (per Mason CJ), approved by Evans LJ, Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 740.

The appellant local authority invoked the Canadian taxation case, *Air Canada v. British Columbia*,[290] but Evans L.J. deemed the Australian cases, which supported the arguments of the respondent bank against the validity of the passing on defence, most relevant for their statements on "the private law of restitution."[291] Evans L.J. quoted from Windeyer J. in *Mason v. NSW*,[292] in support of the view that impoverishment was not required.[293] Similarly, Mason C.J. in *Commissioner of State Revenue v. Royal Insurance Australia Ltd.*[294] emphasised that the law of unjust enrichment, "does not seek to provide compensation for loss".[295] Morritt L.J. concludes that the aim of restitution law is to prevent the defendant from retaining an unintended benefit acquired from the plaintiff.[296] The fact that there is a "subtraction from the plaintiff's wealth" suffices to fulfil the definitional requirement,[297] regardless of extraneous circumstances or whether the plaintiff might make up this loss elsewhere.[298]

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[290] Air Canada v. British Columbia (1989) 59 DLR (4th) 161.

[291] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 739 (per Evans LJ).

[292] Mason v. New South Wales (1959) 102 CLR 108.

[293] Ibid, at 146 (per Windeyer J): "The concept of impoverishment as a correlative of enrichment may have some place in some fields of continental law. It is foreign to our law", approved by Mason CJ, Commissioner of State Revenue v. Royal Insurance Australia Ltd. (1994) 126 ALR 1.

[294] Commissioner of State Revenue v. Royal Insurance Australia Ltd (1994) 126 ALR 1.

[295] Commissioner of State Revenue v. Royal Insurance Australia Ltd. (1994) 126 ALR 1, 15 (per Mason CJ), approved by Evans LJ, Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 740.

[296] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 745 (per Morritt LJ), citing Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1942] 2 AER 122, 135-136, [1943] AC 32, 61 (per Lord Wright).

[297] Commissioner of State Revenue v. Royal Insurance Australia Ltd. (1994) 126 ALR 1, 15 (per Mason CJ).

[298] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 742 (per Evans LJ); "whether the payer is out of pocket or has recouped his outlay from other sources is entirely irrelevant. The payee has been unjustly enriched by receiving and retaining money he has received from the payer and to which he has no right. He does not cease to be unjustly enriched because the

In most cases, there will be a direct and immediate correlation between the loss of one party and the gain of the other, but in order to develop a coherent response to those situations which fall outside this paradigm, it is necessary to be clear that it is the enrichment which generates the action, and the impoverishment which identifies the appropriate plaintiff. In cases of agency, this emphasis distinguishes between the conduit and the principal.[299]

10.4.3. The Unjust Character of the Enrichment

Keane J. underlines in *Dublin Corporation v. Building and Allied Trade Union*[300] that it is the qualification of the transfer as unjust which has posed considerably greater difficulties than the other conditions.[301] The unjust character of the enrichment resides in the fact that the recipient possesses something to which he has no valid entitlement. Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*[302] refers to the need,

> "to prevent a man from retaining the money of or some benefit derived from another *which it is against conscience that he should keep.*"[303]

Interestingly, this formulation of a common law principle resembles equitable principles. The categorisation does not label the act of receiving the payment, but that of retaining it in the future, as unjust. The obligation arises not because the recipient is at fault or blameworthy; he is simply not entitled to the money, and therefore, if nothing is done, he will be enriched without legal justification.[304]

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payer for one reason or another is not out of pocket." - Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 744 (per Saville LJ).

[299] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 741 (per Evans LJ); ibid, 744 (per Saville LJ).

[300] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547.

[301] Ibid, at 558 (per Keane J.).

[302] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32.

[303] Ibid, at 61 (per Lord Wright).

[304] Lipkin Gorman v. Karpnale Ltd [1991] 2 AC 548, 578 (per Lord Goff).

Much modern teaching of restitution law focuses on the identification and classification of "unjust factors".[305] Birks describes *Moses v. Macferlan*[306] as "the first serious attempt to create a taxonomy of unjust factors."[307] However, he asserts that *Moses v. Macferlan*[308] cannot itself be described as an unjust enrichment case, as its outcome can only be explained as restitution based on a wrong.[309] Nonetheless, the case stands as the leading authority for the classes of case in which restitution may be granted.

The established categories of recoverable payments, including duress, mistake and failure of consideration, clearly illustrate circumstances in which it accords with a general sense of equity to consider the retention of the benefit as unjust. The rationale is similar to that which underlies the resulting trust in equity: it is to be presumed that in everyday affairs, and particularly in a commercial context, one person does not intend to make a gift to another. That there may have been a clear mistake at play reinforces this view. Lord Wright in *Fibrosa*[310] refers to the "root idea"[311] as that which emerges from the leading mistake authorities,[312] namely, that there was "no real intention on the company's part to enrich [the recipient]."[313] The consent that might otherwise justify the transfer is either absent or vitiated.[314]

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[305] See P. Birks, "An Introduction to the Law of Restitution" (Clarendon, Oxford, 1988), pp. 99-108.

[306] Moses v. Macferlan (1760) 2 Burr. 1005.

[307] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 44.

[308] Moses v. Macferlan (1760) 2 Burr. 1005.

[309] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 45.

[310] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32.

[311] Ibid, at 61 (per Lord Wright).

[312] R.E. Jones Ltd. v. Waring & Gillow Ltd. [1926] AC 670; Kelly v. Solari (1841) 9 M&W 54.

[313] R.E. Jones Ltd. v. Waring & Gillow Ltd. [1926] AC 670, 696 (per Lord Sumner).

[314] See L. Farrell, "The Overpaying Taxpayer and the Restitutionary Remedy" (2007) 14(10) CLP 214.

Insistence on precedent and conformity with the established causes of action traditionally met the difficulty of setting precise parameters according to which a person can be deemed to be entitled or not to the enrichment. From Mansfield C.J. in *Moses v. Macferlan*[315] to Keane J. in *Dublin Corporation v. Building and Allied Trade Union*[316] the authorities point to the classes of case where recovery has long been accepted in order to illuminate the nature of unjust enrichment.[317]

Since the recognition of the underlying principle against unjust enrichment, it has become more important instead to develop a comprehensive structure for analysing the circumstances in which enrichment is unjust and will lead to recovery. The unjust character of the receipt can be analysed as plaintiff-sided, based on the absence of consent, defendant-sided, or policy-related.[318] Birks identifies two families of unjust factor: non-voluntariness and policy reasons.[319] He repudiated unconscientious receipt and recategorised it as a form of non-voluntariness.[320] Non-voluntariness comprises the absence of intent, impaired intent and conditional intent.[321] This theoretical structure facilitates the development of the law of restitution, by articulating why the recognised causes of action are viewed as unjust, but the individual categories of action also remain central.

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[315] Moses v. Macferlan (1760) 2 Burr 1005; 1 WB 1219.

[316] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547, 558.

[317] Ibid, at 558 (per Keane J.): "money paid under duress or as a result of mistake of fact or law or accompanied by a total failure of consideration".

[318] E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101, 110.

[319] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 47; S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759, 766: "No common law lawyer had ever heard of the 'unjust factors' before Birks himself introduced them in 1985."

[320] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 48.

[321] Ibid, at p. 48.

10.4.4. The Unjust Factors

Enrichment is deemed unjust when it falls within a recognised category of unjust factor.[322] The most important of these unjust factors which can be established where one party has performed under a void contract are failure of consideration and mistake (of fact or of law).[323]

10.4.4.1. The plaintiff may choose between the different causes of action

In some cases, the plaintiff may be able to formulate a claim based on more than one unjust factor. In this case, it seems that the plaintiff should be entitled to choose the action which better serves his interests in the circumstances of the particular case. In *Deutsche Morgan Grenfell*,[324] Lord Hope asks whether the plaintiff can choose which remedy best suits his interests.[325] The case considers the relationship between the *Woolwich* principle[326] and other causes of action.[327] The company sought the repayment of tax payments made to the British authorities, which were

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[322] G. Virgo, "Anticipatory Contracts – Restitution Restrained" (1995) 54 CLJ 243, 244: "even if the defendant has been enriched, this must arise in circumstances of injustice, under one of the established heads of restitution"; cf P. Birks, "P. Birks, "Unjust Enrichment" (Oxford, 2003), see S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759, 764.

[323] See below at 11.2: "Failure of Consideration in Ultra Vires Cases" and at 12.1.2: "Mistake in the Context of Incapacity"; mistake of fact and failure of consideration were already argued (unsuccessfully) as grounds for recovery in an ultra vires context in Sinclair v. Brougham [1914] AC 398, 452; they have since been confirmed in Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938 and Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349; "The two claims for restitution (total failure of consideration and payment under mistake of fact) are interlinked and not always easy to disentangle." - R.J. Friel, "Negotiating Liabilities without Benefit: the Pre-Contractual Liability Trap" (2000) 7(8) CLP 188.

[324] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558.

[325] Ibid, at 576 (per Lord Hope).

[326] Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] AC 70.

[327] See L. Farrell, "The Overpaying Taxpayer and the Restitutionary Remedy" (2007) 14(10) CLP 214.

subsequently declared unlawful.[328] The circumstances of the case were such that the interests of the plaintiff would be best served by an action for mistake,[329] and those of the defendant by an action under the time-barred *Woolwich* principle.[330] The majority in the House of Lords[331] found that the plaintiff company was entitled to recover on the basis of mistake of law. Lord Hoffmann emphasises that the existence of different causes of action in the two spheres does not automatically mean that they are mutually exclusive. Lord Hope points out that in *Kleinwort Benson Ltd v. Lincoln City Council*,[332] Lord Goff asserted that an equally strong case could be made for mistake of law trumping failure of consideration as for failure of consideration trumping mistake of law as the basis for recovery of payments made under void contracts. If only one of the two actions could be available, it is not obvious which should be preferred.[333] Lord Hope approvingly quotes Burrows' view[334] that the claimant ought to be free to choose between the various causes of action under which he can establish a claim.[335] Just as plaintiffs can choose between an action in contract and tort,[336] it accords with the general approach of English law[337] that parties who have actions open to them under a

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[328] Metallgesellschaft Ltd v. Inland Revenue Commissioners (Joined Cases C-397 and C-410/98) [2001] Ch. 620.

[329] Section 32(1)(c), Limitation Act 1980, now amended by Section 320, Finance Act 2004 to exclude mistake of law in tax cases.

[330] Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] AC 70.

[331] Lord Hoffmann, Lord Hope and Lord Walker.

[332] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349.

[333] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 579 (per Lord Hope).

[334] A. Burrows, "Restitution in Respect of Mistakenly Paid Tax" (2005) 121 LQR 540, 542.

[335] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 579 (per Lord Hope).

[336] Henderson v. Merrett Syndicates Ltd [1995] 2 AC 145, 193 (per Lord Goff).

[337] See Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 387 (per Lord Goff).

number of categories of restitution should be allowed to pursue either of the alternative remedies available.[338]

10.4.4.2. Cases in which public policy factors arise

A number of leading cases concern the restitution of money which is unnecessarily paid to organs of the state.[339] In these cases, policy considerations come into play which are foreign to the usual purely private law cases involving private law corporations. *Woolwich*[340] is a public-policy related principle which operates where the state acquires the assets of taxpayers without justification. Recovery in such cases may be on the specific ground of the right to recover payments unjustly demanded by the authorities,[341] or on the basis of ordinary unjust factors.[342] The cases concerning the state do not demonstrate the application of pure restitutionary principles because public policy also affects them. According to Evans LJ, they are therefore "of limited assistance" in discussing the general principles of restitution law.[343]

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[338] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 579 (per Lord Hope), see also Lord Walker, Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 607.

[339] See Murphy v. Attorney General [1982] IR 241; Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] AC 70; In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105.

[340] Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] AC 70.

[341] Ibid.

[342] "[I]t would have been wholly inconsistent with the general principle which he had identified for Lord Goff to conclude that there was no cause of action on the ground of unjust enrichment at common law for payments made under a mistake of law in the case of the third category just because it was also within the scope of the *Woolwich* principle."- Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 578 (per Lord Hope).

[343] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 739 (per Evans LJ): "the taxation cases are of limited assistance in addressing the question of general principle [...] There is a public law element involved in them".

In the Irish context, the need for the State's actions to vindicate the constitutional property rights of citizens buttresses the need for a remedy in the cases with public dimensions.[344] The plaintiff's right of recovery constitutes a chose in action, which is a constitutionally protected property right under Articles 40.3.2 and 43.1 of the Irish constitution.[345] On the other hand, *Murphy v. Attorney General*[346] and the *Health Amendment Bill Reference*[347] show that there is room for a policy defence in public law cases, where restitution would entrain a financial crisis for the state. The cases involving payments to the state are an important part of modern restitution law, but they are not directly relevant to most ultra vires cases involving private parties, except in so far as they develop the law on the ordinary grounds of action, such as mistake or failure of consideration.

10.4.5. Ultra Vires Transactions and Restitution

The doubt which long surrounded the question of remedies available on a finding of ultra vires has in recent years been dispelled by a series of high-profile English authorities. Several unjust factors may ground an action for unjust enrichment in ultra vires cases.[348] The first of these is failure of consideration, which is a confirmed route to recovery following payments which are void for incapacity.[349] The development of the law on failure of consideration in the swaps cases suggests that the basis for recovery in ultra vires cases may be evolving into something different from failure of consideration: perhaps absence of consideration, or

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[344] See In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105, 185.

[345] Ibid, at 180, 182, 196.

[346] Murphy v. Attorney General [1982] IR 241.

[347] See In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105.

[348] See Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 387 (per Lord Goff); see below at Chapter 11: "Failure of Consideration" and at Chapter 12: "Mistake".

[349] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938; [1996] AC 669, [1996] 2 AER 961; Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal London Borough Council [1999] QB 215; see below at Chapter 11: "Failure of Consideration".

incapacity as a new unjust factor.[350] Alternatively, mistake has been shown to ground an action for recovery of benefits transferred ultra vires.[351]

10.4.6. Defences to Claims for Restitution

Once a case of unjust enrichment can be made out based on one of the unjust factors, the focus shifts to whether the person who has been enriched may avail of any defence to the claim.[352] The development of the principle against unjust enrichment and the law's evolution away from technical restrictions[353] imply the necessity for a concomitant development availability of defences.[354] Justice would be ill-served were the balance to swing too far in favour of the plaintiff. In the modern law of restitution a remedy will be denied on a principled basis, rather than because the plaintiff failed to fall within the conditions of a narrowly-defined cause of action or fell foul of one of a myriad of technical restrictions.

The defences which are relevant in ultra vires cases are those which exist in private law. Different policy considerations operate in cases involving money which has unnecessarily paid to organs of the state.[355] In *Murphy v. Attorney General*,[356]

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[350] Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal London Borough Council [1999] QB 215.

[351] See below at Chapter 12: "Mistake".

[352] See See E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101, 141.

[353] Such as the mistake of law bar or the requirement that failure of consideration be total.

[354] "[T]he law must evolve appropriate defences which can, together with the defence of change of position, provide protection where appropriate for recipients of money paid under a mistake of law in those cases in which justice or policy does not require them to refund the money." – Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 373 (per Lord Goff); see also Lipkin Gorman v. Karpnale [1991] 2 AC 548, 581 (per Lord Goff); "In restitution, the equivalent policy of security of receipt is worked out, not by denying a cause of action but by providing appropriate defences" - E. O'Dell, "Incapacity", Chapter 5, in P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000), p. 128.

[355] See Murphy v. AG [1982] IR 241, 320 (per Henchy J.); Woolwich Equitable Building Society v. IRC [1993] AC 70; applied in Ireland per Keane J., O'Rourke v. Revenue Commissioners [1996] 2

Henchy J. refers to "transcendent considerations" which might make recovery "undesirable, impractical or impossible".[357] These factors explain the Canadian Supreme Court's recognition of the defence of "passing on" in *Air Canada v. British Columbia*.[358]

The operable defences in private law reflect circumstances where justice does not require the recipient to repay what he has received.[359] They therefore focus on the protection of the defendant, not on "the merits or demerits" of the plaintiff.[360] Defences, like the underlying claim for restitution, aim to achieve justice through specific legally recognised channels. Since the recovery of money in restitution is not discretionary, but "a matter of right",[361] where recovery is to be denied, it must be "denied on the basis of legal principle."[362] The respondents in *Lipkin Gorman v. Karpnale*[363] argued for a flexible approach to unjust enrichment, so that the claim would be refused wherever it would be "unjust or unfair to order restitution."[364]

I.R. 1; Bank of Ireland Trust Services Ltd, formerly Erin Executor and Trustee Company Ltd (as trustee of Irish Pension Fund Property Unit Trust) v. The Revenue Commissioners [2002] 4 IR 178; see above at 10.4.4.2: "Cases in which public policy factors arise".

[356] Murphy v. Attorney General [1982] IR 241.

[357] Ibid, at 314; he also indicates that a remedy will be available "in the absence of countervailing circumstances", at 316.

[358] Air Canada v. British Columbia (1989) 59 DLR (4^{th}) 161, as distinguished per Evans LJ, Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 739.

[359] "[C]ircumstances in which, despite the mistaken nature of the payment, it is not regarded as unjust for the defendant to retain the money" - Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 385 (per Lord Goff).

[360] Rover International Ltd v. Cannon Film Sales Ltd (No. 3) [1989] 3 AER 423, 436 (per Kerr LJ).

[361] Lipkin Gorman v. Karpnale Ltd. [1991] 2 AC 548, 578 (per Lord Goff).

[362] Ibid, at 578 (per Lord Goff); see also Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423, 442 (per Dillon LJ).

[363] Lipkin Gorman v. Karpnale Ltd. [1991] 2 AC 548.

[364] Ibid, at 577 (per Lord Goff).

Lord Goff rejected such broad judicial discretion.[365] Lord Goff later identifies change of position, compromise and settlement of an honest claim as defences, while acknowledging that the list may be extended.[366] The Supreme Court emphasised the importance of defined defences in *Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004*.[367] Murray C.J. distinguishes between the recognition of "a defence to a lawful claim, which, therefore, presupposes the existence of a valid claim" and an attempt to "extinguish the claims entirely, without permitting a claim to be advanced".[368] The Bill, which purported to extinguish all claims without investigating whether valid and specific defences existed to meet them, was inconsistent with the authority of *Murphy v. Attorney General*[369] that defences could exist.[370]

Two putative defences can be viewed as two sides of the same coin. These are the "passing on" defence and the defence of change of position.[371] Passing on relates to the situation where the loss suffered by the payer has been passed on to a third party. Change of position arises when the benefit received by the payee has been passed on to another. In *Kleinwort Benson Ltd. v. Birmingham City Council*, it was described as an anomaly that passing on could be recognised if change of position were not.[372]

10.4.6.1. The defence of change of position

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[365] Ibid, at 578: the court does not have "carte blanche to reject the solicitors' claim simply because it thinks it unfair or unjust in the circumstances to grant recovery." (per Lord Goff).

[366] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 382, 385.

[367] In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105.

[368] Ibid, at 192.

[369] Murphy v. Attorney General [1982] IR 241.

[370] In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105, 193.

[371] Kleinwort Benson Ltd. v. Birmingham City Council [1996] 4 AER 733, 738 (per Evans LJ).

[372] See ibid, at 742 (Evans LJ).

The defence of change of position relies on the idea that in certain circumstances, where the recipient of the benefit no longer possesses it, he is not enriched and justice does not require that he return the sum received.[373] It requires that the defendant have spent the money received in good faith.[374] In the past, estoppel was sometimes used to respond to the justice of such cases, though it was predicated on the plaintiff's conduct.[375]

The change of position defence was unsuccessfully pleaded at the end of the 1980s in *Rover International Ltd v. Cannon Film Sales Ltd (No. 3)*,[376] and its rejection in that case illustrates the traditional approach of the English courts to the argument. Dillon L.J. acknowledged the existence of the defence,[377] but took a very narrow view of its availability, equating it with estoppel.[378] Dillon L.J. points out that the defendant relied on the payments, not by spending the money, but by performing its part of the obligation in supplying the master prints of the films. The logical consequence of allowing this argument to succeed would be to prevent restitution in any case where the recipient of purported consideration under a void contract had itself performed any part of its obligations. Dillon L.J. rejects such a potentially absurd proposition.[379]

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[373] Murphy v. Attorney General [1982] 1 IR 241, 319 (per Henchy J.).

[374] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423, 441-442.

[375] Holt v. Markham [1923] 1 KB 504.

[376] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423.

[377] Ibid, at 441-442 (per Dillon LJ).

[378] Ibid, at 442 (per Dillon LJ): "money paid by mistake of fact is recoverable unless one or other of two very limited exceptions applies, ie estoppel by conduct or payment to a mere agent who has accounted to his principal", relying on Ministry of Health v. Simpson [1950] 2 AER 1137 and Baylis v. Bishop of London [1913] 1 Ch. 127, [1911-1913] AER 273.

[379] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423, 442 (per Dillon LJ).

Change of position was endorsed by the Supreme Court in *Murphy v. Attorney General*.[380] Henchy J. characterises it as an important element of unjust enrichment law that there should be a defence where,

> "after receiving the money in good faith, his circumstances have so changed that it would be inequitable to compel him to make full restitution".[381]

In *Murphy*,[382] this defence was used to release the State from an obligation to repay overpaid taxes to the vast majority of citizens who had not challenged them.[383]

The House of Lords revisited change of position in *Lipkin Gorman v. Karpnale*.[384] In that decision, and in parallel with its recognition of unjust enrichment as the foundation of restitution, the House accepted change of position as a valid defence. Having rejected a plea of general unfairness,[385] the House accepted that the defence of change of position was a valid response to the respondents' concerns.[386] The casino could rely on change of position in respect of the winnings which it disbursed to the dishonest gambler on foot of his stakes, and the sum to be repaid to the appellants was reduced accordingly.[387]

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[380] Murphy v. Attorney General [1982] 1 IR 241; see also In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105, 192-193.

[381] Murphy v. Attorney General [1982] 1 IR 241, 319 (per Henchy J.): "one of the first principles of the law of restitution on the ground of 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."

[382] Ibid.

[383] Ibid, at 319-320 (per Henchy J.).

[384] Lipkin Gorman v. Karpnale [1991] 2 AC 548.

[385] "If it would be unjust or unfair to order restitution, the claim should fail." - Lipkin Gorman v. Karpnale Ltd. [1991] 2 AC 548, 577-578.

[386] Ibid, at 578 (per Lord Goff).

[387] Ibid, at 583 (per Lord Goff).

The literature supported the existence of the defence,[388] which had been adopted in many common law jurisdictions.[389] The recognition of change of position to protect security of receipt helps assure that the expansion of the right to recover under modern unjust enrichment principles does not become excessive.[390] Before *Lipkin Gorman*[391] the defence of change of position had very limited recognition, through the principle of estoppel.[392] Lord Goff identified two principal difficulties with relying on estoppel to provide a defence in such cases.[393] Firstly, estoppel generally requires reliance on a representation, and where money is given to a third party by a thief, there is no representation. Secondly, he argues, estoppel is unsuitable because it does not allow for a partial defence where the innocent recipient alienates part of the benefit received.[394] Consequently, Lord Goff urges, "bona fide change of position should of itself be a good defence in cases such as these."[395]

The defence of change of position serves the interests of justice.[396] It protects the recipient who, innocently and in good faith, spends what he has received in reliance

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[388] Ibid, at 578 (per Lord Goff).

[389] Ibid, at 579 (per Lord Goff); J. Beatson & W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149, 169 et seq.

[390] A. Burrows, "Understanding the Law of Restitution: a Map through the Thicket" (1994-1995) 18 U Queensland L.J. 149, 160; M. Bryan, "Mistaken Payments and the Law of Unjust Enrichment: David Securities Pty Ltd v. Commonwealth Bank of Australia" (1993) 15 Sydney LR 461, 474: "Generous formulations of the principles of liability demand generous defences".

[391] Lipkin Gorman v. Karpnale [1991] 2 AC 548.

[392] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423, [1989] 1 WLR 912.

[393] See also J. Beatson & W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149, 170.

[394] Lipkin Gorman v. Karpnale Ltd. [1991] 2 AC 548, 579 (per Lord Goff): "if, for example, the defendant has innocently changed his position by disposing of part of the money, a defence of estoppel would provide him with a defence to the whole of the claim".

[395] Ibid, at 579 (per Lord Goff).

[396] Ibid, at 579 (per Lord Goff): "where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to pay outweighs the injustice of denying the plaintiff restitution."; cp J. Beatson & W. Bishop, "Mistaken

on his perceived entitlement to do so.[397] The element of reliance means that the defence does not apply where the recipient either would have spent the same amount of money anyway or receives consideration for his expenditure. In such cases, he remains enriched by his receipt.[398] *Lipkin Gorman v. Karpnale*[399] deliberately leaves the defence's scope undefined, favouring the incremental development of this new mechanism on a case by case basis.[400] However, Lord Goff indicates some principles which should circumscribe it, excluding wrongdoers and those who act in bad faith.[401] Hedley argues that there are more questions than answers after this decision.[402] In *Dublin Corporation v. Building and Allied Trade Union*, Budd J. confirmed that the defence of change of position is recognised in Irish law.[403] O'Dell detects a willingness in the Irish courts to interpret the defence expansively.[404]

Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149, 177-178: "From the perspective of economic theory the development of such a defence is desirable [to avoid] real hardship to R."

[397] Lipkin Gorman v. Karpnale Ltd. [1991] 2 AC 548, 560 (per Lord Templeman).

[398] Ibid, at 580 (per Lord Goff): "the expenditure might in any event have been incurred by him in the ordinary course of things."

[399] Ibid.

[400] Ibid, at 558 (per Lord Bridge).

[401] Ibid, at 580 (per Lord Goff): "the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer."

[402] S. Hedley, "Unjust Enrichment" (1995) 54 CLJ 578, 585: "How does one recognize a "change of position", or assess its extent? To what type of liability does it provide a defence? What is its relation to other defences?"

[403] Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), at p. 75: "It is well established that a change of situation can form an effective bar to restitution in claims of this type."; E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101, 141-144.

[404] E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101, 144-149.

10.4.6.2. The "passing on" defence is rejected

"Passing on" is the converse argument from change of position. Its logic is that the recipient should not be obliged to repay the payer, because he is no longer at a loss, having relayed the impoverishment caused by the transaction to a third party. In the swaps litigation, the local authority defendants argued that the plaintiff banks had not in fact lost out, as they had entered hedging agreements with other banks.[405] Therefore, they argued, the defendants were not enriched at the plaintiffs' expense.[406]

Hobhouse J. rejected this argument in *Kleinwort Benson v. South Tyneside Borough Council,*[407] on the basis that any other contracts to which the plaintiff might be a party are irrelevant to the principle of restitution as applied to the parties.[408] The rejection was affirmed by the Court of Appeal in *Kleinwort Benson v. Birmingham Council.*[409] Evans L.J. distinguished the cases relating to the overpayment of taxes, to which particular public policy considerations apply.[410] Although the element of plaintiff's expense forms a necessary part of the law of unjust enrichment, the function of this requirement is to identify the relevant plaintiff, not to require that he be left permanently at a loss as a result of the payment sought to be recovered.[411] The proposed defence had a superficial attraction that it would prevent "windfall

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[405] Kleinwort Benson v. South Tyneside BC [1994] 4 AER 972, Kleinwort Benson v. Birmingham Council [1996] 4 AER 733; see above at 10.4.2: "At the Plaintiff's Expense".

[406] Kleinwort Benson v. Birmingham Council [1996] 4 AER 733, 741 (per Evans LJ).

[407] Kleinwort Benson v. South Tyneside Borough Council [1994] 4 AER 972, 984-987 (per Hobhouse J).

[408] Ibid, at 985 (per Hobhouse J.); see also Kleinwort Benson v. Birmingham Council [1996] 4 AER 733, 742, 744.

[409] Kleinwort Benson v. Birmingham Council [1996] 4 AER 733.

[410] Ibid, at 739 (per Evans LJ).

[411] Ibid, at 742 (per Evans LJ).

gains" to plaintiffs.[412] However Morritt L.J. disputed that the gain ought therefore be enjoyed by the defendant, especially as the plaintiff may have to account to the other party to which it passed the loss.[413] The House also affirmed that the plaintiff in an unjust enrichment case is under no duty to mitigate his losses.[414]

The apparent anomaly by which change of position is recognised but not passing on can be explained by the fact that unjust enrichment focuses on the recipient and not the payer. McInnes[415] uses two arguments to approve of the rejection of this defence and the retention of the narrow focus on relations between the plaintiff and defendant. Firstly, where a business suffers a loss, and raises prices to pass that loss on to its customers, how, "given the immeasurability of elasticity of demand"[416] could it be measured how much loss the company ends up suffering in the end? The second difficulty is remoteness. Is it any business of the local authority what hedging agreements the bank enters in the course of its business?

10.4.6.3. A defence of honest receipt not accepted

Another possible defence rejected by English law is that of honest receipt. This defence, advocated by Brennan C.J. in Australia in *David Securities Pty Ltd v Commonwealth Bank of Australia*,[417] would exempt from repayment a person who

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[412] Ibid, at 738 (per Evans LJ): "that the plaintiff ought not to recover the payment which has 'unjustly' enriched the defendant, if the result of restitution would be that the plaintiff, not being out of pocket, would himself receive a 'windfall gain'".

[413] Ibid, at 749 (per Morritt LJ): "the plaintiff has a better title to any 'windfall' available, not least so as to be in a position to satisfy any claim made against him by those from whom 'the windfall' was ultimately derived."

[414] Ibid, at 743, 744; J. Beatson & W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149, 172 recovery is "never based on the conduct of the parties".

[415] M. McInnes, "At the Plaintiff's Expense: Quantifying Restitutionary Relief" (1998) 57 CLJ 472.

[416] Ibid, at 479.

[417] David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 175 CLR 353, 399 (per Brennan J.).

had honestly believed himself to be entitled to the benefit he received.[418] In *Kleinwort Benson Ltd v. Lincoln City Council*,[419] Lord Goff rejected the proposed defence as too sweeping.[420] Despite the importance of the security of receipts,[421] the proposed defence of honest receipt was,

> "the most far-reaching of the defences to the right of recovery that has yet been proposed [and] generally regarded as being wider than is necessary to meet the perceived mischief."[422]

Were such a broad defence to exist, there would be no need for other defences such as change of position, and recovery would be impossible following a shared mistake.[423]

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[418] Ibid, at 399 (per Brennan J.): "It is a defence to a claim for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer, that he was entitled to receive and retain the money or property."

[419] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, [1998] 4 All ER 513, [1998] 3 WLR 1095, [1999] RVR 315, [1999] LGR 1.

[420] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 384.

[421] Ibid, at 384.

[422] Ibid, at 384 (per Lord Goff).

[423] Ibid, at 385.

10.4.6.4. The "settled law" defence

Another defence raised in *Kleinwort Benson Ltd v. Lincoln City Council*[424] was the "settled law" argument.[425] This argument was that payments made in accordance with what was widely viewed as the law at the time could not be recovered on the basis of a mistake of law when a judicial decision subsequently falsified the shared understanding of the law.[426] The House rejected the view that a transaction which all parties believed to be lawful on the basis of the weight of authority at the time was therefore not mistaken.[427] Lord Goff disputed that what was proposed was really a defence rather than a denial of the unjust factor.[428] In *Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor*,[429] Lord Walker approves the view expressed by Lord Hoffmann in *Kleinwort Benson Ltd v. Lincoln City Council*,[430] that the creation of such a defence would require legislation.[431]

10.4.6.5. Counter-restitution as a condition

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[424] Ibid.

[425] Ibid, at 376.

[426] See M. Bryan, "Mistaken Payments and the Law of Unjust Enrichment: David Securities Pty Ltd v. Commonwealth Bank of Australia" (1993) 15 Sydney LR 461, 467.

[427] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 379, 382; cf ibid, 357-358 (per Lord Browne-Wilkinson).

[428] "It is based on the theory that a payment made on that basis is not made under a mistake at all. Once that reasoning is seen not to be correct, the basis for the proposed defence is, at least in cases such as the present, undermined." - Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 382 (per Lord Goff).

[429] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558.

[430] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, [1998] 4 All ER 513, [1998] 3 WLR 1095.

[431] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 610 (per Lord Walker).

A number of swaps authorities, where payments were made in both directions, show the courts ordering restitution of the net benefit received.[432] This suggests that counter-restitution has a place in the law of unjust enrichment. Logically, counter-restitution is a necessary part of restitution, though the same end could be accomplished by requiring the two parties to initiate separate actions.[433] However, it is not clear where the requirement that payments in both directions be returned fits in to the theoretical structure. It could be a condition for making the claim, or part of the calculation of the amount of the enrichment. Might it equally be a defence to a claim for unjust enrichment that the plaintiff has also received a benefit from the defendant, which it has not restored? In the case of actions founded on failure of consideration, the calculation of the net enrichment may be characterised as the acceptance of apportionment in place of the traditional requirement of total failure of consideration. However, this explanation does not translate to mistake claims, where counter-restitution must equally be required.[434] This leaves open the possibility that the non-restitution by the plaintiff may operate as a partial defence for the defendant. This would be relevant in incapacity cases where an agreement is performed by both sides before being found to be void.[435] In *Rover International Ltd v. Cannon Film Sales Ltd (No. 3)*,[436] Dillon L.J. rejected the potentially absurd

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[432] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669; Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal London Borough Council [1999] QB 215; Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349; see also In Re Irish Provident Assurance Co Ltd [1913] 1 IR Ch. 352, discussed in E. O'Dell, "Incapacity", in P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000), at pp. 146-147; P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), p. 129.

[433] Cf J. Beatson & W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149, 168: "the classic formulation of the English common law rules exhibits a combination of strict liability (where M recovers nothing) and no liability (where M recovers everything)."

[434] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, [1998] 4 All ER 513, [1998] 3 WLR 1095.

[435] Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal London Borough Council [1999] QB 215.

[436] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423.

proposition that the defendant could rely on its own part-performance as a defence.[437] However, *Lipkin Gorman*[438] indicates instead that change of position may be available as a partial defence to account for reciprocal payments made by the recipient. This would be one means of giving effect to the requirement for counter-restitution to ensure that the appropriate net sum is repaid.

10.4.6.6. General defences, including res judicata, apply

In addition the specific restitutionary defences which might deter the courts from intervening to reverse what appears to be an unjust enrichment, general defences may apply. Keane J. in *Dublin Corporation v. Building and Allied Trade Union*[439] emphasises the importance of the factors which can operate to preclude restitution even where the payment falls under one of the established causes of action. He quotes Henchy J. in *Murphy v. Attorney General*,[440] referring to,

> "prescription (negative or positive), waiver, estoppel, laches, a statute of limitation, *res judicata*, or other matters (most of which may be grouped under the heading of public policy)"[441]

Henchy J. particularly invoked the doctrine of laches.[442] Thus, Keane J. reasons that *res judicata* is not countered by a finding that an unjust enrichment has taken place, but rather remains active as a defence which can preclude restitution even where there is a finding of unjust enrichment.[443] He criticises *Moses v. Macferlan*[444] for

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[437] Ibid, at 442 (per Dillon LJ).

[438] Lipkin Gorman v. Karpnale [1991] 2 AC 548.

[439] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547.

[440] Murphy v. Attorney General [1982] IR 241, 314 (per Henchy J.).

[441] Ibid, at 314 (per Henchy J.), cited by Keane J., Dublin Corporation v. Building and Allied Trade Union 2 ILRM 547 [1996] 2 ILRM 547, 558, also per Murray CJ, In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105, 186.

[442] Murphy v. Attorney General [1982] IR 241, 318 (per Henchy J): "As time went by, his right to complain of the State's unjust enrichment ran the risk of being extinguished by laches on his part."

[443] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547, 560 (per Keane J.).

failing to respect res judicata in finding that, "the 'ties of natural justice and equity' justified the setting aside of the decree of a court of competent jurisdiction."[445] In the present case, even if there had been unjust enrichment, the final binding decision of the arbitrator should not be disturbed.[446] Keane J.'s approach emphasises that unjust enrichment, being a source of obligations on an equal footing with contract and tort, is equally subject to all the established general defences which may be called upon to defeat otherwise valid claims in those domains.

The practical importance of limitation periods is evident from a number of the swaps cases, including *Deutsche Morgan Grenfell*,[447] where mistake was argued because failure of consideration was time barred.[448] In *Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004*,[449] the Supreme Court acknowledges the government's right, as a prospective defendant to claims for the recovery of unlawful charges, to limit repayment under the Statute of Limitations to only those claims relating to the previous six years.[450]

10.4.7. Conclusion

The modern law of restitution is well-adapted to provide a straightforward personal remedy under the common law in many cases where a person is unjustly enriched by the receipt of a benefit for which the consent of the payer has failed. The general structure of restitution law requires that the defendant be unjustly enriched at the expense of the plaintiff, and unable to avail of a defence such as change of position, for the plaintiff to recover from him. It remains to trace exactly how a case for

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[444] Moses v. Macferlan (1760) 2 Burr 1005; 1 WB 1219.

[445] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547, 559 (per Keane J.).

[446] Ibid, at 555 (per Keane J.).

[447] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558.

[448] Ibid, at 573.

[449] In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105.

[450] Ibid, at 205.

restitution might be made out in ultra vires cases on the basis of one of the recognised unjust factors. Failure of consideration and mistake are the two grounds for recovery which are likely to give rise to a personal restitutionary remedy in cases of corporate incapacity.

11. FAILURE OF CONSIDERATION

Failure of consideration offers a remedy against unjust enrichment where a person, contrary to his intentions, receives nothing in return for his transfer of a benefit. He is, Birks writes, "let down".[1] The underlying rationale is the view that, particularly in commerce, parties do not choose to make transfers of their assets as unilateral gifts. Where the reciprocal basis for giving fails, it would be unjust and contrary to good conscience for the recipient to retain it. As with other restitutionary principles, the grant of a remedy for failure of consideration is unrelated to any concept of fault on the part of the recipient.[2] The plaintiff's consent may be viewed as qualified or conditional on receipt of the reciprocal consideration for which he has bargained.[3] When that consideration fails to materialise, the condition underpinning the payer's conditional consent fails.[4]

The concept of consideration in the restitution context differs from the mere promise required to form a contract. In restitution, consideration generally means, "not the promise which is referred to as the consideration, but the performance of the promise."[5] The principle concerns itself with the receipt of actual, concrete benefits. Australian courts have extended the meaning of "consideration" in this context beyond the contractual context to encompass "payment for a purpose which

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[1] P. Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 TIL 155, 192.

[2] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 67 (per Lord Wright): "It is clear that the failure of consideration need not be attributable to breach of contract or misconduct on the part of the defendant".

[3] Ibid, at 61; see E. O'Dell, "The Principle against Unjust Enrichment" (1993) 15 DULJ 27, 37.

[4] R. Grantham, "Restitutionary Recovery ex Aequo et Bono" (2002) Sing. JLS 388, 390; E. O'Dell, "Incapacity" (Chapter 5), in P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000), pp. 113-167, at p.117.

[5] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 48 (per Viscount Simon LC); ibid, at 72 (per Lord Wright).

has failed, such as the non-fulfilment of a condition or disappearance of a state of affairs".[6]

This cause of action is readily applicable to the context of payments made under void contracts. Even when it was doubted whether failure of consideration could ground a remedy in cases of frustration by impossibility,[7] it was accepted that it would apply where a "contract was wiped out altogether".[8] Recent authorities establish conclusively that failure of consideration is a readily available ground for recovery in ultra vires cases.[9] There are hints that incapacity-based voidness may automatically equate to failure of consideration and recovery. Furthermore, the courts are increasingly willing to sidestep the potential obstacle of a failure of consideration which is less than total, even going so far as to allow the recovery of net benefits transferred in a number of swaps cases.

Although failure of consideration has long been a recognised ground for restitution at common law, it has also been subject to important restrictions. The failure must be total: if the donor is to succeed, he must have received no compensation in return for what he has given.[10] This all-or-nothing characteristic of the remedy effects what

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[6] J. Taylor, ""Total" Failure of Consideration and Roxborough v. Rothmans" (2004) 120 LQR 30, 31, citing David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 109 ALR 57 (HC) and Roxborough v. Rothmans of Pall Mall Australia Ltd (2001) 185 ALR 335; 208 CLR 516; R. Grantham, "Restitutionary Recovery ex Aequo et Bono" (2002) Sing. JLS 388, 392: ""consideration" bears its "older and looser" meaning of the basis or reason for the transfer, and thus may correspond to the notion of *causa* in Roman law."

[7] Chandler v. Webster [1904] 1 KB 493.

[8] Ibid, at 499 (per Collins MR): "If the effect were that the contract were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration."

[9] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938; [1996] AC 669, [1996] 2 AER 961; Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal London Borough Council [1999] QB 215.

[10] Hunt v. Silk (1804) 5 East 449; Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 77 (per Lord Porter).

Lord Wright describes as "rough justice".[11] The constraints of the traditional doctrine of failure of consideration must be examined first, in order to understand the issues which arise from the application of the principle in recent ultra vires cases.[12] The intersection between the swaps incapacity cases and the rules on failure of consideration calls into question many of the established elements of the doctrine.[13] However, the Irish courts may prefer to apply orthodox failure of consideration reasoning to ultra vires cases rather than following the English Court of Appeal to the full extent of its "stretching" of the rules.[14] Though failure of consideration is in a state of flux, it is best to start with the old certainties.

11.1. The Doctrine of Failure of Consideration

11.1.1. The Basis of the Right of Recovery

The leading case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd*[15] definitively enunciates the principles governing failure of consideration. A contract between English and Polish companies for the purchase of machinery was frustrated by the invasion of Poland, and the Polish purchaser sought to recoup the money it had paid to the seller. The defendant company had worked on the machines and would be out of pocket if required to reimburse the sum received. Previously, the rule in *Chandler v. Webster*[16] established that, under implied contract theory, where a contract could not be performed due to impossibility, the

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[11] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 72 (per Lord Wright).

[12] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215.

[13] See eg Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938; [1996] AC 669, [1996] 2 AER 961; Goss v. Chilcott [1996] AC 788.

[14] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215, 233.

[15] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 48.

[16] Chandler v. Webster [1904] 1 KB 493.

loss lay where it fell. *Chandler v. Webster*[17] rejected a claim for repayment for failure of consideration by a plaintiff who had hired a room to view a cancelled coronation procession.[18] This refusal to countenance a remedy where a contract was frustrated was supported by the authorities and informed commercial practice over many years[19] but received "much unfavourable criticism".[20] *Fibrosa* overruled *Chandler v. Webster*,[21] ruling that restitution for failure of consideration arises by operation of law, outside of any contract between the parties.[22] According to Lord Wright, its basis is simply "the fact that the defendant has received the money and has on the events which have supervened no right to keep it."[23]

11.1.2. Defining "Consideration"

The defendants in *Fibrosa*[24] argued that there was not total failure of consideration, since the manufacturer company had bound itself by the contract to deliver the goods.[25] This promise, they argued, was consideration received by the plaintiffs.[26]

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[17] Ibid.

[18] Ibid, at 499 (per Collins MR): impossibility "only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply."

[19] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 37.

[20] Ibid, at 45 (per Viscount Simon LC); the appeal to the House of Lords in Fibrosa was the first opportunity to reconsider the rule, which had been expressly stated by the Court of Appeal in 1904.

[21] Chandler v. Webster [1904] 1 KB 493.

[22] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 46 (per Viscount Simon LC): it "is not based on any provision contained in the contract, but arises because, in the circumstances that have happened, the law gives a remedy in quasi-contract to the party who has not got that for which he bargained."

[23] Ibid, at 65 (per Lord Wright).

[24] Ibid, at 48.

[25] Ibid, at 38.

[26] "The consideration for the payment made was the respondents' promise to deliver the goods c.i.f Gdynia. The respondents, by merely binding themselves by a contractual obligation, suffered a detriment and that was sufficient consideration" - ibid, at 38 (per Lord Wright).

However, the court drew a clear distinction between the consideration required in contract law to form a contract and the consideration taken into account in the non-contractual context to determine whether restitution should be granted. Lord Wright explains that, in this context, there must be "a failure in the contract performance".[27] Consideration in restitution is actual performance or transfer, not a promise. To accept the alternative proposition, that there was always consideration given when two parties had exchanged promises in forming a bargain, would be irreconcilable with the many authorities in which a remedy was allowed for failure of consideration where a promise was given but not fulfilled.[28]

The orthodox differentiation between consideration in contract and restitution law ensures that the principle can be used in the typical partly-performed ultra vires case. Where one party has given but not received, it is consistent with the logic of failure of consideration that he should be able to recover. There is one wrinkle in this scenario: this definition of consideration emphasises that consideration is an actual benefit envisaged in the original bargain, as distinct from the promise of that benefit. Where a contract is validly concluded, but frustrated, perhaps by impossibility, this is straightforward. Recent authorities, mindful of the total failure requirement, emphasise that the receipt which precludes recovery is that of the consideration promised in the failed contract.[29] However, the issue becomes more complicated when a contract is declared void. If there is no contract, and therefore no promised transfer to perform, does any benefit at all constitute consideration, or should the presence of actual consideration be judged by reference to what was envisaged in the void contract?[30]

More significant problems arise in relation to a void agreement which both sides have acted to perform, where the courts seem to have moved away from the

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[27] Ibid, at 72 (per Lord Wright).

[28] Ibid, at 49.

[29] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423, 433; Stocznia Gdanska S.A. v. Latvian Shipping Co. Latreefer Inc [1998] 1 Lloyd's Rep. 609, 619.

[30] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423, [1989] 1 WLR 912.

traditional focus on receipt of benefit.[31] In this scenario, the authorities have indicated that consideration is not simply a transfer of benefit, but is in fact related to the giving of a legal promise. Given that the fundamental defect under the ultra vires doctrine is that the company cannot make a promise, this reasoning implies that there would never be consideration in the contractual sense, regardless of the actual transfers made under the void agreement.[32] Therefore, if consideration were defined as a binding legal promise, then there might be recovery for failure of consideration, regardless of the existence of reciprocal transfers.[33]

11.1.3. The Form of the Benefit

In principle, subject to the complications encountered in the most recent ultra vires cases,[34] consideration in the restitution context is the receipt of an actual benefit or transfer. Echoing the old restitutionary actions,[35] this benefit can take the form of money or goods or the performance of a service. Traditionally, the courts were more willing to allow recovery of sums of money paid without consideration than other goods transferred. From the point of view of justice, there does not seem a valid justification for allowing the recovery of cash paid but refusing compensation for other non-monetary benefits.[36] The practical difficulties in evaluating non-cash transfers need not be insurmountable.[37]

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[31] Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal London Borough Council [1999] QB 215.

[32] Cf Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal LBC [1999] QB 215.

[33] Cp Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal LBC [1999] QB 215.

[34] See below at 11.2: "Failure of Consideration in Ultra Vires Cases".

[35] Money had and received, quantum meruit, quantum valebant.

[36] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 71 (per Lord Wright): "the recovery of the benefit of any part performance rendered while the performance was possible [...] should be recognized in any complete system of law, but it is not clear how far they have been admitted in English law."

[37] Arrowsmith discusses the question of the subjective value of goods and services - S. Arrowsmith, "Ineffective Transactions and Unjust Enrichment: a Framework for Analysis" (1989) 9 Legal Studies 121, 125 et seq.

Consideration must be legal to be taken into account. In *Lipkin Gorman v. Karpnale*,[38] the House of Lords held that gambling contracts, being illegal, cannot constitute consideration. The casino had received the firm's misappropriated assets as gambling stakes. Its argument that the supply of chips in exchange for cash constituted consideration was successful at first instance and on appeal. However, the House of Lords rejected this argument because the supply of chips was only subsidiary to the gambling and gambling contracts, being illegal and void, cannot constitute consideration.

11.1.4. Failure of Consideration Must be Total

The most important condition for recovery on the ground of failure of consideration is the long-established rule that such failure must be total.[39] In principle, the payer must not have received any reciprocal benefit from the defendant. Lord Porter states this principle unambiguously in *Fibrosa*:[40] complete failure of consideration grounds the recovery of the entire benefit transferred by the plaintiff, but partial failure does not permit any recovery, unless the contract is divisible into separate transactions.[41] The High Court affirmed the fundamental principle of total failure of consideration in 2006 in *Lombard and Ulster Banking Ltd v. Mercedes-Benz Finance Ltd.*[42] The total failure requirement has been criticised as overly blunt,[43]

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[38] Lipkin Gorman v. Karpnale Ltd. [1991] 2 AC 548.

[39] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 77 ; "This insistence that the relevant failure of consideration be total represents the current state of the law." - E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101, 129.

[40] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32.

[41] Ibid, at 77 (per Lord Porter): "money had and received to the plaintiff's use can undoubtedly be recovered in cases where the consideration has wholly failed, but unless that contract is divisible into separate parts it is the whole money, not part of it, which can be recovered. [...] A partial failure of consideration gives rise to no claim for recovery of part of what has been paid."

[42] "If, however, there has not been a total failure of consideration, the quasi contractual remedy will not be available" - Lombard and Ulster Banking Ltd v. Mercedes-Benz Finance Ltd (High Court, Unreported, 11 January 2006, MacMenamin J.).

and a rule which would allow recovery of net payments advocated.[44] Lord Wright observes that the justice done by the rule is "imperfect because it depends on an entire consideration and a total failure."[45] Birks argues that the theory of unjust enrichment law does not mandate this restriction.[46]

The courts' general adherence to the total failure rule instead of adopting a more refined approach can be explained by reluctance to get involved in delicate assessments of reciprocal value.[47] For example, in *Whincup v. Hughes*,[48] an apprentice's master died one year into the apprenticeship and it was decided that the apprentice could not recover any of his payment. The court emphasised the difficulty of calculating the relative value of the partial consideration received on both sides.[49] If both parties have received something, then, perhaps the safest,

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[43] "There has long been a desire among restitution lawyers to escape from the unfortunate effects of the so-called rule that money is only recoverable at common law on the ground of failure of consideration where the failure is total" - Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 682 (per Lord Goff).

[44] K. Barker, "Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right" (1998) 57 CLJ 301, 308; "This rule has been subject to considerable criticism in the past; but it has to be said that in a comparatively recent report (Law Com. No. 121 (1983) concerned with pecuniary restitution on breach of contract) the Law Commission has declined to recommend a change in the rule" - Stocznia Gdanska S.A. v. Latvian Shipping Co. Latreefer Inc [1998] 1 Lloyd's Rep. 609, 621 (per Lord Goff).

[45] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 72 (per Lord Wright).

[46] S. Arrowsmith, "Ineffective Transactions and Unjust Enrichment: a Framework for Analysis" (1989) 9 Legal Studies 121, 134, citing P. Birks, "Introduction to the Law of Restitution", (1985), pp.242-245.

[47] Whincup v. Hughes (1871) LR 6 CP 78; see J. Taylor, ""Total" Failure of Consideration and Roxborough v. Rothmans" (2004) 120 LQR 30, 30: this rule "was said to serve three important purposes – difficulty of valuation, limitation of restitution claims, and preventing subversion of contractual bargains".

[48] Whincup v. Hughes (1871) LR 6 CP 78.

[49] "To ascertain the amount, which equity in such a case requires to be returned, it would be necessary to go into a great variety of considerations, the relative weight of which it would be almost

easiest, and most conservative response might be to leave well enough alone. After all, if the mutual considerations were passed under a valid contract, the court would have no place in determining their relative worth.[50]

In practice, the position is somewhat nuanced, and the courts often seem willing to allow recovery even in cases where it might appear at first glance that consideration has only partly failed.

11.1.4.1. Avoiding partial consideration by redefining consideration

The courts have historically attempted to bypass the rule requiring total failure of consideration in cases where the overall series of dealings may be severed into distinct transactions.[51] By separating agreements into parts, of which only some might have seen consideration pass, one can avoid the damaging conclusion that there was partial consideration under the whole transaction. For example, in *Whincup v. Hughes*, Bovill C.J. posits as an exception to the general rule, that delivery of six sacks of wheat instead of ten would allow recovery in respect of the four sacks not delivered, because "there the consideration is clearly severable."[52]

Other, more recent, cases show the courts adopting different techniques to mitigate the potential harshness of the total failure rule. If the receipt of any consideration is fatal to a plaintiff's claim, this provides a strong incentive to redefine what constitutes "consideration" in this context. Thus, total failure of consideration need

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impossible correctly to estimate: e.g., the value of the service lost to the master, and the degree to which the apprentice had profited by the instruction" - Whincup v. Hughes (1871) LR 6 CP 78, 86 (per Montague Smith J.).

[50] See J. Taylor, ""Total" Failure of Consideration and Roxborough v. Rothmans" (2004) 120 LQR 30, 30 which identifies three rationales: "difficulty of valuation, limitation of restitution claims, and preventing subversion of contractual bargains".

[51] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 77 (per Lord Porter): "If a divisible part of the contract has wholly failed and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered".

[52] Whincup v. Hughes (1871) LR 6 CP 78, 81.

not be excluded by the possibility that the plaintiff received some benefit from the defendant.[53]

Barron J. allowed recovery in *Chartered Trust Ireland Ltd v. Healy and Commins*[54] despite room for the argument that consideration had not failed, as the payer had received some benefit, however little, for his money.[55] The defendant had purchased a truck from a fraudster on hire purchase finance obtained from the plaintiff. The truck was not the vehicle which it purported to be, and was not legally registered in the jurisdiction. The purchaser stopped paying, arguing the agreement was null because he had not received the specified vehicle.[56] He further claimed repayment of the instalments he had paid, on the basis of failure of consideration. Barron J. ruled that the contract was void for mistake and classed the failure of consideration as total,[57] notwithstanding that the defendant had, in fact, the possession and use of the vehicle for up to two years.[58] The unstated reasoning is apparently that what was bargained for was ownership, not possession of the vehicle.[59] The decision shows

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[53] "If a plaintiff receives some tangible benefit it does not follow that a court will be constrained to hold that there was no total failure of consideration." – per MacMenamin J., Lombard and Ulster Banking Ltd v. Mercedes-Benz Finance Ltd (High Court, Unreported, 11 January 2006), citing Rowland v. Divall [1923] 2 KB 500; Chartered Trust Ireland Ltd v. Healy and Commins (High Court, Unreported, 10 December 1985, Barron J.); United Dominions Trust (Ireland) Ltd v. Shannon Caravans Ltd (1976) IR 225.

[54] Chartered Trust Ireland Ltd v. Healy and Commins (High Court, Unreported, 10 December 1985, Barron J.), following United Dominions Trust (Ireland) Ltd v. Shannon Caravans Ltd (1976) IR 225.

[55] See also Woodchester Investments v. O'Driscoll (High Court, Unreported, 27 July 1995, Barron J.).

[56] Chartered Trust Ireland Ltd v. Healy and Commins (High Court, Unreported, 10 December 1985, Barron J.), p. 5.

[57] Ibid, at p. 7.

[58] Ibid, at p. 9.

[59] "The fact that Healy had used the truck for over a year did not mean that he had received any part of the consideration; in contracts of sale title to the property and in hire purchase cases the option to purchase are seen are the consideration." - Lombard and Ulster Banking Ltd v. Mercedes-Benz Finance Ltd (High Court, Unreported, 11 January 2006, MacMenamin J.).

that the courts are willing to declare a total failure of consideration even where the person seeking restitution of what they have paid has in fact received something in return, once that benefit can be distinguished from the central consideration.[60] Similarly, *Bowmaker (Ir.) Ltd v. Begley*[61] suggests that the supply of an unroadworthy vehicle constitutes failure of consideration.[62]

Rover International Ltd v. Cannon Film Sales Ltd (No. 3)[63] is an influential authority[64] which shows the court avoiding the harshness of a potential finding of partial consideration. The plaintiff had distributed the defendant's films in Italy. Their business relationship dissolved into a series of legal battles[65] and it emerged that their agreement was a void pre-incorporation contract because the plaintiff had not yet been registered.[66] Consequently, the defendant was entitled to all the profits from its films despite the costs incurred and advances paid by the plaintiffs. The plaintiff distributors sought restitution of these sums for mistake of fact and failure of consideration. Harman J. rejected the failure of consideration argument, reasoning that the plaintiffs would have profited from their distribution of the films.[67] Kerr L.J. on appeal considered that this was both factually mistaken, since the profits would accrue to the defendants, and incorrect in principle. He rejected the view that the receipt of any benefit would exclude total failure of consideration. Instead, he related consideration to actual receipt of "any part of the benefit

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[60] See also United Dominions Trust (Ireland) Ltd v. Shannon Caravans Ltd (1976) IR 225 (Supreme Court).

[61] Bowmaker (Ir.) Ltd v. Begley (1980) 114 ILTR 28.

[62] Ibid.

[63] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423, [1989] 1 WLR 912 (per Kerr LJ).

[64] See Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215.

[65] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423, 429 (per Kerr LJ).

[66] Rover International Ltd v. Cannon Film Sales Ltd [1987] BCLC 540.

[67] Ibid, at 546 (per Harman J.), quoted by Kerr LJ, [1989] 3 AER 423, 432.

bargained for under the contract or purported contract."[68] If failure of consideration means not performing the thing promised in the agreement, actual benefits other than those envisaged in the contract could be ignored in determining whether consideration had failed.[69] Thus, the possession of the films by the plaintiffs did not prevent their claim.[70]

This seems to be an attempt to circumvent the total failure rule, which would in principle have seen the plaintiffs lose a just claim because they did receive possession of the film prints. Not only was this a benefit, though perhaps of minimal value, but it was also a contractually-envisaged benefit. No doubt the benefits which were expected to flow to both companies from external sources were the real advantage sought by the plaintiff from the bargain and the large part of the consideration, but there was delivery of contractual consideration here.

More recent authorities continue to grapple with the problem, reiterating the link between the benefit received and that promised in contract. *Stocznia Gdanska S.A. v. Latvian Shipping Co. Latreefer Inc*[71] concerned a shipbuilding contract which was rescinded by the shipyard after work had commenced and the purchasers had paid a number of instalments. The shipbuilders sought the outstanding instalments and the purchasers claimed the repayment of the sums already paid. The House of Lords ruled that, since the consideration included both the construction and the transfer of the vessels, the construction work which had been done meant that there had not been total failure of consideration. Lord Goff differentiates between consideration and the receipt of a benefit by the contracting party. He proposes that the court must look to whether the defendant has performed some of his contractual obligations, rather than whether such performance actually confers a benefit on the

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[68] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423, 433 (per Kerr LJ), following Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32.

[69] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423, 433 (per Kerr LJ).

[70] Ibid, at 433.

[71] Stocznia Gdanska S.A. v. Latvian Shipping Co. Latreefer Inc [1998] 1 Lloyd's Rep. 609.

plaintiff.[72] In the present dispute, the shipyard's consideration included the design and construction of the ships, as well as their sale. Therefore the work done was part of the contractual consideration and there was not total failure.[73] This reasoning may suggest a solution to the *Folens*[74] conundrum, with the proviso that the Irish case never involved a concluded contract.[75] There was some consideration on the part of Folens, by analogy with *Latvian Shipping*,[76] for which it received nothing in return.

A contrasting plaintiff-focused approach was taken in the Australian case of *Dillon v. Baltic Shipping (The "Mikhail Lermontov")*.[77] This case held that there was total failure of consideration where a cruise ship sank eight days into a two-week holiday. The plaintiff passenger sought damages for her loss and injury, as well as the repayment of the full fare. The New South Wales Court of Appeal upheld the decision that consideration had wholly failed, even though the ship sank halfway through the cruise.[78] Kirby P. emphasises that the consideration sought by the plaintiff was not an eight-day cruise, and certainly not an eight-day cruise ending in shipwreck. Viewing the consideration bargained for as "a relaxing holiday

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[72] Ibid, at 619 (per Lord Goff): "failure of consideration does not depend upon the question whether the promisee has or has not *received* anything under the contract [...]the test is not whether the promisee has received a specific benefit, but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due."

[73] Ibid, at 628 (per Lord Lloyd): "Even though the buyers have not enjoyed the *whole* of the benefit for which they contracted, which included the completion and delivery of the vessels, their enjoyment of *part* of the benefit is sufficient to defeat any claim to recover back the second instalment."

[74] Folens and Co Ltd v. Minister for Education [1984] ILRM 265.

[75] See above at 10.4.1: "The Receipt of a Benefit".

[76] Stocznia Gdanska S.A. v. Latvian Shipping Co. Latreefer Inc [1998] 1 Lloyd's Rep. 609; [1998] 1 AER 883; [1998] 1 WLR 574.

[77] Dillon v. Baltic Shipping (The "Mikhail Lermontov") [1990] 1 Lloyd's Report 579; [1991] 2 Lloyd's Report 155 (CA NSW).

[78] Ibid: this decision is also striking because the contract for the cruise had not been set aside prior to the court's discussion of failure of consideration.

experience",[79] he confirms that the contract cannot be divided. He recalls the assertion of Jessel M.R. that one shoe is not half-performance of a contract to provide a pair of shoes.[80] It is authority that, in some circumstances, the receipt of part of the bargained-for consideration is of little benefit to the recipient and should therefore not constitute an obstacle to recovery for failure of consideration.

Cumulatively, these cases show that the courts are willing to adopt a strict interpretation of consideration in order to grant a remedy for total failure in those cases where they wish to allow recovery. A lot turns on the conception of consideration preferred in each case. These developments set the stage for the specific problems which would arise in defining consideration in the case of void ultra vires contracts.

11.1.4.2. The question of apportionment

Even if the courts are increasingly willing to rule that a total failure of consideration has occurred, this is not necessarily a sufficient or unequivocal advance towards treating all parties fairly. Part of the reason that failure of consideration "works a rough justice"[81] is that the availability of a remedy is an all-or-nothing matter. It is difficult to devise a rule that treats all parties fairly in such cases.[82] *Chandler v. Webster*[83] may have operated arbitrarily and unfairly in many cases by refusing repayment of the sum advanced, but simply ordering full repayment of the money advanced would not always be a just and comprehensive judicial response either. Sometimes it may not be fair for the recipient to return the entire benefit received,

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[79] Dillon v. Baltic Shipping (The "Mikhail Lermontov") [1991] 2 Lloyd's Report 155, 171 (per Kirby P.).

[80] In Re Hall and Barker (1878) 9 Ch.D. 538, 545.

[81] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 72 (per Lord Wright); R. Goff, "Reform of the Law of Restitution" (1961) 24 MLR 85, 89.

[82] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 49 (per Viscount Simon LC).

[83] Chandler v. Webster [1904] 1 KB 493.

especially if the recipient has incurred expenses on his side.[84] The essential difficulty in the *Fibrosa*[85] scenario is that neither party was at fault, but there is a real cost due to the work done which must be borne by somebody.

Rover International Ltd v. Cannon Film Sales Ltd (No. 3)[86] highlights the risk of under- or over-compensating one of the parties, which is related to the black and white question of whether there has been total failure of consideration. Perhaps it was the injustice of the result at first instance which motivated the Court of Appeal to categorise the failure of consideration as total, but there is as great an injustice done in the event of overcompensation of the plaintiff as undercompensation, and this argues for refinement of the rules to achieve more balanced results.

A more subtle, nuanced approach, could achieve a more just outcome by permitting net or reciprocal restitution to ensure that neither party emerged enriched.[87] Viscount Simon L.C. relates the difficulty in the *Fibrosa* context to the law's refusal to apportion the costs of part-performance.[88] He therefore suggests that the legislature should decide the matter.[89] Perhaps a more general common law solution can be found, without straining modern principles too far. The possible solution lies in recognising that there can be two separate acts of restitution moving in different directions between the parties.[90] Barker advocates allowing recovery of net

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[84] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 49 (per Viscount Simon LC); Stocznia Gdanska S.A. v. Latvian Shipping Co. Latreefer Inc [1998] 1 Lloyd's Rep. 609; [1998] 1 AER 883; [1998] 1 WLR 574.

[85] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32.

[86] Rover International v. Cannon Film Sales (No.3) [1989] 3 AER 423, [1989] 1 WLR 912 (per Kerr LJ).

[87] R. Goff, "Reform of the Law of Restitution" (1961) 24 MLR 85, 90: "it is difficult to see why the payer should not in general be entitled to recover to the extent of the payee's enrichment."

[88] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 49 (per Viscount Simon LC).

[89] As it did for the dissolution of partnerships: Section 40, Partnership Act, 1890.

[90] See P. Birks, "Failure of Consideration, in F. Rose ed., "Consensus ad Idem: Essays in Honour of Guenter Treitel" (1996) 179, 180-181, cited by J. Taylor, ""Total" Failure of Consideration and

payments for partial failure of consideration.[91] Thus, while under the doctrine of failure of consideration, the payer in such a case could claim repayment of the sum advanced, a separate act of restitution could see an appropriate sum paid to compensate for the outlay honestly spent by the party who had begun work towards performance.[92]

It was suggested in *Fibrosa*[93] that such an approach might be possible in Scots law, but the House of Lords regarded that proposition as dubious, and declared that in any event apportionment was not part of English law.[94] Lord Porter appreciates the argument that the law should be amended so that "some equitable portion of any sum paid in advance shall be recoverable when the contract becomes impossible"[95] but insists on the need for statutory intervention.[96] Thus, while it may be possible to apportion shares in the event of partial failure, *Fibrosa*[97] concluded that the courts could not attempt this allocation without clear legislative authority and guidelines.

Roxborough v. Rothmans" (2004) 120 LQR 30, 31; see also above at 10.4.6.5: "Counter-restitution as a condition".

[91] K. Barker, "Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right" (1998) 57 CLJ 301, 308.

[92] "It is unnecessary to discuss the interesting suggestion that the Scots law does not in fact entitle the claimant to recover necessarily the whole amount paid, but only so much as can be shown to be an unjust enrichment of the defender – in other words, that the latter may claim an adjustment in respect of the amount by which he is out of pocket for expenses incurred in respect of the contract" - Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 54 (per Lord Atkin).

[93] Ibid.

[94] "The Scots law derives from the Roman law a different view, founded on the doctrine of restitutio, which has no place in English law, and which it is not open to us to import into the law of England. [...] I know no principle of English Law which would enable either party to a contract which has been frustrated to receive from the other compensation for any expense, or indemnity from any liability, already incurred in performing the contract." - ibid, 55-56 (per Lord Russell).

[95] Ibid, at 78 (per Lord Porter).

[96] Ibid, at 78 (per Lord Porter): "without an Act of Parliament it is difficult to determine what sum shall be recoverable and on what principles."

[97] Ibid.

11.1.5. Judicial Moves to Allow Counter-restitution

Subsequent judicial developments undermine the traditional hostility to apportionment and move towards allowing counter-restitution and the set-off of transfers to identify a net overall benefit.[98] The Australian judiciary has been a prime mover. The inflexible requirement for total failure was criticised in *David Securities Pty Ltd v. Commonwealth Bank of Australia.*[99] Mason C.J. suggested that in those cases where apportionment or counter-restitution was straightforward, the strict requirement of total failure "can be misleading or confusing".[100] This has moved Australian law away from the all or nothing paradigm.[101] Birks has proposed that the total failure rule be replaced with a general principle of counter-restitution.[102]

Roxborough v Rothmans of Pall Mall Australia Ltd[103] further tests the boundaries of total failure of consideration using the traditional principle of severability.[104] The plaintiff retailers had purchased cigarettes from the defendant wholesaler, at a price

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[98] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 682.

[99] David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 109 ALR 57 (HC); (1992) 175 CLR 353.

[100] David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 175 CLR 353, 383.

[101] J. Taylor, ""Total" Failure of Consideration and Roxborough v. Rothmans" (2004) 120 LQR 30, 31: "David Securities therefore established that courts will not insist upon total failure where consideration can be apportioned or where counterrestitution is simple."

[102] P. Birks, "Failure of Consideration", in F. Rose ed., "Consensus Ad Idem: Essays in Honour of Guenter Treitel" (1996) 179, 180-181, cited by J. Taylor, ""Total" Failure of Consideration and Roxborough v. Rothmans" (2004) 120 LQR 30, 31.

[103] Roxborough v. Rothmans of Pall Mall Australia Ltd (2001) 185 ALR 335; 208 CLR 516; see P. Birks, "Failure of Consideration and its Place on the Map" (2002) 2 OUCLJ 1.

[104] It is "broadly based on an expanded notion of failure of consideration" - T.A. Baloch, "The Unjust Enrichment Pyramid" (2007) 123 LQR 636, 649; Grantham characterises the case as a "fundamental departure from the orthodox view" in rejecting unjust enrichment - R. Grantham, "Restitutionary Recovery ex Aequo et Bono" (2002) Sing. JLS 388, 389.

comprised of the ordinary wholesale price plus a tax in the form of a licence fee. When this tax was determined to be invalid, the plaintiffs sought to recover from the defendants that proportion of the price paid which related directly to the invalid tax. They relied on total failure of consideration for that part of the price which covered the tax, even though there was consideration for the overall price in the form of the goods received. The majority in the High Court of Australia accepted that there was total failure of consideration for a severable component of the total price.

In *Goss v. Chilcott*,[105] the Privy Council adopted a "similarly lax"[106] approach consistent with *Roxborough*.[107] The decision allowed recovery, on the basis of failure of consideration, of money loaned under an invalid mortgage instrument despite the payment of two instalments of interest to the lender. Lord Goff distinguished between the interest payments and the repayment of the capital.[108] He observed that, if an interest payment was made after the contract failed, then there could be restitution in both directions,[109] under the authority of *Westdeutsche v. Islington*.[110] *Westdeutsche* had, in its novel approach to lack of consideration under void contracts, sidestepped explicitly authorising counter-restitution for partial

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[105] Goss v. Chilcott [1996] AC 788.

[106] J. Taylor, ""Total" Failure of Consideration and Roxborough v. Rothmans" (2004) 120 LQR 30, 32.

[107] Roxborough v. Rothmans of Pall Mall Australia Ltd (2001) 185 ALR 335; 208 CLR 516; descibed as "a similarly lax approach" by J. Taylor, ""Total" Failure of Consideration and Roxborough v. Rothmans" (2004) 120 LQR 30, 32.

[108] Goss v. Chilcott [1996] AC 788, 797-798: it is "both legitimate and appropriate for present purposes to consider the two separately".

[109] Ibid, at 798 (per Lord Goff): "the capital sum would be recoverable by the lender, and the interest payment would be recoverable by the borrower; and doubtless judgment would, in the event, be given for the balance with interest at the appropriate rate".

[110] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938; see below at 11.2.1: "Recovery of Benefits Transferred under a Partly Performed Void Contract".

failure.[111] Nonetheless, it made an expansive application of the principle in permitting recovery of the net profits on the basis of total failure of consideration, even though payments were made in both directions.[112] This had a precedent in an old line of void annuity cases.[113] In a purely financial matter, the payments could be severed so that there was total failure of consideration in respect of the net profit, or alternatively, payments in either direction under a void contract had no legal basis and could not serve as consideration for each other.[114]

In *Goss v. Chilcott*,[115] Lord Goff also approves *David Securities*[116] and affirms that the net result of mutual transfers of liquid monetary sums can easily be calculated. Consequently, in those cases where it is practical, English law will now allow partial recovery for partial failure, at least in those cases where the calculation of the benefits transferred in both directions is simple.[117] In reality, apportionment is straightforward and therefore more likely to occur where the transfers in each

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[111] Ibid, at 953 (per Leggatt LJ): "There can have been no consideration under a contract void ab initio. So it is fallacious to speak of the failure of consideration having been partial."; Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 683 (per Lord Goff).

[112] J. Taylor, ""Total" Failure of Consideration and Roxborough v. Rothmans" (2004) 120 LQR 30, 32: "Birks has suggested that the interest rate swap cases show total failure is not required because the party with overall gain was merely required to make restitution of the surplus received."

[113] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 683 (per Lord Goff): "cases in which payments had been made, so to speak, both ways; and the courts had to decide whether they could, in such circumstances, do justice by restoring the parties to their previous positions. They did not hesitate to do so, by ascertaining the balance of the account between the parties, and ordering the repayment of the balance."

[114] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938, 945 (per Dillon LJ).

[115] Goss v. Chilcott [1996] AC 788.

[116] David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 109 ALR 57 (HC); (1992) 175 CLR 353, 383.

[117] Goss v. Chilcott [1996] AC 788, 798: "for at least in those cases in which apportionment can be carried out without difficulty, the law will allow partial recovery on this ground".

direction comprise liquidated sums of money.[118] Even in more complex cases, where the benefit is a service, valuation of partial consideration may be difficult but not impossible.[119] Taylor cites *D.O. Ferguson v. Sohl*[120] and *Planché v. Colburn*[121] to illustrate the courts' capacity to value part performance, in cases concerning an unfinished shopfitting and an unwritten book.

The law on failure of consideration is in a state of flux. With recent cases ever more closely approaching recovery for partial failure of consideration, there are concerns that the doctrine may be used to disturb contractual bargains.[122] This concern reinforces the need to ensure that restitutionary remedies only enter the equation where there is no valid contractual arrangement between the parties.[123] It is not yet clear the extent to which the Irish courts will follow their Australian and English counterparts in the direction of permitting counter-restitution for partial failure of consideration. Such an approach, though accompanied by certain risks, is more apt to result in just outcomes. Additional uncertainty arises from the English cases on failure of consideration for ultra vires swaps agreements, which have the potential to make even greater changes to the recognised principles governing failure of consideration.

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[118] J. Taylor, ""Total" Failure of Consideration and Roxborough v. Rothmans" (2004) 120 LQR 30, 32.

[119] "It should always be possible to ascribe a money value to the benefit obtained by the defendant, subject to any necessary subjective devaluation." - J. Taylor, ""Total" Failure of Consideration and Roxborough v. Rothmans" (2004) 120 LQR 30, 32-33.

[120] D.O. Ferguson & Associates v. Sohl (1992) 62 B.L.R. 95.

[121] Planché v. Colburn (1831) 8 Bing. 14.

[122] J. Taylor, ""Total" Failure of Consideration and Roxborough v. Rothmans" (2004) 120 LQR 30, 34; T.A. Baloch, "The Unjust Enrichment Pyramid" (2007) 123 LQR 636, 649: "the majority decision failed to explain how restitution could be allowed despite the presence of a valid contractual obligation calling for the payment of the tax."

[123] Cf Roxborough v. Rothmans of Pall Mall Australia Ltd (2001) 185 ALR 335; 208 CLR 516; J. Taylor, ""Total" Failure of Consideration and Roxborough v. Rothmans" (2004) 120 LQR 30, 34.

11.2. Failure of Consideration in Ultra Vires Cases

Failure of consideration is firmly recognised as an appropriate ground of recovery in ultra vires cases.[124] The cause of action had previously been deemed relevant to void pre-incorporation contracts *in Rover International v. Cannon Film Sales (No.3)*.[125] There, Kerr L.J. asked whether the plaintiff had received the benefit bargained for under the void contract.[126] *Westdeutsche v. Islington*[127] and *Guinness Mahon v. Kensington*[128] confirm that recovery for failure of consideration is available where transfers have been made pursuant to a contract which is void for incapacity. However, this clear response on the authorities belies the theoretical difficulties which arise in applying the principle of failure of consideration to ultra vires cases. These difficulties exist below the surface in *Westdeutsche*, where failure of consideration is used to grant recovery of part-performed obligations.

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[124] See E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101, 132, citing: Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 710-711; Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215.

[125] Rover International v. Cannon Film Sales (No.3) [1989] 1 WLR 912, 925, see also Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215, 226, 238: "Non-existence is the most extreme form of incapacity."

[126] Rover International v. Cannon Film Sales (No.3) [1989] 1 WLR 912, 923.

[127] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938.

[128] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215.

11.2.1. Recovery of Benefits Transferred under a Partly Performed Void Contract

Hobhouse J.'s decision in *Westdeutsche v. Islington*[129] is the initial authority grounding restitution in an ultra vires case on lack of consideration.[130] He ordered the council to repay to the bank the net balance of the payments made between the parties.[131] *Westdeutsche*[132] was a test case to represent all the swaps agreements which had not expired when proceedings commenced and so was of general application.[133] Because the swaps transactions were still in progress, it was possible to view the decision as the application of the traditional principle of failure of consideration.[134] Because there were payments made in both directions, there was the potential for difficulty in showing total failure of consideration, but, if that could be surmounted, one party had been enriched in the net amount without consideration. Hobhouse J. avoided the total failure problem by characterising the ground of recovery as absence, rather than failure, of consideration.[135]

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[129] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938.

[130] Hobhouse J. allowed recovery because the "purported contract [...] was ultra vires the council and so void, no consideration having been given for the making of the payment." - Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 681 (per Lord Goff).

[131] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 681.

[132] Ibid.

[133] Ibid, at 680.

[134] Though Hobhouse J., denied that total failure of consideration was the basis: Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 4 AER 890, 929; see T. Krebs, "In Defence of Unjust Factors" (2000) Oxford U Comparative L Forum 3, ouclf.iuscomp.org, 3(I).

[135] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, 683 (per Lord Goff): "considered that the true ground in these cases, where the contract is void, is to be found in the absence, rather than the failure, of consideration; and in this he was followed by the Court of Appeal. This had the effect that the courts below were not troubled by the question whether there had been a total failure of consideration."; see below at 11.2.3: "Failure of Consideration or Absence of Consideration?"

Leggatt L.J. in the Court of Appeal rejects the local authority's claim that, because payments had been made in both directions, there could not be said to have been a total failure of consideration.[136] He reasons that acts done in relation to a void contract cannot constitute performance or consideration because there was never a binding legal obligation.[137] This relies on the somewhat circular assumption that though the recipient received possession of the money, it did not acquire ownership of it because the contract was void.[138] The reasoning is that, since there was no contract, and consideration is defined by reference to the consideration agreed in a contract, then, no matter what benefit was transferred, it could not constitute the passage of consideration, and there must be total failure of consideration. Surprisingly, we are informed that even full performance of a supposed obligation under a void contract is not consideration.[139] Though the House of Lords in *Westdeutsche*[140] was not considering the question of failure of consideration,[141] it apparently accepted this reasoning.[142]

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[136] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938, 953: "As it was, they were not performing the contract even in part: they were making payments that had no legal justification"

[137] Ibid, at 953; "The relevant failure of consideration was the failure not of counter-performance but of the contractual obligation to render the performance." - R.J. White, "Restitution and the Doctrine of Ultra Vires" (1999) 115 LQR 380, 382.

[138] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 4 AER 890, 968: "What they obtained were payments made under a void agreement, which in equity remained the property of Islington and which even at law they were always entitled to recover back."

[139] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215, 227 (per Morritt LJ).

[140] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938.

[141] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 681.

[142] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215, 223 (per Morritt LJ),: "the decisions of Hobhouse J. and the Court of Appeal in that respect were evidently approved."; cf Westdeutsche Landesbank Girozentrale v. Islington London Borough

While, under *Fibrosa*,[143] contractual consideration in the form of a promise does not constitute consideration for failure of consideration purposes, nor, under *Westdeutsche*,[144] does performance where there was no binding promise. The idea that actual benefits transferred are irrelevant if they are not contractually-promised gives pause for thought. White notes the similarity between "failure of contractual obligation" and the "failure of promise" approach rejected in *Fibrosa*.[145] Jaffey suggests that where a contract is void, consideration should not be measured by reference to the void contract.[146] If the payment in one direction may be disregarded so that it does not constitute partial consideration, what is the rationale for taking account of the payment made in the other direction? If there is no consideration at all, in the eyes of the court, what need is there for restitution to intervene? The true complexity of applying failure of consideration analysis to void contract scenarios becomes clear in *Guinness Mahon v. Kensington*,[147] which nonetheless affirms the availability of the principle.

11.2.2. Unravelling a Fully-performed Void Contract

Guinness Mahon v. Kensington[148] illustrates the difficulty perfectly. The case concerned a closed swap agreement. It was finished and both parties had completed their respective payments before the local authorities' swaps agreements were

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Council [1996] AC 669, 683 (per Lord Goff); see A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), pp. 399-400.

[143] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32, 61 (per Lord Wright).

[144] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669; [1994] 1 WLR 938.

[145] R.J. White, "Restitution and the Doctrine of Ultra Vires" (1999) 115 LQR 380, 382.

[146] P. Jaffey, "Failure of Consideration: Roxborough v. Rothmans" (2003) 66 MLR 284, 292: "the failure of the performance specified in the contract surely cannot be a ground for recovery, even if it is said to operate as a non-contractual condition."

[147] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215.

[148] Ibid.

determined to be beyond their capacity. Both sides had fully performed their presumed contractual obligations, so that the usual justification of the failure of consideration rule, that a party's transfer is entirely unreciprocated, did not apply.[149] This scenario is therefore the contrary of that in which it is clear that justice demands a remedy because one party only has performed the invalid obligation. Robert Walker L.J. characterises it as, "at first blush the complete opposite of failure of consideration."[150] Why is it unjust for both parties to have received what they had, in fact, bargained to receive when they were unaware of the incapacity? Burrows suggests that failure of consideration should not avail here, and a claim must instead be formulated on the basis of mistake.[151]

Nonetheless, *Guinness Mahon & Co. Ltd. v. Kensington*[152] identifies failure of consideration as the basis for recovery in ultra vires cases.[153] The council argued that it should not have to repay the bank because there is no failure of consideration when a void agreement is fully performed.[154] Birks had argued that, since both sides of the invalid deal were performed, and both parties had received what they has

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[149] Ibid, at 236 (per Robert Walker LJ): "The proposition that such a plaintiff cannot complain because he has got all that he bargained for has a simple and direct appeal."; Counsel cited Goff & Jones, "The Law of Restitution", 4th ed. (1993), p. 61: "No doubt it is right that a party who has received the very thing which he contracted to receive should be unable to reopen the transaction to recover his money."; "In a completed swap, there can be no question of restitution based on failure of consideration." - T. Krebs, "In Defence of Unjust Factors" (2000) Oxford U Comparative L Forum 3, ouclf.iuscomp.org, 3(I).

[150] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215, 236.

[151] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 401.

[152] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215.

[153] Ibid, at 227.

[154] Ibid, at 217, citing P. Birks, "No Consideration: Restitution after Void Contracts" (1993) 23(2) WALR 195.

intended to bargain for, there was no substantial need for restitution in such cases.[155] However, the Court of Appeal held that since an ultra vires contract was void *ab initio*, there was a total failure of consideration for the agreement and the bank was entitled to recover the balance of the payments as money had and received. It relied heavily on *Westdeutsche*[156] in support of this position.[157] Morritt L.J. states unequivocally that,

> "in the case of a contract void from the start there must for that reason have been total failure of consideration [...] it is the very fact that the contract is ultra vires which constitutes the total failure of consideration..."[158]

The Court of Appeal held that the doctrine of failed of consideration should be generously interpreted so as to apply to void contract cases.[159] Morritt L.J. characterises the failed consideration for each swap as the benefit of a contractual obligation which did not exist.[160] He supports his reasoning by referring to the theory of the ultra vires doctrine itself. Given that an ultra vires transaction can have no legal effect, he reasons that it "must follow that the recipient of money

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[155] P. Birks, "No Consideration: Restitution after Void Contracts" (1993) 23(2) WALR 195, extracted at Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215, 224.

[156] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938; [1996] AC 669, [1996] 2 AER 961.

[157] Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal London Borough Council [1999] QB 215, 224 ,227 (per Morritt LJ): "the true basis for the recovery by the bank of the net amount it paid to the local authority, which had no capacity to enter into the swap agreement, was for money had and received as on a total failure of consideration. I take this to have been one of the two distinct grounds of decision of Hobhouse J. and of the Court of Appeal and that ground was expressly approved by at least two of the members of the Appellate Committee in the House of Lords."

[158] Ibid, at 227.

[159] Ibid, at 239-240, in keeping with the Australian approach in David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 109 ALR 57 (HC).

[160] Ibid, at 230.

thereunder has no right to it".[161] For that person to retain the benefit transferred under the void agreement therefore equates to unjust enrichment. Robert Walker L.J. asserts, echoing *Westdeutsche*, that in the particular case of applying failure of consideration to a void contract, there is no question of partial failure. Failure is total, because the consideration which was not received was the creation of a valid legal obligation.[162]

Waller L.J. agrees, but confesses some doubts about the novelty of this principle.[163] He questions whether there is a general principle that the performance of void contracts should be unravelled, but accepts that it might be done in some cases.[164] The decision was motivated by reluctance to distinguish between open and closed swaps, as that could lead to the absurdity that a person could have the agreement nullified and recover his money up to the moment it would have concluded, but not thereafter.[165]

This case makes it quite clear that a distinct variant of the failure of consideration principle applies to void contract cases.[166] Whatever the academic criticism or

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[161] Ibid, at 229.

[162] Ibid, at 239 (per Robert Walker LJ): "Either there was total failure of consideration, in that neither side to the supposed contract undertook any valid obligation, or there was [...] absence of consideration."

[163] Ibid, at 232: "if the principle were so simple and straightforward – voidness equals rights on both sides simply to have returned to them that which has been transferred – why had that not been spelt out clearly in some authority prior to Westdeutsche."

[164] Ibid, at 232.

[165] Ibid, at 230, 240; cf R.J. White, "Restitution and the Doctrine of Ultra Vires" (1999) 115 LQR 380, 382-382: "the ground of failure of consideration is not the correct vehicle for averting this absurdity".

[166] Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal London Borough Council [1999] QB 215, 240 (per Robert Walker LJ): "With a valid contract total failure of consideration and full performance are at opposite ends of the spectrum. The same is not true of a void contract."

nuanced interpretation,[167] the courts have definitively accepted failure of consideration as the basis of recovery in ultra vires cases. Failure of consideration has not yet been expressly relied in an ultra vires case in this jurisdiction, but given the persuasive authority supporting it and its consistency with principle, there is no reason to doubt its availability.

11.2.3. Failure of Consideration or Absence of Consideration?

As Robert Walker L.J. makes clear in *Guinness Mahon*,[168] there is inherent difficulty in speaking of lack of consideration where a contract is void.[169] To say that a party in such a case, who gave and received exactly what he thought he had bargained for, has received no consideration strains the normal meanings of these words.[170] Hobhouse J. at first instance in *Westdeutsche*[171] allowed recovery at common law on the basis of an "absence" rather than a failure of consideration.[172] It is unclear how much significance should be attached to this terminological distinction. It could be viewed as a variant of failure of consideration, as a new

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[167] T. Krebs, "In Defence of Unjust Factors" (2000) Oxford U Comparative L Forum 3, ouclf.iuscomp.org.

[168] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215.

[169] Ibid, at 236 (per Robert Walker LJ): "Where a contract is void ab initio there is in the eyes of the law no contract at all and so speaking of failure of consideration, in the sense of failure of contractually promised performance, may be confusing."

[170] C. Mitchell & S. Watterson, "Subrogation Law and Practice" (Oxford, 2007), p. 124; R.J. White, "Restitution and the Doctrine of Ultra Vires" (1999) 115 LQR 380, 383.

[171] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938.

[172] See also Woolwich Building Society v. Inland Revenue Commissioners (No. 2) [1993] AC 70, Barclays Bank Ltd v. W J Simms Son & Cooke (Southern) Ltd [1980] QB 677; Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 4 AER 890, 959-960.

unjust factor,[173] or as a precursor of a rejection of unjust factors in favour of an "absence of basis" analysis.

Hobhouse J.'s decision suggests that, while something similar to failure of consideration would make retention of transfers made under a void contract unjustified, the conditions of an action for failure of consideration itself would not be met. Firstly, as Hobhouse J. understood the term "failure of consideration", it assumes the prior existence of a valid contract.[174] On this reading, it would seem not to apply to cases involving void contracts. Lord Goff questions whether failure of consideration must be "so narrowly defined" as to require the prior existence of a valid binding obligation.[175] O'Dell points out that this view is directly contrary to the position expressed in *Chandler v. Webster*.[176]

Hobhouse J.'s other rationale was that, since there had been payments in both directions, there could not be said to be a failure of consideration. However, the higher courts were willing to find that failure of consideration was total, and so, that failure of consideration was the basis for the decision. The absence of consideration ground was criticised because, as its application where there were closed reciprocal

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[173] see E. O'Dell, "The Principle against Unjust Enrichment" (1993) 15 DULJ 27, 42; D. Sheehan, "Unjust Factors or Restitution of Transfers Sine Causa" (2008) Oxford U Comparative L Forum 1 at ouclf.iuscomp.org, after endnote 62.

[174] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 4 AER 890. 924: it "presupposes that there has been at some stage a valid contract which has been partially performed by one party."

[175] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 683; see also P. Jaffey, "Failure of Consideration: Roxborough v. Rothmans" (2003) 66 MLR 284, 292: "here 'consideration' should be understood in the broad, old-fashioned sense by which it signifies a legal basis for enforcing a contract".

[176] E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101, 132.

transfers indicates, it does not equate to unjust enrichment.[177] Lord Goff in *Westdeutsche*, while not required to decide between failure and absence of consideration, suggested that there was "considerable force in the criticisms" of absence of consideration.[178] O'Dell describes Hobhouse J.'s "absence" as being "transmuted" into "failure" of consideration.[179] However, Birks sees the concept of "absence of consideration" as highly significant for the development of unjust enrichment law, compatible with a preferable theory of "absence of basis".[180]

11.3. From Failure of Consideration to an Automatic Right of Recovery for Void Contracts?

Guinness Mahon & Co Ltd v. Kensington and Chelsea Royal LBC [181] went further, ruling that in all cases where the contract was void, the appropriate remedy would

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[177] J. Convery, "Lord Goff's Swansong: Restitution, Mistake of Law, and the Retrospective Effect of Judicial Decisions" (1999) 3 ELR 202, 212: it "fails to capture the Common Law requirement that the enrichment be unjust."

[178] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 683; Jones hopes that absence of consideration "can now be buried" – G. Jones, "Ultra Vires Swaps – The Common Law and Equitable Fall-Out" (1996) CLJ 432, 433.

[179] E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101, 131; Robert Walker L.J. suggests that the choice between the two terms "may be no more than a matter of which is the apter terminology." - Guinness Mahon & Co Ltd v. Kensington and Chelsea Royal LBC [1999] QB 215, 239-240; E. O'Dell, "Incapacity" (Chapter 5), in P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000), at p.159: "a consensus seems to be emerging that it may be right to regard the unjust factor in Westdeutsche as failure of consideration."

[180] P. Birks, "Failure of Consideration and its Place on the Map" (2002) 2 OUCLJ 1, 3: "It would permanently avert a recurrent misunderstanding if 'failure of basis' could once and for all displace 'failure of consideration'."; S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759, 770-771.

[181] Guinness Mahon & Co Ltd v. Kensington and Chelsea Royal LBC [1999] QB 215.

be based on failure of consideration.[182] While this statement provides a straightforward answer to the immediate question of the availability of a remedy in ultra vires cases, its basis and ramifications invite further discussion.

However *Guinness Mahon* may be explained, it moves quite a distance from the spirit of the rule allowing recovery for failure of consideration. The same sense of justice which clamours for repayment where the payer has received nothing in return does not arise where both parties have in fact made the reciprocal payments for which they had initially bargained. This is therefore a departure in terms of failure of consideration, though, so long as there is reciprocal repayment or recovery of the net balance, it is not necessarily an unjust outcome. White argues that, instead of distorting the principle of failure of consideration to provide a remedy, the real reason why it is deemed necessary to unravel bilateral transactions under a void agreement must be identified and given effect.[183]

The proposition that there is always a total failure of consideration where a contract is void[184] is far-reaching. It would circumvent the traditional limits of the failure of consideration rule in all ultra vires cases. *Westdeutsche* avoids the strict application of the total failure rule, where there have been attempts to perform by both parties under a void contract, to allow net recovery. *Guinness Mahon* implies that all the constraints of the failure of consideration doctrine can be disregarded. If absence of consideration or nullity is a distinct unjust factor, it is easier to plead than either failure of consideration or mistake, because it is unnecessary to establish either lack of reciprocation or error.[185]

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[182] T. Krebs, "In Defence of Unjust Factors" (2000) Oxford U Comparative L Forum 3, ouclf.iuscomp.org, 3(I): "there is now unequivocal Court of Appeal authority that nullity as such can trigger restitution".

[183] R.J. White, "Restitution and the Doctrine of Ultra Vires" (1999) 115 LQR 380, 383: "It is important, therefore to articulate the reason why mutual restitution is desirable, so that it can be given effect independently, without imaginative recourse to failure of consideration."

[184] Guinness Mahon & Co Ltd v. Kensington and Chelsea Royal LBC [1999] QB 215.

[185] D. Sheehan, "Unjust Factors or Restitution of Transfers Sine Causa" (2008) Oxford U Comparative L Forum 1 at ouclf.iuscomp.org, after endnote 72.

Baloch argues that, in the swaps cases, the basis for recovery was the same incapacity which rendered the contracts void.[186] If either voidness or incapacity is to become a new unjust factor, it must be clearly distinguished from the *Woolwich* principle of recovery of ultra vires demands by public authorities.[187] The policy-motivated *Woolwich* principle does not apply in private law relationships.[188]

The suggestion that ultra vires directly grounds recovery may also have significant consequences for restitution law as a whole. If true, it may move English law towards a principle of recovery because a payment was not due,[189] rather than requiring any of the recognised unjust factors.[190] Morritt L.J.'s reasoning that there must be a remedy in ultra vires cases based on general unjust enrichment in *Guinness Mahon v. Kensington*[191] is appealing,[192] but it fails to acknowledge the

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[186] T.A. Baloch, "The Unjust Enrichment Pyramid" (2007) 123 LQR 636, 646: "the reason for invalidity was the same reason as that under which the contracts were declared void, namely that the contracts were concluded ultra vires the public authorities".

[187] Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] AC 70.

[188] R.J. White, "Restitution and the Doctrine of Ultra Vires" (1999) 115 LQR 380, 381: White concludes that it ought to have more general application: ibid, 384; Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 381-382 (per Lord Goff).

[189] Woolwich Building Society v. Inland Revenue Commissioners (No. 2) [1993] AC 70, 265; [1992] 3 AER 737, 754 (per Lord Goff): "Where a sum has been paid which is not due, but it has not been paid under a mistake of fact or under compulsion [...] it is generally not recoverable."; P. Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 TIL 155, 161: "In the terminology of an earlier generation, "failure of basis" was always "failure of consideration"."

[190] T. Krebs, "In Defence of Unjust Factors" (2000) Oxford U Comparative L Forum 3, ouclf.iuscomp.org; S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759, 770-771: "So the 'Swaps Cases' propel Birks on the final leg of his journey".

[191] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215.

[192] Ibid, at 229; see also Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938, 953 (per Leggatt LJ): "In my judgment the payments made are in those circumstances recoverable by the bank, in so far as they exceed the payments made by the council, as money had and received to the use of the bank, by which the council have been unjustly enriched."

firm requirement that all restitution cases come within a known cause of action. Similarly, Leggatt L.J. in the Court of Appeal asserts that unjust enrichment should give rise to a remedy without starting with the building block of failure of consideration.[193]

Burrows regards as open the question of the relationship between void contracts and failure of consideration[194] and challenges the reasoning in *Guinness Mahon v. Kensington*.[195] He insists that ultra vires cases should be made out on either failure of consideration or mistake grounds in order for restitution to be allowed.[196] Burrows regards the approach taken by the Court of Appeal in *Guinness Mahon v. Kensington*[197] as unfortunate, and argues that mistake should have been relied on,[198] though he is not hostile to incapacity becoming an unjust factor.[199] Birks rejects nullity as a reason for restitution in current law.[200] He suggests that, while failure of consideration is the appropriate cause of action before performance is complete, it

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[193] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 4 AER 890, 967 (Leggatt LJ): "Where A has the money of B under a void transaction, B should be entitled to reimbursement unless some principle of law precludes it."; cp S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759, 764.

[194] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 386.

[195] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215.

[196] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), pp.387-8: "reliance on automatic total failure of consideration (and absence of consideration) merely serves to hide the true grounds for restitution at play in void contract cases".

[197] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215.

[198] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), pp.387-8: "the true grounds are failure of consideration [...] and mistake. Only the latter can apply where the void contract has been fully executed."

[199] Ibid, at p. 420: "the most natural and straightforward view" is that the policy which make ultra vires contracts void also grounds recovery.

[200] P. Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 TIL 155, 196: "In English law nullity or "absence of legal ground" is not in itself a reason for restitution."

should be possible in the case of a completed void bargain to rely directly on the policy underlying the invalidity.[201] He argues that the policy underlying the ultra vires doctrine favours restitution.[202] Arrowsmith also argued, before the swaps cases arose, that the protective policy of the ultra vires rule could itself justify the recovery by a company of its own performance of an obligation for which it lacked the capacity.[203]

That void contracts may automatically equate with total failure of consideration and thus always give rise to a right of recovery is hinted at by Robert Walker L.J.'s characterisation of one of the alternative claims made in *Kleinwort Benson v. Lincoln City Council*[204] as, simply, "a claim based on money paid under a void contract."[205] This ellipsis implies that it may no longer be necessary in ultra vires claims to demonstrate failure of consideration, if it can be argued that the payment of money under a void contract of itself constitutes unjust enrichment. Jaffey favours voidness as the ground for recovery.[206]

This approach moves a step closer to Birks' absence of basis from the orthodox reliance on specific unjust factors. It also corresponds with Baloch's analysis that in the swaps cases, it was the voidness of the contracts which itself gave rise to

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[201] Ibid, at 196: "The real engine behind the right to restitution of fully-executed void interest swaps was the protective policy underlying the ultra vires doctrine, not the nullity in itself."

[202] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 45: "If this is correct, then the focus of policy in the context of ultra vires receipts will have flipped from justifying retention to justifying restitution."; R.J. White, "Restitution and the Doctrine of Ultra Vires" (1999) 115 LQR 380, 383: "The reason for restitution must be the protection of the public at large, through promotion of legality."

[203] S. Arrowsmith, "Ineffective Transactions and Unjust Enrichment: a Framework for Analysis" (1989) 9 Legal Studies 121, 125.

[204] Kleinwort Benson v. Lincoln City Council [1999] 2 AC 349.

[205] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 603 (Per Lord Walker).

[206] P. Jaffey, "Failure of Consideration: Roxborough v. Rothmans" (2003) 66 MLR 284, 292.

restitution, not the existence of any intent-related unjust factor.[207] Nullity as an unjust factor does not fit within the consent or policy based structure of restitution law.[208] However, O'Dell argues that incapacity can be accommodated as a consent-related unjust factor.[209]

11.3.1. Incapacity as an Unjust Factor

If lack of consent because of incapacity is a direct source of a restitutionary remedy, this can be rationalised either as a step towards allowing restitution for lack of basis, or by the existence of incapacity itself as an unjust factor. Either there is no longer a requirement for an unjust factor, or there is a new unjust factor.

O'Dell argues for the recognition of incapacity as an unjust factor.[210] If most of the categories of action in restitution are based on the failure or vitiation of the plaintiff's consent, there is a strong argument that incapacity can itself also constitute a plaintiff-sided unjust factor, as it prevents the formation of any real consent.[211] Incapacity, "the ultimate impairment of consent",[212] should logically ground at least as strong a claim as mistake, duress and failure of consideration. This would apply to corporations which exceeded their capacity, offering an alternative to failure of consideration and mistake in ultra vires cases. Incapacity as an unjust factor could be raised by the incapax.[213] O'Dell highlights *International*

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[207] T.A. Baloch, "The Unjust Enrichment Pyramid" (2007) 123 LQR 636, 646.

[208] T. Krebs, "In Defence of Unjust Factors" (2000) Oxford U Comparative L Forum 3, ouclf.iuscomp.org.

[209] E. O'Dell, "Incapacity" (Chapter 5), in P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000), at pp. 113-167.

[210] E. O'Dell, "Incapacity" (Chapter 5), in P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000), p. 113; cp G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 387 et seq.

[211] Ibid, pp. 116-117.

[212] Ibid, p. 118.

[213] Ibid, p. 161.

Sales v. Marcus[214] as granting recovery of an ultra vires gift on the ground of incapacity.[215] In *Brougham v. Dwyer*, Lush J. compared ultra vires cases to others where restitution was allowed because there was no contract.[216] Burrows considers that "the most natural and straightforward" explanation of this and other cases which suggested a restitutionary remedy might be possible is that the ultra vires doctrine "carried on through to allow the company restitution".[217] Virgo asserts that incapacity was the ground for recovery in those swaps cases where the party which had exceeded its capacity was granted a remedy.[218] Others discount the incapacity argument. Birks argued that the void contract could not be both the occasion and the rationale for restitution.[219] Waller L.J. in *Guinness Mahon*[220] expressly disputed that voidness automatically leads to restitution.[221]

As a new cause of action, distinct from failure of consideration, incapacity would not be subject to that principle's requirements, such as total failure of consideration. It would offer a means of resolving the difficulties inherent in applying failure of consideration logic to void contract cases. This view also offers a principled and attractive manner of justifying the apparent equation of voidness with unjust enrichment which emerges from the most recent authorities, without dispensing

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[214] International Sales v. Marcus [1982] 3 AER 551.

[215] E. O'Dell, "Incapacity" (Chapter 5), in P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000), pp. 113-167, at p. 137; O'Dell also cites, inter alia: the judgment of Lardner J. in Re Frederick Inns Ltd [1991] ILRM 582; In Re Irish Provident Assurance Co Ltd [1913] 1 IR Ch. 352; Simmonds v. Heffer [1983] BCLC 298.

[216] Brougham v. Dwyer (1913) 108 LT 504, 565 (per Lush J.).

[217] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 420.

[218] G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 397.

[219] E. O'Dell, "Incapacity", in P. Birks & F. Rose (eds.), "Lessons of the Swaps Litigation" (Mansfield Press, 2000), p. 113, 120, citing P. Birks, "No Consideration: Restitution After Void Contracts" (1993) 23 UWALR 195.

[220] Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal London Borough Council [1998] 2 AER 272.

[221] Ibid, at 287.

with the established requirement for stated unjust factors. However, it is not clearly articulated in the case law and cannot be said to represent current law.

11.3.2. Conclusion: Failure of Consideration Grounds Recovery for Ultra Vires Transfers

The short, simple answer to the ultra vires question is that lack of consideration grounds a remedy where a contract is void for incapacity. As a result, it may confidently be supposed that, were the facts of *In Re Jon Beauforte (London) Ltd*[222] to recur, the fuel suppliers would be entitled to reimbursement for the goods supplied under the void contract, in addition to any tracing remedy which might be open.

The more complex theoretical issues relate to whether this claim must meet the requirements of failure of consideration, or whether voidness itself is sufficient ground. If incapacity is enough to ground a claim, does this suggest that the law is moving towards dispensing with the need for an unjust factor, or that incapacity should now be recognised as a consent-related unjust factor? No doubt these questions will occupy theorists for years to come. Birks describes the law after these cases as "very unstable".[223] It can certainly be argued that, following *Guinness Mahon v. Kensington*[224] the void contract is itself an unjust factor sufficient to ground recovery. On the other hand, it may be safer for plaintiffs to continue to establish either mistake or failure of consideration. However, in doing so, they should not be deterred by the total failure of consideration rule, given widespread judicial flexibility on this point coupled with the existence of authorities such as *Westdeutsche*.[225]

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[222] In Re Jon Beauforte (London) Ltd (1953) 1Ch. D. 634.

[223] P. Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 TIL 155, 195.

[224] Guinness Mahon & Co. Ltd v. Kensington and Chelsea Royal London Borough Council [1999] QB 215.

[225] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938, [1994] 4 AER 890; [1996] AC 669 (HL).

12. MISTAKE

12.1. MISTAKE AS AN UNJUST FACTOR

Mistake, like failure of consideration, is a long-established and firm ground for restitution.[1] Birks describes mistake as "the core case"[2] and the "archetype".[3] In *Deutsche Morgan Grenfell v. Inland Revenue*,[4] Lord Hoffmann cites *Kelly v. Solari*[5] to illustrate its pedigree.[6] This "classical"[7] mid-nineteenth century case allowed recovery of money mistakenly paid out under a lapsed insurance policy.[8] The justification for mistake acting as a factor which renders enrichment unjust is that the payer's mistake vitiates his apparent consent to the transfer. Lord Hope articulates this underlying logic in *Deutsche Morgan Grenfell*:[9] it is unjust to retain a benefit which was not intended, but which was given due to a mistaken belief that

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[1] See J. Beatson & W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149.

[2] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 6.

[3] P. Birks, "Failure of Consideration and its Place on the Map" (2002) 2 OUCLJ 1, 10; cp G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 137.

[4] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558.

[5] Kelly v. Solari (1841) 9 M & W 54.

[6] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 569 (Per Lord Hoffmann).

[7] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 7.

[8] Kelly v. Solari 9 M & W 54, 58 (per Parke B.): "where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it"

[9] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558.

it was due.[10] Where a transferee is enriched by virtue of a mistake, he is obliged to return the benefit under a form of strict liability.[11] The right of recovery which arises because a transfer was due to mistake does not take into account the carelessness of the mistake or the innocence of receipt.[12]

In recent years, mistake has operated to provide a remedy in ultra vires cases, and its availability is evidenced by *Kleinwort Benson Ltd. v. Lincoln City Council.*[13] The case for mistake is straightforward: the payment is made because of the mistaken belief that it is warranted under a valid contract.[14] The major obstacle of the mistake of law bar has been abrogated.[15] Hedley questions the need to invoke mistake in the case of incapacity.[16] Since absence or failure of consideration will ground recovery of transfers made under void ultra vires contracts, it may appear that mistake is no longer necessary. However, it is certainly available as an alternative unjust factor, and there may be circumstances in which it is more attractive for the parties.[17] Burrows views mistake as more favourable given the requirement that failure of consideration be total.[18]

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[10] Ibid, at 581 (per Lord Hope).

[11] P. Birks, "Failure of Consideration and its Place on the Map" (2002) 2 OUCLJ 1, 8.

[12] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 7, citing Kelly v. Solari (1841) 9 M & W 54.

[13] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349.

[14] S. Arrowsmith, "Ineffective Transactions and Unjust Enrichment: a Framework for Analysis" (1989) 9 Legal Studies 121, 123.

[15] See below at 12.2: "Mistake of Law".

[16] S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759, 772: "Why was it assumed that the payments in the case were 'mistaken' at all? It was certainly very convenient for the parties…"

[17] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558.

[18] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 129.

12.1.1. Evolution of Mistake Rules: towards the Simple Causative Approach

The mistake which constitutes a ground for restitution is distinct from, and more expansive than, the mistake which might operate to have a contract set aside. The stringent test which must be fulfilled to set a contract aside contrary to the principle of legal security acts as a preliminary filter, avoiding the need for restitution law to limit the mistakes which it recognises.[19] In the case of contracts which are void for want of capacity, the necessary first step of setting aside any apparent obligations between the parties is met by the application of the rules on ultra vires.[20] In *Deutsche Morgan Grenfell Group Plc v. Inland Revenue*,[21] Lord Scott underlines the need for any obligation to be set aside before mistake can lead to restitution, but espouses the "but for" test to allow recovery once the contractual basis is invalid or void.[22]

Like the law on failure of consideration, the circumstances in which mistake can justify restitution have witnessed growth in recent years.[23] Historically, the law on mistake was very technical.[24] The authorities focused on particular categories of mistake where recovery was deemed permissible.[25] It was long understood that only liability mistakes, where the payer thought himself liable under a legal obligation,

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[19] See Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 591 (per Lord Scott); A "developed doctrine of unjust enrichment tends to grant restitution wherever the mistake causes the payment" - J. Beatson & W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149, 149.

[20] See above at 4.2.3: "A Concluded Act which is Ultra Vires".

[21] Deutsche Morgan Grenfell Group plc v. Inland Revenue & Anor [2007] 1 AC 558.

[22] Ibid, at 591 (per Lord Scott); see also A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), pp. 135-136.

[23] J. Beatson & W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149, 161-162, 164-165.

[24] M. Bryan, "Mistaken Payments and the Law of Unjust Enrichment: David Securities Pty Ltd v. Commonwealth Bank of Australia" (1993) 15 Sydney LR 461, 472-473.

[25] It was "notoriously difficult to harmonise all the cases dealing with payment of money under a mistake of fact" - Weld-Blundell v. Synott [1940] 2 KB 107, 112 (per Asquith J).

could ground recovery.[26] However, there has been a general movement away from legal limitations towards general principles.

National Bank v. O'Connor and Bowmaker[27] dates from 1963, but prefigures a relatively modern outlook.[28] The plaintiff bank had made payments to the defendant on the basis of fraudulent bank drafts. The defendant argued that mistake could only operate where the mistake was that the payer owed a liability to the payee, which was not the case here. Budd J. undertook a comprehensive review of the authorities[29] to reject the liability mistake argument: it did not matter that the mistake was not between the bank and the first defendant.[30] He espoused the test that there,

> "must be a fundamental mistake [such 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."[31]

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[26] Aiken v. Short (1856) 1 H&N 210, 215; cf Barclays Bank v. WJ Simms [1980] QB 677; R.J. Friel, "Negotiating Liabilities without Benefit: the Pre-Contractual Liability Trap" (2000) 7(8) CLP 188; A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 130 et seq.

[27] National Bank v. O'Connor and Bowmaker (1963) CIII ILTR 73.

[28] O'Dell discusses whether the case is consistent with a purely causative approach or whether it requires that the mistake be fundamental - E. O'Dell, "Bricks and Stones and the Structure of the Law of Restitution" (1998) 20 DULJ 101, 136.

[29] Kelly v. Solari 9 M & W 54; R. E. Jones Ltd v. Waring and Gillow Ltd [1926] AC 670; Budd J. describes these cases as "of the highest authority" and "of an obviously just and equitable nature." - National Bank v. O'Connor and Bowmaker (1963) CIII ILTR 73, 95 (per Budd J.); cp Barclays Bank Ltd v. W J Simms Son & Cooke (Southern) Ltd [1980] QB 677, 692.

[30] "[W]hen payment is made to a person, because of a supposed obligation to pay someone, induced by the frauds of another, and because it is believed that payment to that person is appropriate and suitable or will discharge the supposed obligation, and there is no obligation, the money paid can be recovered as paid under a mistake of fact." - National Bank v. O'Connor and Bowmaker (1963) CIII ILTR 73, 93 (per Budd J.).

[31] Ibid, at 94 (per Budd J.).

Now the test is unequivocally a causal one.[32] It is for the person claiming there was a mistake to prove that his actions were caused by an error.[33] The character of the mistake is not determinative.[34] It can range from complete ignorance to an incorrect application of a person's knowledge to the facts.[35] The moment at which the mistake intervened is unimportant, provided the error is determinative.[36] In *David Securities*,[37] the Australian High Court rejected a proposed limitation that retention of a mistaken payment must be unjust to grant recovery.[38] Goff J. emphasised the sufficiency of a causal connection between the mistake and the payment in *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd.*[39] This "straightforward test of

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[32] Barclays Bank Ltd v. W J Simms Son & Cooke (Southern) Ltd [1980] QB 677, 695; M. Bryan, "Mistaken Payments and the Law of Unjust Enrichment: David Securities Pty Ltd v. Commonwealth Bank of Australia" (1993) 15 Sydney LR 461, 473; G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 156.

[33] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 581 (per Lord Hope).

[34] "The rationale of the unjust factor of mistake is the effect it has on the claimant's consent, therefore it seems correct that the type of mistake should not matter, rather it is the effect on the payer that is important." - L. Farrell, "The Overpaying Taxpayer and the Restitutionary Remedy" (2007) 14(10) CLP 214.

[35] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 581 (per Lord Hope): "cases of mistake could vary from complete ignorance to a state of ample knowledge but a misapplication of what was known to the facts - from sheer ignorance to positive but incorrect belief", citing Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 409-410 and David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 175 CLR 353, 374.

[36] Ibid, at 581 (per Lord Hope): "so long as it can be said that if he had known of the true state of the facts or of the law at the time of the payment he would not have made it."

[37] David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 109 ALR 57 (HC); (1992) 175 CLR 353.

[38] M. Bryan, "Mistaken Payments and the Law of Unjust Enrichment: David Securities Pty Ltd v. Commonwealth Bank of Australia" (1993) 15 Sydney LR 461, 474.

[39] Barclays Bank Ltd v. W J Simms Son & Cooke (Southern) Ltd [1980] QB 677, 692, 694 (per Goff J.); J. Beatson & W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149, 164; though the authority of Barclays Bank v. Simms as a general principle was questioned

causation" has "stood the test of time".[40] Lord Hope defends the simplicity of the proposition that any payment caused by a mistake may be equated with unjust enrichment.[41] Notwithstanding this process of simplification, a critical persisting question has been whether a mistake relating to the law rather than a factual question suffices to ground recovery. This is of particular relevance to potential ultra vires cases.

12.1.2. Mistake in the Context of Incapacity

In the case of a payment made under a contract which turns out to be void for incapacity, the mistake which might ground an action for recovery is the belief that the contract is valid. The payment would not be made but for this belief. However, Lord Hoffman suggests that the existence of a mistake is not always as obvious as it seems.[42] A more pertinent issue is that this mistake will be characterised as a mistake of law, which may hinder recovery.[43]

Kleinwort Benson[44] addresses the specific circumstance where a judicial decision reveals the assumption of validity to be false.[45] Given that judicial decisions declare

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by Virgo: see L. Farrell, "The Overpaying Taxpayer and the Restitutionary Remedy" (2007) 14(10) CLP 214, citing G. Virgo, "The Principles of the Law of Restitution", 2nd ed, (Oxford, 2006), p. 159.

[40] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558 (per Lord Walker).

[41] Ibid, at 576 (per Lord Hope): "money paid under a mistake is recoverable is based on the principle that, prima facie, its receipt by the defendant will lead to his unjust enrichment. There is no reason to distrust a proposition based on such an elementary principle just because it is simple."

[42] Ibid, at 569.

[43] This was assumed in the early swaps cases: Westdeutsche Landesbank Girozentrale v. Islington London BC [1994] 4 All ER 890, 931 (Hobhouse J.); it "was inevitably held by Hobhouse J to have been a mistake of law and so, on the law as it then stood, irrecoverable on that basis" - Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 380 (per Lord Goff).

[44] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349.

[45] "To me it is plain that the money was indeed paid over under a mistake, the mistake being a mistake of law" - Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 379 (per Lord

the law, rather than changing it, they can be said to have retroactive effect.[46] Therefore, acts done under the old view of the law can be characterised as mistaken.[47] Lord Browne-Wilkinson and Lord Lloyd dissented in refusing to consider the belief that swaps agreements were within the capacity of the local authorities at the time they were concluded as a mistake.[48]

12.1.3. The Effect of Doubt on a Case for Mistake

Another potential problem concerns a payer who has reason to doubt the capacity of one party, but proceeds nonetheless. In the context of contractual capacity cases, it can often be a very difficult task for companies or their advisers to determine on the basis of the objects clause as constrained by the courts' tests and rules of interpretation whether or not a company has the capacity to engage in a particular transaction. This raises the question of the effect of doubt on the possibility of recovery for mistake. In *Rogers v. Louth County Council*,[49] Griffin J. indicates that there can be consent, despite the possibility of error, if the plaintiff is informed and indifferent to the chance that he is mistaken or overrides his doubts in order to close the transaction.[50] Thus, even where there is a mistake, a payment could be deemed

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Goff); J. Convery, "Lord Goff's Swansong: Restitution, Mistake of Law, and the Retrospective Effect of Judicial Decisions" (1999) 3 ELR 202, 207 et seq.

[46] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 378 (per Lord Goff).

[47] "[C]ontracts which at the time were understood by all concerned to be valid and binding, so that the payments themselves were believed to be lawfully due under those contracts. This misunderstanding was, of course, removed by the decision of this House in Hazell v. Hammersmith and Fulham London BC" - Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 376, 379 (per Lord Goff).

[48] "[R]etrospection cannot falsify history: if at the date of each payment it was settled law that local authorities had capacity to enter into swap contracts, Kleinworts were not labouring under any mistake of law at that date." - Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 358 (per Lord Browne-Wilkinson); K. Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153, 1171.

[49] Rogers v. Louth County Council [1981] IR 265.

[50] Ibid, at 271 (per Griffin J.).

voluntary if it was deliberately made by a plaintiff who was aware that it might not be due or indifferent to that possibility.

The question of doubt and consent arose in *Deutsche Morgan Grenfell v. Inland Revenue*,[51] where the revenue authorities argued that payments made by the plaintiff companies, in spite of their doubts as to the legality of the statute, were not mistaken and could not therefore be recovered on this ground.[52] Previous dicta seemed to militate against recovery in situations of doubt, by characterising doubt as the scenario where the person weighs up the competing possibilities, and consents nonetheless to take the chance and consent to the payment. Lord Hoffmann quotes Lord Hope in *Kleinwort Benson Ltd. v. Lincoln City Council,*[53] who distinguishes doubt from mistake on the basis of the voluntary assumption of the risk.[54] However, Lord Hoffmann refuses to interpret this as ruling out an action for mistake wherever there is the slightest doubt in the payer's mind. He moves the focus of inquiry away from the existence of doubt, to "whether the person who made the payment took the risk that he might be wrong".[55]

This accords better with the appropriate emphasis on consent. In *Deutsche Morgan Grenfell*,[56] Lord Hope also clarifies his previous remarks. While it is difficult to determine "what degree of doubt is compatible with a mistake claim",[57] Lord Hope identifies the crucial question as that of causation, and asserts that in the circumstances of each case, the payer's "reason for making the payment despite his

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[51] Deutsche Morgan Grenfell Group plc v. Inland Revenue & Anor [2007] 1 AC 558.

[52] Ibid, at 570 (per Lord Hoffmann).

[53] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349.

[54] Any "person who pays when in doubt takes the risk that he may be wrong" – Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 410 (per Lord Hope), cited by Lord Hoffmann, Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 571.

[55] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 571 (per Lord Hoffmann).

[56] Ibid, at 583 (per Lord Hope).

[57] Ibid, at 583 (per Lord Hope).

doubt"[58] will be relevant in determining whether he should be deemed to have borne the risk of being wrong.[59] The decision to pay despite doubts may break the causal link between the mistake and the payment.[60] Convery points out that, in a common law system, there is always room for doubt as to the law, which may in practice militate against recovery in mistake of law cases,[61] but this level of doubt would not suffice to exclude a causative mistake.

Applying this to cases of corporate capacity, it is not fatal to a mistake-based claim that the plaintiff entertained doubts about the company's capacity. It is unlikely that any party to a contract would "take the risk" of voidness, especially since the risk can be averted by amending objects.[62] Consequently, doubt is unlikely to negative the causal link between a mistaken view of capacity and the transfer.

12.2. Mistake of Law

12.2.1. The Mistake of Law Problem

The principal potential obstacle to recovery on the basis of mistake after a contract is declared void for incapacity has been the traditional rule that is was not possible to claim restitution for a payment made due to mistaken understanding of the law,

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[58] Ibid, at 583 (per Lord Hope).

[59] Ibid, at 583 (per Lord Hope).

[60] Ibid, at 585 (per Lord Hope): "where a payer who is in a state of doubt about the state of the law in a private transaction decides to pay nevertheless and take the risk that he may be wrong. In such a case the causative link between the mistake and the payment may be broken because the evidence shows that the payer was content to pay irrespective of whether the sum is due or not."

[61] J. Convery, "Lord Goff's Swansong: Restitution, Mistake of Law, and the Retrospective Effect of Judicial Decisions" (1999) 3 ELR 202, 212.

[62] See Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221, 228 (per Keane J.): "It is, of course, inconceivable that he appreciated the lack of vires but simply did not do anything about it"; see also above at 5.4.1: "The Alteration of Objects Clauses".

as opposed to a factual error.[63] In *Kleinwort Benson Ltd v. Lincoln City Council*,[64] Lord Goff traces its origins to the 1802 case of *Bilbie v Lumley*.[65] There, an underwriter paid on an insurance claim which he could have avoided on the grounds of non-disclosure. He had been aware of the relevant facts entitling him to repudiate the contract, but not of their legal effect. Lord Ellenborough rejected his claim to recover the money, as all must be presumed to know the law.[66] Later authorities, such as *Brisbane v Dacres*,[67] accepted the rule as sound policy.[68] Burrows characterises the appeal of the bar to recovery for a mistake of law as based in fear of "too much restitution".[69] The exclusion reflected a view that restitution law should be curtailed in the interests of "the certainty and finality of commercial transactions".[70] Consequently, it was initially believed that the mistake of law rule

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[63] Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal London Borough Council [1999] QB 215, 233 (per Waller LJ): "It is of course recognised that English law would have to be liberalised to achieve that result since "mistake of law" is still not a recognised basis for recovery despite criticisms."; see K. Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153; J. Beatson & W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149, 175 et seq.

[64] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, [1998] 4 All ER 513, [1998] 3 WLR 1095, [1999] RVR 315, [1999] LGR 1; affirmed in Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2006] UKHL 49 (25 October 2006).

[65] Bilbie v. Lumley (1802) 2 East 469, [1775-1802] All ER Rep 425; cp K. Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153, 154, citing Lowry v. Bourdieu (1780) 2 Doug 467.

[66] "Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case." - Bilbie v. Lumley (1802) 2 East 469, 471, [1775-1802] All ER Rep 425, 426 (per Lord Ellenborough).

[67] Brisbane v. Dacres (1813) 5 Taunt 143; 128 ER 641.

[68] They "show, the rule was perceived, after due deliberation, to rest on sound legal policy." - Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 371 (per Lord Goff).

[69] A. Burrows, "Restitution for Mistake in Australia" (1993) 13 OJLS 584, 588.

[70] J. Convery, "Lord Goff's Swansong: Restitution, Mistake of Law, and the Retrospective Effect of Judicial Decisions" (1999) 3 ELR 202, 206.

prevented restitution on the basis of mistake in the swaps cases.[71] The capacity of a corporation was deemed to be a legal question, covered by the exclusive rule.

However, the modern approach to the law of unjust enrichment sees arbitrary restrictions replaced with a coherent framework of actions and defences.[72] These developments, coupled with direct criticism of the mistake of law bar,[73] put this element of the law under pressure.[74] It was seen as an "obvious archaism"[75] and its abolition may have been "only a matter of time".[76] The mistake of law bar was criticised as being based on a misapplication of the principle that no one may plead ignorance of the law.[77] Lord Goff identifies three main criticisms levelled against it.[78] These were, that it was unjust to allow the recipient to retain mistaken payments, that the distinction between mistakes of fact and law can lead to results

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[71] Westdeutsche Landesbank Girozentrale v. Islington London BC [1994] 4 All ER 890, 931 (Hobhouse J.); it "was inevitably held by Hobhouse J to have been a mistake of law and so, on the law as it then stood, irrecoverable on that basis" - Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 380 (per Lord Goff); cp Woolwich Equitable Building Society v. Inland Revenue Commissioners [1993] AC 70.

[72] G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 142.

[73] See K. Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153, 159.

[74] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 370 (per Lord Goff): "after many years of criticism of the rule by scholars specialising in the law of restitution, and after the rule itself has been discarded in a number of major common law jurisdictions."

[75] M. Bryan, "Mistaken Payments and the Law of Unjust Enrichment: David Securities Pty Ltd v. Commonwealth Bank of Australia" (1993) 15 Sydney LR 461, 462.

[76] J. Convery, "Lord Goff's Swansong: Restitution, Mistake of Law, and the Retrospective Effect of Judicial Decisions" (1999) 3 ELR 202, 206.

[77] R. Goff, "Reform of the Law of Restitution" (1961) 24 MLR 85, 87: "while a man cannot generally plead ignorance of law in excuse of a criminal offence, the rule of policy which forbids such a plea appears to have no relevance in actions of restitution."; Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 371.

[78] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 372; cp G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 143.

that seem arbitrary or capricious,[79] and that the courts had been tempted to distort the law to mitigate the unjust effects of the rule, which led to legal uncertainty.[80] Lord Goff further reasons that the abrogation of the mistake of law bar becomes inevitable once the House of Lords accepts the general principle of unjust enrichment[81] because the rule disregards the question of whether or not a receipt is unjust.[82]

Following similar moves in other jurisdictions,[83] this constraint was dramatically excised from English law in *Kleinwort Benson Ltd v. Lincoln City Council.*[84] It

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[79] R. Goff, "Reform of the Law of Restitution" (1961) 24 MLR 85, 88; "the distinction between a mistake of fact and mistake of law can best be described as a fluttering, shadowy will o the wisp" – Nepean Hydro Electric Comm. v. Ontario Hydro (1982) 132 DLR (3d) 193, 207-208 (per Dickson J.).

[80] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 372 (per Lord Goff); the rule "collapsed under the weight of its own exceptions" – E. O'Dell, "Restitution", in "Annual Review of Irish Law 1997", at 607; see K. Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153, 156-159.

[81] Lipkin Gorman v. Karpnale [1991] 2 AC 548.

[82] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 373 (per Lord Goff): "because a blanket rule of non-recovery, irrespective of the justice of the case, cannot sensibly survive in a rubric of the law based on the principle of unjust enrichment."

[83] Air Canada v. British Columbia (1989) 59 DLR (4th) 161; David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 109 ALR 57 (HC); (1992) 175 CLR 353; Willis Faber Enthoven (Pty) Ltd v. Receiver of Revenue (1992) (4) SA 202; see Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349; see J. Beatson & W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149, 162, 175; M. Bryan, "Mistaken Payments and the Law of Unjust Enrichment: David Securities Pty Ltd v. Commonwealth Bank of Australia" (1993) 15 Sydney LR 461.

[84] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, [1998] 4 All ER 513, [1998] 3 WLR 1095, [1999] RVR 315, [1999] LGR 1; see also David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 175 CLR 353 and A. Burrows, "Restitution for Mistake in Australia" (1993) 13 OJLS 584 for the same development in Australia.

almost certainly no longer forms a part of Irish law, which had previously narrowed its scope in the 1981 Supreme Court decision in *Rogers v. Louth County Council*.[85]

12.2.2. Removal of the Bar in Kleinwort Benson

Kleinwort Benson Ltd v. Lincoln City Council[86] dramatically rejected this rule.[87] The case involved a leapfrog appeal to the House of Lords to give its verdict on the mistake of law bar. The House agreed that the distinction between recoverable mistakes of fact and irrecoverable mistakes of law should be abandoned.[88] The policy underlying the rule can best be achieved, consistently with justice, by the recognition of a right of recovery subject to specified defences to cater for the fears which formerly appeared to require a blanket exclusion of recovery.[89] For Lord Goff, the decisive argument is that the mistake of law bar no longer has a place in an area of law which is founded on the principle against unjust enrichment.[90] The mistake of law rule no longer exists in English law.[91] Consequently, the unjust

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[85] Rogers v. Louth County Council [1981] IR 265.

[86] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, [1998] 4 All ER 513, [1998] 3 WLR 1095, [1999] RVR 315, [1999] LGR 1; affirmed in Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2006] UKHL 49 (25 October 2006).

[87] S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759, 772: "Considered as a precedent, Kleinwort Benson is a disaster, despite appearing straightforward at the time."; K. Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153, 163-166.

[88] Lord Goff previously expressed the hope that the House of Lords would ultimately explain the true basis of the authorities - R. Goff, "Reform of the Law of Restitution" (1961) 24 MLR 85, 88.

[89] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 373 (per Lord Goff): "the law must evolve appropriate defences which can, together with the defence of change of position, provide protection where appropriate for recipients of money paid under a mistake of law in those cases in which justice or policy does not require them to refund the money"; see also Lipkin Gorman v. Karpnale [1991] 2 AC 548, 581 (per Lord Goff).

[90] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 373 (per Lord Goff).

[91] P. Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 TIL 155, 196: "Mistake of law is now a good unjust factor, although its wings may be clipped a bit in later cases."

factor of mistake is now available in ultra vires cases.[92] Applying the new approach, the plaintiff could recover the money paid under a mistaken view of the capacity of council and the validity of the agreement.[93]

Deutsche Morgan Grenfell v. Inland Revenue[94] reiterates the majority approach on the existence of a mistake where a tax payment considered at the time to be required by law was subsequently held to have been unlawful.[95] Lord Hoffmann strenuously affirms that judges do change the law, with retrospective effect. Consequently, in the situation which arose in *Kleinwort Benson Ltd. v. Lincoln City Council*,[96] "the effect of the later judgment is that, contrary to his opinion at the time, the money was not owing",[97] and this misconception constitutes mistake for the purposes of restitution. While Lord Hoffmann acknowledges that this approach may seem to stretch the concept of a mistake, it is the fair solution, given the "absence of a more general condictio indebiti" which would permit recovery outside the recognised categories, and critics may view this approach as the payer being "*deemed* to have made a mistake" if they prefer.[98]

12.2.3. Has the Mistake of Law Bar been Abolished in Ireland?

There is a strong case to be made that the Irish law now reflects the current English position and has no place for the mistake of law bar.[99] Lord Goff's argument that

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[92] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 388.

[93] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 379 (per Lord Goff).

[94] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558.

[95] Metallgesellschaft Ltd v. Inland Revenue Commissioners (Joined Cases C-397 and C-410/98) [2001] Ch. 620.

[96] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349.

[97] Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 570 (per Lord Hoffmann).

[98] Ibid, at 570 (per Lord Hoffmann).

[99] It "creates an irrational and artificial distinction between the two categories" - K. Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153, 154.

the mistake of law bar cannot be justified in a legal system which has recognised the unifying principle of unjust enrichment is equally applicable to this jurisdiction.[100] In addition, there is support in *Dublin Corporation v. Building and Allied Trade Union*,[101] where Keane J. cites "money paid [...] as a result of mistake of fact or law"[102] among the recognised categories of unjust enrichment. This implies that Irish law has already implicitly abrogated the mistake of law bar. The alternative interpretation of Keane J.'s reference to mistakes of fact or of law would be that mistakes of law are still grounds of recovery under the restricted conditions set out by the Supreme Court in 1981 in *Rogers v. Louth County Council*.[103]

Rogers v. Louth County Council[104] reflects a narrow Irish approach to the mistake of law bar predating its abolition in England. It shows the Supreme Court's readiness to find exceptions to the general rule.[105] The plaintiff had paid the local authority to redeem the annuity payable on her house. The method of calculation was subsequently found to have been wrong, so that the plaintiff had paid too much.[106] Griffin J. stated the general rule as being that money paid under a mistake of law is not recoverable, but that recovery could be granted where the plaintiff was not responsible for the mistake[107] and the payment was made involuntarily, under legal compulsion.[108] By contrast, recovery of the payment would not be allowed, if it were deliberately made by a plaintiff who was aware that it might not be due or

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[100] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 373 (per Lord Goff).

[101] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547.

[102] Ibid, at 558 (per Keane J.).

[103] Rogers v. Louth County Council [1981] IR 265.

[104] Ibid.

[105] See also K. Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153, 156-159.

[106] Meade v. Cork County Council (Supreme Court, Unreported, 3 July 1974).

[107] Kiriri Cotton Co Ltd v. Dewani [1960] AC 192, approved by Kenny J., Dolan v. Neligan [1967] IR 247, cited by Griffin J., Rogers v. Louth County Council [1981] IR 265, 270.

[108] Rogers v. Louth County Council [1981] IR 265, 271 (per Griffin J.).

indifferent to that possibility.[109] Kenny J. similarly suggests that the statement that money paid under a mistake of law was not recoverable was an oversimplification[110] and recovery was possible where the recipient's conduct was such that it was primarily responsible for the mistake.[111] *Rogers v. Louth County Council*[112] indicates judicial resistance to the mistake of law bar, creating exceptions relating to either the voluntariness of the payment or the primary responsibility for the mistake. The latter test could be of broader application in private law transactions.

It is probable, however, that that the definitive abolition of the restriction will render the distinctions drawn by the Supreme Court redundant. The likelihood must be that the Irish courts will abolish the bar entirely following *Kleinwort Benson Ltd v. Lincoln City Council*[113] and the strong hint to that effect in *Dublin Corporation v. Building and Allied Trade Union.*[114] Logic suggests that the distinction is untenable in the modern system of unjust enrichment law, which has been accepted in Ireland.[115]

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[109] Ibid, at 271.

[110] Ibid, at 273 (per Kenny J.).

[111] "[I]f there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake – then it may be recovered back…" - Kiriri Cotton Co Ltd v. Dewani [1960] AC 192, 204 (per Denning LJ), cited by Kenny J., Rogers v. Louth County Council [1981] IR 265, 273.

[112] Rogers v. Louth County Council [1981] IR 265.

[113] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, [1998] 4 All ER 513, [1998] 3 WLR 1095, [1999] RVR 315, [1999] LGR 1.

[114] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547, 558 (per Keane J); K. Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153, 166: "It seemed clear, as a matter of Irish law, that an enrichment conferred under a mistake of law was now recoverable."

[115] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547; see E. O'Dell, "Restitution",in R.Byrne & W.Binchy (eds), "Annual Review of Irish Law 1997" (Round Hall, Dublin, 1997), pp. 607-665, at 619: the bar is now a "historical absurdity rather than current doctrine".

Yet, a couple of Irish decisions allow for doubt on the assumption that the mistake of law bar no longer forms part of Irish law. These are *Duff v. Minster for Agriculture*[116] and the *Health (Amendment) Bill Reference*.[117] *Duff v. Minister for Agriculture*[118] raises doubts about the current status of Irish law on mistake of law.[119] The plaintiff farmers had lost out because the Minister had made a mistake in relation to his own power to distribute the national milk quota in a manner which would benefit development farmers. The Supreme Court found that, in public law, where an official through a mistaken view of the law inadvertently precludes himself from exercising his discretion as intended, the person who suffers detriment may be awarded a remedy.[120] The relevance of the case to private law matters lies in the continuing endorsement of *Rogers v. Louth County Council*,[121] which implies the retention of mistake of law as a particular class of mistake in restitution law. O'Flaherty J. allowed a remedy by analogy with *Rogers v. Louth County Council*,[122] accepting the premise that, "money paid under a mistake of law can be recovered if the responsibility for the mistake lies more on the one party than the other and the one with the responsibility for the mistake is in a more powerful position".[123]

The *Health (Amendment) Bill 2004* case is an *a priori* determination by the Supreme Court under Article 26 of the Constitution of the constitutionality of

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[116] Duff v. Minister for Agriculture (No. 2) [1997] 2 IR 22; see E. O'Dell, "Restitution",in R.Byrne & W.Binchy (eds), "Annual Review of Irish Law 1997" (Round Hall, Dublin, 1997), pp. 607-665, at 619.

[117] In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105.

[118] Duff v. Minister for Agriculture (No. 2) [1997] 2 IR 22.

[119] Albeit in a "non-restitution and extremely questionable context" - K. Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153, 166.

[120] Cf Pine Valley Developments v. The Minister for Environment [1987] I.R. 23; Glencar Explorations plc v. Mayo County Council (No. 2) [2002] 1 IR 84, 150.

[121] Rogers v. Louth County Council [1981] IR 265.

[122] Ibid.

[123] Duff v. Minister for Agriculture (No. 2) [1997] 2 IR 22, 75.

proposed legislation. The legislation responded to revelations that the state had unlawfully charged elderly persons in nursing homes for their care irrespective of their entitlement to free health care. The Bill introduced a new scheme of charges for the future and sought effectively to deem historic charges retrospectively lawful,[124] thus barring citizens' entitlement to recover the sums unlawfully demanded. This led the court to consider the common law right of recovery which would "normally"[125] be open to those who had paid the charges, subject to defences. The retrospective legislation extinguishing the right of recovery was deemed to constitute an unjust attack on prospective plaintiffs' property rights, in the absence of evidence that it was necessary in order to avoid "an extreme financial crisis or a fundamental disequilibrium in public finances".[126] The Court considered it unnecessary to "expound the precise contours" of the right of recovery, but flagged mistake of law among the issues which may be relevant.[127] Murray C.J. refers to "the modern approach to the recovery of money paid under a mistake of law",[128] again citing *Rogers v. Louth County Council*.[129]

It is to be hoped that these cases show simply that the appropriate opportunity has not yet arisen for the Irish courts wholeheartedly to embrace *Kleinwort Benson Ltd v. Lincoln City Council*.[130] Neither authority involves a direct claim by an individual turning on the mistake of law issue. Thus, by indicating that mistake of law "may be

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[124] Section 1(b), Health (Amendment) (No. 2) Bill, 2004.

[125] In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105, 176.

[126] Ibid, at 206-207.

[127] Ibid, at 177.

[128] Ibid, at 202.

[129] Rogers v. Louth County Council [1981] IR 265.

[130] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, [1998] 4 All ER 513, [1998] 3 WLR 1095, [1999] RVR 315, [1999] LGR 1; affirmed in Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2006] UKHL 49 (25 October 2006); Spencer urges that *Duff* should be "isolated [and] erased from our memories" - K. Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153, 168.

relevant"[131] the court did not express a desire to retain the bar, but simply deferred to a more fitting occasion the determination that the mistake of law bar no longer forms part of Irish law. Therefore, although it has not yet been expressly stated, it must surely be the case that, in Ireland, mistake would be available to ground recovery in appropriate ultra vires cases.[132]

12.2.3.1. Conclusion: mistake should ground recovery in ultra vires cases

Thus, provided Irish law follows the path taken in England, mistake is now fully available as an alternative unjust factor to failure of consideration, which will enable plaintiffs to claim restitution of benefits transferred under a contract which is void for incapacity. The test is straightforward: where a payment is caused by the mistaken belief that a transaction is within the parties' capacity, this should suffice to ground recovery.[133] Fulfilling the causative test grounds the claim, subject to any available restitutionary defences.[134] In principle, counter-restitution is likely to be a necessary condition, though its relationship to the analytical framework remains unclear.[135]

It has been argued that, if nullity, incapacity or the absence of consideration is a new unjust factor which grounds recovery in ultra vires cases, then there is no longer any

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[131] In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105, 177.

[132] The existence of a restitutionary remedy based on mistake, "does not mean that money paid, or property transferred, under a mistake of law is necessarily recoverable, just as money paid, or property transferred, under a mistake of fact is not necessarily recoverable." – Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558, 590 (per Lord Scott); K. Spencer, "Restitution of Monies Paid Pursuant to a Mistake of Law" (2004) 12 ISLR 153, 171.

[133] Barclays Bank Ltd v. W J Simms Son & Cooke (Southern) Ltd [1980] QB 677; Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558.

[134] See above at 10.4.6: "Defences to Claims for Restitution".

[135] See above at 10.4.6.5: "Counter-restitution as a condition".

need to rely on mistake.[136] The preference for the mistake claim on the basis of the limitation period beginning later[137] shows one reason why mistake might be useful.[138] If failure of consideration might still required to be total, that is another. There are likely further circumstances in which one or other of the unjust factors might be chosen by plaintiffs, and it is therefore valuable to underline that both causes of action are fully available.

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[136] D. Sheehan, "Unjust Factors or Restitution of Transfers Sine Causa" (2008) Oxford U Comparative L Forum 1 at ouclf.iuscomp.org, after endnote 72.

[137] See Section 32(1), Limitation Act, 1980 (United Kingdom); "[T]he notion that it is right to show some indulgence to a claimant labouring under an undiscovered mistake is an entirely natural one" - Deutsche Morgan Grenfell Group plc v. Inland Revenue & Anor [2007] 1 AC 558, 607 (per Lord Walker).

[138] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349; Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558.

13. PROPRIETARY REMEDIES

Proprietary remedies enable a plaintiff to make a direct claim to property. They confer a right over an item of property as opposed to a personal right against another person.[1] They enable the pursuit of the property through various forms[2] and hands.[3] The most common proprietary remedies are trusts, which are the domain of equity.[4] In addition, tracing is both a mechanism for identifying property[5] and a remedy, offered by both common law and equity.[6] One advantage of a proprietary remedy is illustrated in *Trustee of the Property of FC Jones v. Jones*:[7] it may enable the owner to reap the benefit of any increase in value of the asset, rather than the

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[1] G. Samuel, "Property Notions in the Law of Obligations" (1994) 53 CLJ 524, 531-532; R. Grantham & C. Rickett, "Tracing and Property Rights: The Categorical Truth" (2000) 63 MLR 905, 908.

[2] "[T]he "trust fund" can change its dress, but maintain its integrity. To-day it appears as a piece of land; tomorrow it may be some gold coins in a purse; then it will be a sum of Consols; then it will be shares in a Railway Company, and then Peruvian Bonds." - F.W. Maitland, "Trust and Corporation", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 141, 172.

[3] One attraction being, as Maitland points out, "Dishonest people are often impecunious, insolvent people" - F.W. Maitland, "Trust and Corporation", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 141, 171.

[4] E. O'Dell, "Fermat's Last Theorem and the Context of Proprietary Remedies" (2005) 19(2) TLI 97, 99: "proprietary remedies in the common law world are very often in the position of elephants in the middle of the room – present, but their presence is politely ignored"; R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561, 565.

[5] R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561, 570; A. Toy, "Emergence of the New Tracing Process" (2001-2002) 8 Canterbury LR 129, 130: "Tracing is a process that allows value to be tracked through substitutions."

[6] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 50.

[7] Trustee of the Property of FC Jones v. Jones [1996] WLR 703; see D.M. Fox, "Common Law Claims to Substituted Assets" (1997) 56 CLJ 30.

monetary equivalent of the value at the time it was removed from his possession.[8] It may also confer priority over creditors of the person in possession.[9]

The proprietary interest in the property may be viewed either as the persistence of prior ownership or as a legal imposition born of the defendant's duty.[10] The relationship between restitution and proprietary claims is controversial,[11] but in this jurisdiction it is indisputable that proprietary rights can be created by the courts as a remedial measure.[12] In some cases, the rationale for the proprietary remedy is unjust enrichment,[13] though in other cases wrongful conduct or unconscientiousness is required to justify the creation of a trust. If proprietary claims are a response to unjust enrichment, one of the most difficult questions in restitution law is when a proprietary right should be awarded instead of a personal one.[14]

13.1. TRACING

Tracing is both a mechanism to identify property to be recovered[15] and a remedy facilitating its recovery.[16] It exists both at common law and in equity.[17] No

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[8] See L. Smith, "Unravelling Proprietary Restitution" (2004) 40 CBLJ 317, 331.

[9] C. Rotherham, "The Metaphysics of Tracing: Substituted Title and Property Rhetoric" (1996) 34 Osgoode Hall L.J. 321, 323.

[10] R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561, 562; C. Rotherham, "The Metaphysics of Tracing: Substituted Title and Property Rhetoric" (1996) 34 Osgoode Hall L.J. 321.

[11] See G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 4, 570; A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), pp. 61-62, 65.

[12] See below at 13.2.3.2.1: "The "new model" constructive trust in Ireland".

[13] Trustee of the Property of FC Jones v. Jones [1996] 4 AER 721, 727 (per Millett LJ): "If she were to retain the profit made by the use of the trustee's money, then, in the language of the modern law of restitution she would be unjustly enriched at the expense of the trustee."

[14] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 60; A. Burrows, "Unravelling Proprietary Restitution: A Response to Professor Lionel Smith" (2005) 41 Can. Bus. L.J. 424, 424.

[15] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 79.

examination of the remedies which might be available in ultra vires cases would be complete without reference to tracing. Under the old rule in *Sinclair v. Brougham*,[18] which excluded a restitutionary remedy for void contracts, tracing, alongside subrogation, which arose where a void loan was used to pay legitimate debts, offered a remedy to providers of ultra vires loans.[19] In *Sinclair v. Brougham*,[20] a form of equitable "tracing" was used where the property was no longer clearly identifiable. This remedy may in fact have been closer to the imposition of a trust than true tracing.[21] Nonetheless, it is accepted that tracing can occur in ultra vires cases.

Tracing allows the rightful owner of property to follow it into the hands of a third party in order to recover it from that person, provided it can be clearly identified at all times. Typically, it is more practical to recover goods than money by tracing, as money is more likely to be mixed up with other money and cease to be identifiable. However, a number of more recent decisions suggest it may be a more extensive remedy than previously thought.[22] As a common law proprietary remedy, tracing is clearly exceptional. Because tracing is anointed by precedent, it resists too much

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[16] C. Mitchell, "Common Law Tracing Revisited" (1997-1998) 8 KCLJ 123, 124; cf R. Grantham & C. Rickett, "Tracing and Property Rights: The Categorical Truth" (2000) 63 MLR 905, 905; A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 81.

[17] See F.O.B. Babafemi, "Tracing Assets: a Case for the Fusion of Common Law and Equity in English Law" (1971) 34 MLR 12; The two forms of tracing are becoming closer: A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 82.

[18] Sinclair v. Brougham [1914] AC 398.

[19] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 97; see above at 9.2.3: "Traditionally Accepted Remedies: Tracing, Subrogation and Estoppel".

[20] Sinclair v. Brougham [1914] AC 398.

[21] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 56, 59: it is "difficult to abstract anything of value from Sinclair v. Brougham on the so-called "tracing" issue."

[22] Trustee of the Property of FC Jones v. Jones [1996] WLR 703.

questioning of its basis.[23] Since the elaboration of an overarching structure for the law of restitution, there are a number of debates about the nature of tracing. One school of thought emphasises that tracing can be a remedial mechanism, rather than simply a means of vindicating pre-existing property rights.[24] Tracing is often characterised in academic discourse as one response to unjust enrichment, though the courts still favour its conceptualisation as a distinctive property-based notion.[25] Others consider that tracing is properly only a technique for identifying property which is the subject of a claim.[26] Burrows requires tracing to be coupled with unjust enrichment to ground a claim. On this view, tracing shows enrichment at the expense of the original owner, and should be followed by an inquiry into unjust factors.[27] These attempts to explain the doctrine are not fully consistent with the authorities, which treat tracing as a means to lay direct claim to property.

Depending on the answer to the question of what tracing is, the persistence of separate tracing doctrines at common law and equity is perhaps becoming outdated. The old distinctions between the common law and equitable tracing rules are diminishing.[28] Burrows argues that they should be abandoned.[29] One difference between common law and equitable tracing concerns their limits. The equitable

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[23] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 78: "It is not easy to describe what tracing and subrogation are"; ibid, p. 81: "more work needs to be done in clarifying the "unjust factor" involved in the tracing cases"; see D.W. Logan , "Restatement on Restitution" (1938) 2 MLR 153, 156.

[24] C. Rotherham, "The Metaphysics of Tracing: Substituted Title and Property Rhetoric" (1996) 34 Osgoode Hall L.J. 321, 328; cp D.W. Logan , "Restatement on Restitution" (1938) 2 MLR 153, 157; cf Foskett v. McKeown [2001] 1 AC 102; see A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), pp. 64-66.

[25] R. Grantham & C. Rickett, "Tracing and Property Rights: The Categorical Truth" (2000) 63 MLR 905, 905-907.

[26] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 78.

[27] A. Burrows, "Unravelling Proprietary Restitution: A Response to Professor Lionel Smith" (2005) 41 Can. Bus. L.J. 424, 425.

[28] Trustee of the Property of FC Jones v. Jones [1996] 3 WLR 703, at 712.

[29] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 82.

claim is defeated when the property reaches the possession of a bona fide purchaser for value without notice, whereas at common law, the ultimate purchaser can acquire no better title than that of the seller.[30] The two doctrines are still sufficiently distinct to be considered separately.

13.1.1. Common Law Tracing

Tracing as a means of identifying property is well-established at common law.[31] However, the legal right to trace property was very much overshadowed by the equitable claim.[32] As Lord Goff points out in *Lipkin Gorman v. Karpnale*,[33] while it was possible for a person whose money had been given to a third party to claim it by showing that the money was his legal property, the cases in which a claim succeeded were "very rare".[34] He attributed this scarcity of successful claims to the fungibility and easy mixture of money.[35]

Trustee of the Property of FC Jones v. Jones[36] has brought common law tracing to the fore as a restitutionary remedy. The decision hastens the move towards the alignment of tracing claims in equity and common law, while underlining that common law tracing belongs in the armoury of remedies at the courts' disposal to combat unjust enrichment. The case arose after money was wrongfully withdrawn from a partnership, given to a third party, invested in the potato futures market, and

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[30] F.O.B. Babafemi, "Tracing Assets: a Case for the Fusion of Common Law and Equity in English Law" (1971) 34 MLR 12, 22-23.

[31] Lipkin Gorman v. Karpnale [1991] 2 AC 548, 573 (per Lord Goff): it is "well established that a legal owner is entitled to trace his property into its product, provided that the latter is indeed identifiable as the product of his property."

[32] D.M. Fox, "Common Law Claims to Substituted Assets" (1997) 56 CLJ 30.

[33] Lipkin Gorman v. Karpnale [1991] 2 AC 548.

[34] Ibid, at 572 (per Lord Goff).

[35] Ibid, at 572 (per Lord Goff): "at common law, property in money, like other fungibles, is lost as such when it is mixed with other money."

[36] Trustee of the Property of FC Jones v. Jones [1996] 4 AER 721; [1996] WLR 703; see C. Mitchell, "Common Law Tracing Revisited" (1997-1998) 8 KCLJ 123.

the increased proceeds of this investment deposited in the bank. The trustee to the partnership's bankruptcy claimed this increased capital sum. The issue was whether he could follow the money through the hands of the broker and ultimately into the bank account. A claim for equitable tracing would have failed, as the person who had received the void payment from the bankrupt partnership was not a fiduciary. The Court of Appeal confirmed that the trustee could trace the property at common law. Millett L.J. described the trustee's case as "simplicity itself"[37] as there was a "chain of straight substitutions"[38] between the original sum and the larger sum of money now in the bank account.

When the money was withdrawn from the partnership's bank account to be given to the defendant, the bankrupt partners "had no title to it at law or in equity"[39] and the defendant was therefore unable to obtain any title, legal or equitable. It followed from this that she could not be allowed to profit from the use of someone else's money or she would be unjustly enriched.[40] Thus, the principle against unjust enrichment required that she return all the proceeds of the misappropriation to the legal owner, which could be accomplished by a common law tracing claim. Millett L.J. relied on *Lipkin Gorman v. Karpnale*[41] to support the decision that the trustee had a legal right to the entire proceeds which could be traced from his property. The contents of the bank account were a chose in action relating to the balance.[42] This result was difficult to explain in terms of the general rules of property law, but nonetheless, the trustee became the beneficial owner of the money in the bank. The novel outcome was justified by unjust enrichment reasoning.[43] Fox points out that

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[37] Trustee of the Property of FC Jones v. Jones [1996] 4 AER 721, 723 (per Millett LJ).

[38] D.M. Fox, "Common Law Claims to Substituted Assets" (1997) 56 CLJ 30, 31.

[39] Trustee of the Property of FC Jones v. Jones [1996] 4 AER 721, 726 (per Millett LJ).

[40] Ibid, at 727.

[41] Lipkin Gorman v. Karpnale [1991] 2 AC 548.

[42] Trustee of the Property of FC Jones v. Jones [1996] 4 AER 721, 730 (per Millett LJ).

[43] Trustee of the Property of FC Jones v. Jones [1996] 3 WLR 703, 710, 714.

the desire of the court to grant a restitutionary remedy did not require, however, that such a remedy be proprietary rather than personal.[44]

The rationale for this willingness to allow tracing as a restitutionary remedy is that it aligns the equitable and common law rules, and reduces the disadvantage to claimants who bring a case at common law rather than equity. This favours the development of "a rational and coherent law of restitution"[45] The readiness of the Court of Appeal in *FC Jones*[46] to grant the proprietary remedy of tracing at common law also indicates a broadening of the remedial tools which the courts are willing to use in cases of unjust enrichment. However, Millett L.J. implicitly affirmed the limitations on the possibility of tracing which exclude it where the funds pass through a mixture.[47] For this reason, it will remain unavailable in many cases.

13.1.2. Equitable Tracing

Equitable tracing, though it is more familiar than its common law equivalent, was previously subject to the limitation that it is not normally available except where there is a fiduciary relationship involved.[48] In the corporate context, this is most likely to occur if the directors receive company property. Equitable tracing provided a remedy in the context of the misapplication of company property in *Clark v. Cutland*.[49] Unauthorised directors' remuneration was deemed to be both a breach of fiduciary duty and void for want of authority. It was traced into a pension fund.[50] In

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[44] D.M. Fox, "Common Law Claims to Substituted Assets" (1997) 56 CLJ 30, 32.

[45] Trustee of the Property of FC Jones v. Jones [1996] 3 WLR 703, at 712.

[46] Ibid.

[47] Ibid, at 711.

[48] R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561, 565.

[49] Clark v. Cutland [2004] 1 WLR 783.

[50] Ibid, at 793 (per Arden LJ): "the company is entitled to trace the payments of pension fund contributions which Mr Cutland made without authority into the pension fund assets".

Lipkin Gorman v. Karpnale,[51] Lord Goff observes that equitable tracing would have been available in the circumstances of that case to the firm whose money had been fraudulently withdrawn from its bank account by a partner.[52]

As a rule, there had to exist an equitable title in the property for the tracing claim to arise. The fiduciary requirement was imposed in *Re Diplock*,[53] and subject to criticism[54] before being fatally undermined by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington LBC*[55] and Budd J. in *Dublin Corporation v. Building and Allied Trade Union.*[56] O'Dell asserts that these comments sounded "the death-knell" for the fiduciary requirement.[57]

Boscawen v. Bajwa[58] may have extended equitable tracing beyond its normal boundary. It arose from a failed house purchase: a solicitor wrongly paid the vendor before the sale collapsed, the intending vendor discharged the mortgage, and his creditor sold the house free from the mortgage, thus benefiting from a windfall at the expense of the original purchaser's lender. The lender successfully pleaded a novel combination of tracing and subrogation. Millett L.J. was prepared to follow

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[51] Lipkin Gorman v. Karpnale [1991] 2 AC 548.

[52] Ibid, at 572 (per Lord Goff): "there is no doubt that, even if legal title to the money did vest in Cass immediately on receipt, nevertheless he would have held it on trust for his partners, who would accordingly have been entitled to trace it in equity into the hands of the respondents."

[53] In Re Diplock [1948] 1 Ch. 465.

[54] See F.O.B. Babafemi, "Tracing Assets: a Case for the Fusion of Common Law and Equity in English Law" (1971) 34 MLR 12, 19; E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 58-59.

[55] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, 716; [1996] 2 AER 961, 974.

[56] Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), p. 40.

[57] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 59.

[58] Boscawen v. Bajwa [1996] 1 WLR 328, noted at (1996) 55 CLJ 199.

the lender's money through a number of hands. The solicitor's fiduciary role justified the use of tracing, but Birks[59] has argued that the apparatus of a fiduciary relationship was here surplusage, as Millett L.J. admitted to using tracing simply to identify the passage of the money through a chain of transferees. The combination of tracing with the equitable remedy of subrogation brought it within the equitable jurisdiction. The lender was deemed to have been subrogated for the mortgagee, and had a prior claim to the proceeds of the house sale. Andrews approves this novel approach on the basis of fairness.[60]

Tracing is thus an established option for recovering property, provided it remains identifiable. It will be most useful to follow property through a number of hands, and recent authorities suggest that this will be possible for money as well as goods. However, tracing is likely in most ultra vires cases to be no more than a secondary ground for recovery. Given the modern arguments on one side of the debate that tracing does not directly grant the right of recovery, it might perhaps be prudent to couple it with an unjust enrichment claim.[61] Equitable tracing to recover company property might be subsidiary to an institutional *Belmont* trust.[62] The advantages of a proprietary remedy may also be sought directly, through the imposition of a remedial trust mechanism.

13.2. Resulting and Constructive Trusts

The trust is equity's most far-reaching potential response to the problem of property transferred in an ultra vires transaction. Smith defines the trust broadly: "the trustee holds property and owes certain kinds of obligation with respect to that particular property."[63] The trust mechanism which arises in this context may respond to either

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[59] (1995) 9 Trust Law International 124-6, cited by N.H. Andrews, "Tracing and Subrogation" (1996) 55 CLJ 199.

[60] N.H. Andrews, "Tracing and Subrogation" (1996) 55 CLJ 199, 200.

[61] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 78.

[62] See below at 13.2.3.1: "The institutional trust, knowing receipt and the Belmont principle".

[63] L. Smith, "Unravelling Proprietary Restitution" (2004) 40 CBLJ 317, 323.

unjust enrichment or wrongful conduct.[64] It is an adaptation of the principles which apply to express trusts. Lord Goff explains the readiness of plaintiffs to seek to embrace and adapt the trust in pursuit of their "legitimate ambition" of ensuring that there are sufficient remedies to counter unjust enrichment.[65] By contrast, equity lawyers have been concerned not to distort trust principles in unjust enrichment cases.[66] Modern Irish law posits the common law personal restitutionary action and the equitable proprietary claim "for a declaration that certain monies were held in trust" as equally viable alternative paths to a remedy.[67]

Unlike the personal claims which the common law typically offers, as of right, to counter unjust enrichment, the proprietary remedies supplied by equity are discretionary. The equitable proprietary remedy, which gives the plaintiff an interest in the money or goods which he claims, is an attractive award. While interest on the sum repaid is available at common law,[68] it may be easier to obtain compound interest or profits[69] in equity.[70] Trust property can be pursued through the hands of third parties as far as purchasers for value without notice.[71]

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[64] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 705 (per Lord Browne-Wilkinson): the constructive trust is imposed "by reason of his unconscionable conduct".

[65] Ibid, at 685 (per Lord Goff): "certain equitable institutions, notably the constructive trust and the resulting trust, have been perceived to have the function of reversing unjust enrichment, they have sought to embrace those institutions within the law of restitution, if necessary moulding them to make them fit for that purpose."

[66] Ibid, at 685 (per Lord Goff): "the trust concept should not be distorted, and also that the practical consequences of its imposition should be fully appreciated."

[67] In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105, 202 (per Murray CJ).

[68] Bank of Ireland Trust Services Ltd v. Revenue Commissioners [2002] 4 IR 178; Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938, 947 (per Dillon LJ), relying on Woolwich Equitable Building Society v. Inland Revenue Commissioners [1992] 3 AER 737; [1993] AC 70.

[69] East Cork Foods Ltd v. O'Dwyer Steel Co Ltd [1978] IR 103, 112 (per Henchy J).

The types of trust which could be sought in unjust enrichment cases in an ultra vires context include resulting trusts and constructive trusts.[72] Both forms of trust arise by operation of law in the absence of the creation of an express trust by the parties.[73] Where the property to which the law deems the plaintiff entitled by equitable principles is mixed with other property, this may give rise to an equitable lien over the property to the value of the plaintiff's entitlement.[74]

13.2.1.1. The proprietary interest as the continuation of a pre-existing property right

One approach to proprietary rights and remedies predicates the acknowledgement of a proprietary interest on the prior existence of a property right, rejecting the view that proprietary claims can simply be invented by the courts.[75] This view was strongly endorsed in *Lister v. Stubbs*.[76] The defendant was guilty of taking bribes and liable to account, but this did not suffice to grant a proprietary remedy in the land and investments he bought with the proceeds. The court distinguished between personal obligations and proprietary rights.[77] Stirling J. considered the true test for

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[70] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938, 949 (per Dillon LJ); cf Sempra Metals Ltd v. Inland Revenue Commissioners [2008] 1 AC 561.

[71] See R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 310.

[72] See Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), pp. 105-106.

[73] See R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 309.

[74] Ibid, at 309.

[75] R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561; G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), pp. 11-12; see A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 64 et seq.

[76] Lister v. Stubbs (1890) 45 ChD 1; see R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561, 564-565.

[77] Lister v. Stubbs (1890) 45 ChD 1, 15.

the existence of a proprietary remedy to be whether the plaintiff had a beneficial interest in the property before the defendant's wrongful act.[78]

Grantham argues that, although prior ownership is a sufficient reason for a proprietary remedy, it does not therefore follow that it is the only possible justification.[79] Smith observes that equity "consistently, deliberately, indeed unashamedly" blurs the line between ownership and obligation.[80] More recent authorities have moved away from justifying proprietary rights as a continuation of prior interests.[81] The pre-existing right argument is stronger in England than in Ireland, which has wholeheartedly embraced the remedial constructive trust.[82]

13.2.2. The Resulting Trust as a Remedy

The resulting trust traditionally comes into being where one person unilaterally transfers property to another, apparently not intending it as a gift.[83] Its justification is the unexpressed but presumed intention of the payer that any property he transfers to the recipient, in the absence of reciprocal consideration, is not to be a gift but rather should be held for the benefit of the payer himself. There is a rebuttable presumption[84] that, in the absence of a relationship of a particular class between the parties,[85] the unilateral transfer of money or property is not a gift.[86] Like the

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[78] Ibid, at 10-11.

[79] R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561, 572.

[80] L. Smith, "Unravelling Proprietary Restitution" (2004) 40 CBLJ 317, 318.

[81] Cf In Re PMPA Garage (Longmile) Ltd. [1992] ILRM 337, 351-352.

[82] See below at 13.2.3.2.1: "The "new model" constructive trust in Ireland".

[83] See Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 689 (per Lord Goff).

[84] See McEneaney v. Shevlin [1912] 1 IR 32; H. Delany, "Equity and the Law of Trusts in Ireland", 4th ed. (Thomson Round Hall, Dublin, 2007), p. 174 et seq.

[85] See Hepworth v. Hepworth (1870) LR 11 Eq 10, cited by H. Delany, "Equity and the Law of Trusts in Ireland", 4th ed. (Thomson Round Hall, Dublin, 2007), p. 169.

[86] See Megarry J, In Re Vanderwell's Trusts (No. 2) [1974] Ch. 269, 294.

constructive trust, it arises by operation of law, but, in contrast to it, the purpose of the resulting trust is to give effect to intention, albeit presumed.[87] The alternative view has been advanced that the resulting trust is an express trust which the presumptions help create.[88] The distinction may be that resulting trusts "do not respond to wrongs"[89] whereas constructive trusts do.

The resulting trust was used in *Sinclair v. Brougham*[90] to allow the depositors to recover the money they had invested in the ultra vires banking business. Notwithstanding the "woolliness" of this part of the decision,[91] this was followed by many subsequent cases, as far as the Court of Appeal in *Westdeutsche v. Islington*.[92] Birks identifies the resulting trust as the most frequent proprietary claim outside unjust enrichment.[93]

O'Dell describes the successful proprietary claim as one of "two entries in the diary of legal madness"[94] in *Sinclair v. Brougham*.[95] According to Jones, given the

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[87] Air Jamaica Ltd v. Charlton [1999] 1 WLR 1399, 1412 (per Millett LJ); see also N.A.D. v. T.D. [1985] ILRM 153, 160 (per Barron J.).

[88] See P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 17, citing Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 708 and W.J. Swadling, "A New Role for Resulting Trusts" (1996) 16 Legal Studies 110.

[89] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 17.

[90] Sinclair v. Brougham [1914] AC 398.

[91] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 62.

[92] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938.

[93] P. Birks, "Recovering Value Transferred under an Illegal Contract" (2000) 1 TIL 155, 164.

[94] E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 33.

[95] Sinclair v. Brougham [1914] AC 398.

different reasoning employed by the judges in *Sinclair v. Brougham*,[96] it was never "clear why the equitable proprietary claim succeeded".[97] The *Sinclair v. Brougham*[98] resulting trust was deeply undermined in the House of Lords in *Westdeutsche v. Islington.*[99] The bank sought the declaration of a resulting trust in line with *Sinclair v. Brougham.*[100] Hobhouse J. accepted this argument, reasoning that in all cases of payments under void contracts, the equitable interest in the property never passed and it would be unconscionable for the recipient to retain it.[101]

However, the House of Lords overruled *Sinclair v. Brougham*[102] and rejected this approach, accepting instead the alternative personal remedy based on failure of consideration. Lord Goff emphasised that the resulting trust had been applied in *Sinclair v. Brougham*[103] to avoid the unacceptable outcome of the shareholders of the building society being enriched by the money which the customers of the ultra vires banking business had lodged.[104] Since implied contract theory precluded a restitutionary remedy, the court felt obliged to turn to equity to achieve "practical

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[96] Ibid.

[97] G. Jones, "Ultra Vires Swaps: The Common Law and Equitable Fall-Out" (1996) 55 CLJ 432, 434.

[98] Sinclair v. Brougham [1914] AC 398.

[99] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669.

[100] Sinclair v. Brougham [1914] AC 398.

[101] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 4 AER 890, 929 (per Hobhouse J.): "any payments made under a contract which is void ab initio, in the way that an ultra vires contract is void, are not contractual payments at all. They are payments in which the legal property in the money passes to the recipient, but in equity the property in the money remains with the payer."; Lord Browne-Wilkinson dismissed this reasoning as "meaningless" at ibid, [1996] AC 669, 706.

[102] Sinclair v. Brougham [1914] AC 398.

[103] Ibid.

[104] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 687 (per Lord Goff), citing Lord Dunedin, in Sinclair v. Brougham [1914] AC 398, 436.

justice", though the legal rationale for this was unclear.[105] This clutching at straws is no longer necessary. Though strongly critical of the *Sinclair v. Brougham*[106] resulting trust, Lord Goff chooses only to distinguish it.[107] He does not fully dismiss it as the majority does, because if the law were in future to develop in a way that prevented a personal claim in restitution, it would stand for the principle that a remedy should be granted.[108]

Lord Goff emphasises that the ultra vires payments case does not fall within the traditionally accepted sources of resulting trusts, such as voluntary payments or the purchase of joint property.[109] He also points to the "practical problems" of using a trust as a remedy, both because of questions as to whether the recipient must fulfil the duties of a trustee and the problem of excluding the usual defences available to a personal claim.[110] Lord Browne-Wilkinson argues that attempts to offer the plaintiff a right of recovery through the resulting trust could lead to unjust results, especially in relation to innocent third parties.[111] Lord Goff[112] and Lord Browne-Wilkinson[113] both argue that a trust only arises when the conscience of the person receiving the money is affected. Since Islington's conscience was not affected when it received the money, it could only have been affected later, when it learned the contract was

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[105] G. Jones, "Ultra Vires Swaps: The Common Law and Equitable Fall-Out" (1996) 55 CLJ 432, 434.

[106] Sinclair v. Brougham [1914] AC 398.

[107] However, he observed, "the temperature of the water must be regarded as decidedly cold" for the remedial use of the resulting trust - Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 689 (per Lord Goff).

[108] Westdeutsche Landesbank Girozentrale v. Islington BC [1996] AC 669, 688 (per Lord Goff).

[109] Ibid, at 689 (per Lord Goff).

[110] Ibid, at 690 (per Lord Goff): "the duty to account for profits from the trust property; the inability of the payee to rely upon the defence of change of position; the absence of any limitation period; and so on."

[111] Ibid, at 703-704 (per Lord Browne-Wilkinson).

[112] Ibid, at 689 (per Lord Goff).

[113] Ibid, at 705 (per Lord Browne-Wilkinson).

ultra vires. However, by that time, the money was no longer traceable, so without identifiable trust property, a trust could not be created.

The rejection of the *Sinclair v. Brougham* trust avoided the risk that ultra vires creditors would have a better claim to repayment than valid ones.[114] However, Jones points out that the distinction between resulting and constructive trusts, "becomes even more blurred"[115] after *Westdeutsche*,[116] if both depend on the conscience of the recipient being affected. Likewise, the Irish cases which do not insist on unconscionability for constructive trusts also erode the distinction.

The Irish case of *In Re PMPA Garage (Longmile) Ltd*[117] endorsed an approach similar to that of Hobhouse J. in *Westdeutsche*. Murphy J. explicitly approves the *Sinclair v. Brougham*[118] resulting trust proposition.[119] He presents it as "properly" accepted by both sides that the maker of an invalid loan is entitled in rem to the monies lent, as they "were never validly lent or advanced by the PMPS and remained its property at all times".[120] It should be noted however that this judgment predates the House of Lords' decision in *Westdeutsche*,[121] and that the status of the resulting trust would be open to reconsideration in future Irish cases. Not only does the House of Lords in *Westdeutsche*[122] dismiss resulting trust logic, but Lord Browne-Wilkinson also condemns the reasoning in *Chase Manhattan Bank N.A. v.*

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[114] G. Jones, "Ultra Vires Swaps: The Common Law and Equitable Fall-Out" (1996) 55 CLJ 432, 434.

[115] Ibid, at 435.

[116] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938.

[117] In Re PMPA Garage (Longmile) Ltd. [1992] ILRM 337.

[118] Sinclair v. Brougham [1914] AC 398.

[119] In Re PMPA Garage (Longmile) Ltd. [1992] ILRM 337, 352.

[120] Ibid, at 351-352.

[121] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938.

[122] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669.

Israel-British Bank (London) Ltd[123] that a person who makes a mistaken payment "retains an equitable property in it".[124] Lord Browne-Wilkinson questions how this could be where there was no prior equitable interest.[125]

If the resulting trust as a remedial measure is in decline, *Westdeutsche*[126] leaves open the possibility that in other cases, there might be question of a constructive trust, depending on the knowledge of the recipient. Lord Browne-Wilkinson indicates that the remedial constructive trust, though not yet a part of English law, "may provide a more satisfactory road forward."[127] It could apply where the recipient "knowingly retains property of which the plaintiff has been unjustly deprived."[128]

13.2.3. The Constructive Trust

The constructive trust arises, not because its creation reflects the intention of the parties, but because the circumstances are such that the law imposes a trust on the legal owner or recipient of property. This formulation indicates the fundamental difficulty in defining it. As Birks highlights, the problem is the lack of precision as to the events which cause its imposition. He points out that "the word "constructive" tells us what the event is not".[129] The causative event that gives rise to a

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[123] Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd. [1981] Ch. 105.

[124] Ibid, at 119 (per Goulding J.).

[125] Westdeutsche Landesbank Girozentrale v. Islington BC [1996] 2 WLR 802 (per Lord Browne-Wilkinson).

[126] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938.

[127] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 716 (per Lord Browne-Wilkinson).

[128] Ibid, at 716 (per Lord Browne-Wilkinson).

[129] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), pp. 16-17.

constructive trust is generally a wrong, as opposed to unjust enrichment.[130] Nor does it necessarily reflect the continuation of a plaintiff's pre-existing property right.[131]

The archetypal example, illustrating the role of justice and good conscience, is that a constructive trust will be created to prevent a person from benefiting from the proceeds of fraud. For example, a constructive trust will be deemed to arise where a person receives trust property in breach of trust with either actual or constructive notice of the breach.[132] This gives rise to a specific species of constructive trust, known as the *Belmont* principle, in cases where company property is misapplied.[133] The institutional *Belmont* trust is distinguished from the "new model" or remedial constructive trust,[134] which arises where there was no previous trust relationship, and which has been the subject of dramatic evolution in this jurisdiction over the past two decades.[135] Birks asserts that in some jurisdictions, such as Canada, "remedial" equates to "discretionary".[136]

13.2.3.1. The institutional trust, knowing receipt and the Belmont principle

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[130] Ibid, pp. 35-36, 39-43; cf L. Smith, "Unravelling Proprietary Restitution" (2004) 40 CBLJ 317, 323.

[131] R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561, 562: "the courts do recognize proprietary claims where the plaintiff has not retained an interest in the asset".

[132] See eg International Sales v. Marcus [1982] 3 AER 551; Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547 (per Budd J.), p. 107: "In the first the constructive trustee is already a trustee and the trust arises because he has derived some benefit from his trusteeship to which he is not entitled."

[133] See Belmont Finance Corporation v. Williams Furniture Ltd (No. 2) [1980] 1 AER 393.

[134] See R. Goode, "Property and Unjust Enrichment", in A. Burrows (ed), "Essays on the Law of Restitution" (Clarendon, Oxford, 1991), p. 215, at 218.

[135] See Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), pp.107-108.

[136] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 36.

Firstly, something resembling a constructive trust may be imposed where company funds are misapplied. This arises from the fiduciary relationship which exists between company management and the company. It is known as the *Belmont* principle, after *Belmont Finance Corporation Ltd v. Williams Furniture Ltd (No. 2)*[137] and has been applied in the Irish Supreme Court in *Re Frederick Inns Ltd.*[138]

Belmont[139] arose out of a complex scheme for the acquisition of the plaintiff company, which essentially involved the cost of the acquisition being financed by the target company itself though its acquisition at an inflated price of the purchaser's subsidiary. Belmont went into liquidation and its receiver sued the other companies involved in the transactions, alleging that they were liable as constructive trustees. The Court of Appeal accepted this argument. Buckley L.J. approves the general principle stated by Lord Selborne L.C. in *Barnes v. Addy.*[140]

Applying the general trust framework to the limited company, the directors, who have fiduciary duties to the company, are treated like trustees.[141] Consequently, if the directors, in breach of their fiduciary duties, misapply the company's funds so they pass to someone who has either actual or constructive knowledge of the breach, that person cannot conscientiously retain them and holds them on a constructive trust for the company.[142] The focus is on the conscience of the recipient, which is affected by his knowledge of the breach of trust or fiduciary duty. The *Belmont* institutional trust principle applies where company directors breach their fiduciary

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[137] Belmont Finance Corporation Ltd v. Williams Furniture Ltd (No. 2) (1980) 1 AER 393.

[138] In Re Frederick Inns [1994] 1 ILRM 387.

[139] Belmont Finance Corporation Ltd v. Williams Furniture Ltd (No. 2) [1980] 1 AER 393.

[140] Barnes v. Addy (1874) LR 9 Ch. App 244, 251-2 (per Selborne LC): "If a stranger to a trust (a) receives and becomes chargeable with some part of the trust fund or (b) assists the trustees of a trust with knowledge of the facts in a dishonest design on the part of the trustees to misapply some part of a trust fund, he is liable as a constructive trustee.", approved in Belmont Finance Corporation Ltd v. Williams Furniture Ltd (No. 2) [1980] 1 AER 393, 405 (per Buckley LJ).

[141] Belmont Finance Corporation Ltd v. Williams Furniture Ltd (No. 2) [1980] 1 AER 393, 405 (per Buckley LJ); cp L.S. Sealy, "The Director as Trustee" [1967] CLJ 83.

[142] Ibid, at 405 (per Buckley LJ).

duties and as a result, corporate assets come into the possession of a third party. The recipient, provided he has either actual or constructive knowledge of the breach of trust, is liable in equity to return the assets, which "he cannot conscientiously retain".[143]

The second ground on which a similar remedy might exist is where a person is a party to the dishonest design and assists the breach of trust, even if he does not himself receive the proceeds.[144] According to Lord Goff, "wilfully shutting his eyes to the truth" of the transaction may suffice to implicate him.[145] However, liability to account as a constructive trustee may better be viewed as a personal remedy, not a true trust.[146]

The *Belmont* principle may be of general use in recovering ultra vires payments, which are also frequently breaches of directors' duties.[147] It applies when the directors exercise the company's powers for an improper purpose or in breach of the articles.[148] Blayney J. explicitly adopts the Belmont constructive trust in *Frederick Inns*.[149] If, as is suggested in his decision, the courts will deem all excesses of capacity to constitute a breach of duty, then the recipients will almost always be constructive trustees. Blayney J. fixed the recipients with constructive knowledge of the incapacity on the basis that the memorandum is a public document.[150]

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[143] Ibid, at 405 (per Buckley LJ).

[144] Ibid, at 405 (per Buckley LJ).

[145] Ibid, at 412-3 (per Lord Goff).

[146] See below at 14.2.2: "Knowing Assistance of Breach of Trust".

[147] If not always: L. MacCann, "Directors' Fiduciary Duties – Part 1" (1991) 9 ILT 80, 80.

[148] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1986] Ch. 246, 297-298 (per Slade LJ); ibid, 303 (per Browne-Wilkinson LJ).

[149] In Re Frederick Inns [1994] 1 ILRM 387, 398-399; see also Ulster Factors Ltd v. Entonglen Ltd (High Court, Unreported, 21st February 1997, Laffoy J.).

[150] In Re Frederick Inns Ltd [1994] 1 ILRM 387, 399.

The *Belmont* principle is specifically applicable to corporate assets, which makes it potentially very useful in ultra vires cases. The second type of constructive trust is the "new model" or remedial constructive trust, which can be imposed more widely in circumstances where there was no pre-existing trust. It is primarily the latter which has been the subject of evolution and debate in recent years.[151]

13.2.3.2. The "new model" or remedial constructive trust

In contrast to the accepted *Belmont* constructive trust, the "new model" or remedial constructive trust is controversial. It runs directly counter to the widespread view that proprietary claims must result from pre-existing property rights.[152] The remedial constructive trust is more flexible than either the institutional constructive trust or the resulting trust, in so far as it leaves a greater role for judicial discretion, and consequently, perhaps, more dangerous.[153] Birks describes the remedial constructive trust as having "no roots".[154] He further argues that this device invites the courts to exercise a discretion which they do not possess "to amend or contradict the law of property".[155]

Yet the constructive trust has existed for a long time, including the principle of *Hallett's Case*.[156] Lord Denning M.R. favoured the use of the constructive trust

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[151] It is "the biggest challenge to the orthodoxy" - E. O'Dell, "Fermat's Last Theorem and the Context of Proprietary Remedies" (2005) 19(2) TLI 97, 100.

[152] See R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561, 568.

[153] Westdeutsche Landesbank Girozentrale v. Islington BC [1996] 2 WLR 802 (per Lord Browne-Wilkinson): "the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court."

[154] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 37.

[155] Ibid, at p. 38.

[156] Hallet's Case (1880) 13 Ch. D. 696; see R.A. Wright, "Sinclair v. Brougham" (1936-1938) 6 CLJ 305, 309.

"wherever justice and good conscience require it."[157] This formulation reflects the underlying rationale, though it does raise further questions as to the basis and extent of the courts' jurisdiction to impose such trusts. Defining its scope is difficult, as the rules which have developed are "practical and just but [...] cannot claim scientific precision".[158]

Lord Denning propounded a strikingly flexible and broad view of the constructive trust in the leading case of *Hussey v. Palmer.*[159] He presented it as a liberal process based on principles of equity, justice and good conscience.[160] This formulation conjures the spectre of palm tree justice. Given that the imposition of a constructive trust in place of a personal remedy entails significant ramifications for the parties and for others, in the absence of any agreement or intention on their part, it is clear that the parameters of the doctrine need to be clearly defined. It is necessary to move beyond a general and imprecise notion that constructive trusts will arise where it seems fair, to establish definite and unambiguous legal rules to delimit this.

It is difficult to develop a principled test as to when a constructive trust should be inferred. Some commentators advocate looking at the case law for the fact scenarios which have led to constructive trusts in the past as a starting point rather than attempting to prescribe an exhaustive list of causes.[161] *Hussey v. Palmer*[162] is the place to start. In *Hussey v. Palmer*,[163] the plaintiff had sold her house and moved in

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[157] Hussey v. Palmer [1972] 3 AER 744, 747 (per Lord Denning MR); see also N.A.D. v. T.D., [1985] ILRM 153 (per Barron J.).

[158] Dublin Corporation v. Building and Allied Trade Union Union (High Court, Unreported, 6 March 1996, Budd J.), p. 117.

[159] Hussey v. Palmer [1972] 3AER 744, 747.

[160] Ibid, at 747: "By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity".

[161] See eg H. Delany, "Equity and the Law of Trusts in Ireland", 4th ed. (Thomson Round Hall, Dublin, 2007), p. 212; Pettkus v. Becker [1980] 2 SCR 834 (per Dickson J.).

[162] Hussey v. Palmer [1972] 3AER 744, 747.

[163] Ibid, at 747.

with her daughter and son-in-law, the defendant. She had paid for the construction of an extension to the defendant's house, on the assumption that she would continue to live there. Following a deterioration in relations, the plaintiff moved out, and sought either to recover the money she had spent on his house or to acquire a beneficial interest in it. The plaintiff ultimately won in the Court of Appeal, where Lord Denning favoured an expansive view of constructive trusts. He suggested the test that "the defendant cannot conscientiously keep the property for himself alone."[164]

The seeds of Lord Denning's new model constructive trust did not fall on fertile ground in their own jurisdiction.[165] To date, English law has not recognised the new model constructive trust. From the perspective of the mid-1990s, there was little support for the idea that it might.[166] Then, there came influential, if cautious, support for the possibility of the English law developing a remedial constructive trust.[167] Although he views it as unavailable on the facts of *Westdeutsche Landesbank Girozentrale v. Islington LBC*,[168] and it was not argued,[169] Lord Browne-Wilkinson indicates his support for the introduction of the remedial constructive trust into English law in an appropriate case.[170] In contrast to the resulting trust, which can go too far and prejudice innocent third parties, Lord Browne-Wilkinson proposes that the remedial constructive trust "may provide a

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[164] Ibid, at 747.

[165] Cf Eves v. Eves (1975) 1 WLR 1338.

[166] See J. Mee, "Palm Trees in the Rain - New Model Constructive Trusts in Ireland" (1996) 1(1) CPLJ 9.

[167] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, [1996] 2 WLR 802, noted by G. Jones, "Ultra Vires Swaps: The Common Law and Equitable Fall-Out" (1996) 55 CLJ 432.

[168] Ibid.

[169] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, 685 (per Lord Goff); ibid, 703 (per Lord Browne-Wilkinson).

[170] G. Jones, "Ultra Vires Swaps: The Common Law and Equitable Fall-Out" (1996) 55 CLJ 432, 435.

more satisfactory road forward" to take account of third parties' interests and possible defences.[171] On this basis, it is possible that English law might eventually accept the "new model" constructive trust.

However, other authorities are hostile to its development. In particular, *In Re Polly Peck International (No. 2): Marangos Hotel v. Stone*[172] shows that the English courts are particularly reluctant to introduce and impose the constructive trust in a way which would disturb the distribution of the assets of an insolvent company in the manner prescribed by Parliament.[173] Despite resistance in England and New Zealand,[174] the new model constructive trust has been enthusiastically endorsed in Canada and Ireland.

13.2.3.2.1. The "new model" constructive trust in Ireland

In Ireland, the "new model" constructive trust has been applied liberally and flexibly.[175] A number of authorities applying the constructive trust predate the 1990s, but it is since then that it has unquestionably become firmly embedded in this jurisdiction.[176] The more recent cases tend towards a remarkably extensive application of the device, which may go further than can be justified in principle. In *N.A.D. v. T.D.*, Barron J. articulates the orthodox view of the constructive trust.[177]

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[171] Westdeutsche Landesbank Girozentrale v. Islington BC [1996] 2 WLR 802 (per Lord Browne-Wilkinson).

[172] In Re Polly Peck International (No. 2): Marangos Hotel v. Stone [1998] 3 AER 812.

[173] Ibid (per Mummery, Nourse LJJ).

[174] Fortex Group Ltd v. MacIntosh [1998] 3 NZLR 171 (CA).

[175] Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), pp. 119, 120: Budd J. cites In Re Irish Shipping Ltd (In Liquidation) [1986] ILRM 518 and HKN Invest OY v. Incotrade PVT Ltd. [1993] 3 IR 152; In Re Frederick Inns Ltd [1991] ILRM 582, 591-592.

[176] eg HKN Invest OY v. Incotrade PVT Ltd. [1993] 3 IR 152, John Kelly v. Nellie (otherwise Ellen) Cahill and Michael Cahill Junior [2001] 2 ILRM 205.

[177] N.A.D. v. T.D. [1985] ILRM 153, 160 (per Barron J.).

According to this statement, the "essential prerequisite" for the imposition of a constructive trust is,

> "an element in the conduct of the person upon whom the trust is imposed which would make it inequitable for him to assert his legal rights." [178]

There must be something in the conduct of the defendant at the time the trust is imposed.[179] The standard at which this conduct is measured will depend on the circumstances, including the value transferred.[180]

13.2.3.2.2. Trusts in the Irish courts – but are they resulting or constructive?

In principle, the difference between resulting and constructive trusts relates to the idea that resulting trusts are founded on presumed intention, whereas constructive trusts disregard intention and target inequitable conduct. Lord Denning on the other hand downplayed the distinction.[181] In the past, although the courts have always acknowledged the distinct foundations of the resulting and constructive trusts, the difference between them was not considered important and they were often mentioned in the same breath. It is true that, once a trust is deemed to exist, it does not matter much in terms of its effect whether it is a resulting or a constructive trust.[182]

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[178] Ibid, at 161 (per Barron J.).

[179] Ibid, at 160 (per Barron J.): "its imposition is dependent upon the conduct of the person upon whom the trust is imposed and prevents him acting in breach of good faith".

[180] Ibid, at 160 (per Barron J.).

[181] Hussey v. Palmer [1972] 3AER 744, 747 (per Lord Denning MR): "this is more a matter of words than anything else. The two run together."

[182] H. Delany, "Equity and the Law of Trusts in Ireland", 4th ed. (Thomson Round Hall, Dublin, 2007), p. 209.

A blurring of the distinction between resulting and constructive trusts is evident in practice in the line of cases where cohabitees have sought beneficial interests in family property to which they contributed.[183] The early cases included *Heavey v. Heavey*[184] and *C v. C*[185] in the 1970s. Finlay P. set out the legal principles in *W v. W.*[186] These cases were decided on the basis of either resulting or constructive trusts: there is an element of uncertainty as to which was employed. Mee views the early cases as providing "some degree of support" for a remedial constructive trust, though this aspect is unclear.[187] The Supreme Court approved the line of jurisprudence in *McC v. McC*[188] and *N(E) v. N(R)*,[189] appearing to favour the resulting trust over the constructive trust.[190] In *N.A.D. v. T.D.*,[191] Barron J. sought to reintroduce the distinction and reconcile the authorities on a logical basis.[192] The case involved a claim by a wife who had contributed towards the construction of the family home on land acquired by her husband. Barron J. explains the authorities on the basis that resulting trusts are used where the contribution is to the acquisition of property, and constructive trusts, where the contribution is to improvements.[193]

More recently, the growth of the remedial constructive trust has illuminated the difference and this new model has come to overshadow the resulting trust. With the

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[183] see eg. Heavey v. Heavey (1977) ILTR 111 1, 3 (per Kenny J); also J. Mee, "The End of the Affair: The Equitable Rights of Cohabitees" (2001) 6 (2) CPLJ 43.

[184] Heavey v. Heavey (1974) 111 ILTR 1.

[185] C v. C [1976] IR 254.

[186] W v. W [1981] ILRM 202.

[187] J. Mee, "Palm Trees in the Rain - New Model Constructive Trusts in Ireland" (1996) 1(1) CPLJ 9.

[188] McC v. McC [1986] ILRM 1.

[189] N(E) v. N(R) [1992] 2 IR 116.

[190] J. Mee, "Palm Trees in the Rain - New Model Constructive Trusts in Ireland" (1996) 1(1) CPLJ 9, pointing to BL v. ML [1992] 2 IR 77 and N(E) v. N(R) [1992] 2 IR 116.

[191] N.A.D. v. T.D. [1985] ILRM 153.

[192] Ibid, at 159 (per Barron J.).

[193] Ibid, at 159 (per Barron J.).

decline of the resulting trust as a remedial device,[194] the stage is set for the constructive trust to replace it.

13.2.3.2.3. Proprietary estoppel as a form of constructive trust

The Irish decisions offer another controversial approach related to the constructive trust. Costello J. in *Re J.R.*[195] indicates that proprietary estoppel is a form of constructive trust. Proprietary estoppel is limited, in that it applies only to land.[196] The deceased ward of court owned a house, where he resided with the respondent, his partner. He had induced her to come and live with him by assuring her that she would be able to live there for the rest of her life, and later, that she would inherit. When the ward's health deteriorated and his committee sought the sale of the house to meet his expenses, the respondent argued that she had an interest in the property from acting in reliance on his representations.

Costello J. discussed promissory estoppel, which could not create any interest in land[197] and proprietary estoppel, which could create an interest, as shown by the English authorities of *Greasley v Cooke*[198] and *In Re Basham*,[199] where a person had acted to their detriment in reliance on an assurance that they could live in a house, or would inherit it. This moves away from a narrow view that the person must have expended money in reliance on the assurance[200] and aligns it more closely with the constructive trust. Costello J. views proprietary estoppel as a form of constructive

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[194] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669.

[195] In Re J.R., a Ward of Court [1993] ILRM 657.

[196] J. Mee, "Lost in the Big House: Where Stands Irish Law on Equitable Estoppel?" (1998) 33 Ir. Jur. 187, 199, citing Western Fish Products Ltd v. Penwith DC [1981] 2 AER 204.

[197] Costello J. cites Maharaj v. Chand [1986] AC 898 as an example of the application of promissory estoppel.

[198] Greasley v. Cooke [1980] 1 WLR 1306.

[199] In Re Basham [1987] 1 All ER 405.

[200] See A. Keating, "A Proprietary Estoppel or in the Alternative a "New Model" Constructive Trust" (2003) 8 (1) CPLJ 9.

trust which arises where a person is led to believe that they will be given a right in the future, and equity deems it unconscionable for the person who makes to assurance to rely on his legal rights.[201] However, there may be difficulties in treating proprietary estoppel as a constructive trust because proprietary estoppel applies in those cases where there is expenditure in reliance without the requirement of misconduct, which ought to be present for a constructive trust.[202]

In *Re J.R.*,[203] the respondent was entitled to claim a promissory estoppel, from the time she moved in with the ward, which could be satisfied by the purchase of reasonable accommodation in which she could live, but there was no proprietary estoppel or constructive trust because the ward had not intended to give her an immediate interest. Since constructive trusts are not based on intention, the more principled reason for rejecting the constructive trust might be said to have been the absence of any act on the part of the ward which offended good conscience.

In *Reidy v McGreevy*,[204] the plaintiff was a farmer's son. When the father died, he gave rights over certain lands to the plaintiff's sisters. The plaintiff then sought to be reimbursed for the years he had worked on the land for his father, on the understanding that the power of appointment would be exercised in his favour. In his decision, Barron J. referred to Costello J.'s judgment in *Re J.R.*[205] Barron J. summarised the law as that,

> "Where it would be unconscionable to disregard a promise such as that alleged here, the Court will declare the existence of a constructive trust."[206]

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[201] In Re J.R., a Ward of Court [1993] ILRM 657, citing In Re Basham [1987] 1 All ER 405.

[202] Eg Smyth v. Halpin [1997] 2 ILRM 38.

[203] In Re J.R., a Ward of Court [1993] ILRM 657.

[204] Reidy v. McGreevy (High Court, Unreported, 19 March 1993, Barron J.).

[205] In Re J.R., a Ward of Court [1993] ILRM 657.

[206] Reidy v. McGreevy (High Court, Unreported, 19 March 1993, Barron J.), p. 5 (002619).

This links a promise, not necessarily made by the defendant, to the imposition of a constructive trust. Barron J. further indicates that the remedy granted is discretionary and varies according to the circumstances.[207] Mee asserts that *In Re J.R., a Ward of Court*[208] blurs the boundaries between estoppels, "by allowing promissory estoppel to be used as a sword",[209] though the judge seems unaware of potential controversy.[210] He consequently criticises it as "another example of an Irish judge reaching a conclusion which he regarded as just without paying much attention to strict legal doctrine."[211]

13.2.3.2.4. Liberal use of the constructive trust

Though the boundaries of the constructive trust are blurred, it is clear that the remedial constructive trust is definitively part of Irish law. Furthermore, the liberal attitude of the Irish courts to the constructive trust has been evident from an early date. In the 1978 case of *East Cork Foods Ltd v. O'Dwyer Steel Co Ltd*,[212] Henchy J. stated obiter[213] that the respondent, who had paid compensation when it emerged that it was not liable, would be able to recover the payment under a constructive trust. Henchy J. characterises the claimant as being at fault because it was held liable in the tort action. He also emphasises that the claimant should have been aware, once the appeal was filed, that it might have to repay some of the money, and had a "fiduciary responsibility" for it.

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[207] Ibid, at p. 5 (002619): "depending upon the facts, the Plaintiff may be entitled to an estate in the property; to a charge over it; or to nothing".

[208] In Re J.R., a Ward of Court [1993] ILRM 657.

[209] J. Mee, "Lost in the Big House: Where Stands Irish Law on Equitable Estoppel?" (1998) 33 Ir. Jur. 187, 207.

[210] Ibid, at 219.

[211] Ibid, at 219.

[212] East Cork Foods Ltd v. O'Dwyer Steel Co Ltd [1978] IR 103.

[213] Because the only issue of contention related to the payment of interest.

In 1986, in *Re Irish Shipping Ltd (In Liquidation)*,[214] Carroll J. also applied a broad conception of the constructive trust. Korean Exchange Bank had unwittingly made a duplicate payment to the company, which it lodged in its account with Citibank, before entering liquidation. The payer claimed an equitable right to trace the mistaken payment. The recipient sought to set off this sum against the monies owed to it by the company, arguing that, although the company held the money on a constructive trust for the payer, the defendant bank, having no knowledge of the trust and acting in good faith, was not bound by it. Carroll J. held that this principle could not apply in the case of a constructive trust as the rules on constructive trusts should not serve to perpetrate an injustice.[215] Neither of these authorities involved unconscionable conduct on the part of the legal owner of the asset as a precondition to the imposition of the constructive trust. In this respect, they set the tone for the subsequent Irish cases.

Budd J.'s decision in *Dublin Corporation v. Building and Allied Trade Union*[216] seems to represent a more orthodox view of constructive trusts and is consistent with the principles enunciated by Lord Browne-Wilkinson in *Westdeutsche v. Islington*.[217] The corporation argued on the alternative bases of unjust enrichment and a constructive trust that the defendant union should repay the money which it received on the understanding that it would reinstate its building. Budd J. considered that the failure of the union to disclose to the corporation that it had already demolished the building prior to the agreement that it would be given funds

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[214] In the Matter of Irish Shipping Ltd (In Liquidation) [1986] ILRM 518, see also Gill, "Constructive Trusts and the Recovery of Money Paid under Mistakes of Fact – A Novel Irish Development" (1986) 4 ILT 97.

[215] In the Matter of Irish Shipping Ltd (In Liquidation) [1986] ILRM 518, 522 (per Carroll J.): "If the concept of a constructive trust is an equitable device for achieving justice, it should not work an injustice."; this was approved by Budd J., Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), pp. 110-111.

[216] Dublin Corporation v. Building and Allied Trade Union [1996] 2 ILRM 547.

[217] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669.

to reinstate it was unconscionable and grounded a constructive trust.[218] O'Dell suggests Budd may have consciously stressed the union's awareness at the time of the transfer to ensure that the law conforms to the principles set out by Lord Browne-Wilkinson in *Westdeutsche,*[219] which require misconduct at the same moment as an identifiable trust property exists.[220] Budd J. concedes that, "the case is on the outer margins of the circumstances in which the law will imply a constructive trust".[221] If Budd J. were to conduct a survey of the Irish authorities today, he may be surprised: by virtue of applying an unconscionability requirement, this is one of the more conservative decisions.

In *HKN Invest OY v. Incotrade PVT Ltd*,[222] Costello J., in the High Court, declared that there was a constructive trust. The defendant company was set up by fraudsters, purportedly as a loan brokerage business. The plaintiffs dealt with the defendant and signed an agreement whereby they would pay it money in advance. This agreement was signed before the defendant company was incorporated, and the plaintiff made payments under it both before and after the defendant's incorporation. As it emerged, these payments were lodged to the personal accounts of the promoters rather than to the company itself. The fraudulent individuals behind the defendant company fled the jurisdiction and the company's angry creditors.[223] The plaintiff claimed money in the fraudsters' personal accounts. The liquidator opposed this claim on the basis that the money in question belonged to the company and should therefore be available for its creditors.

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[218] Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), pp. 114, 120, 123.

[219] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] 2 WLR 802, noted by G. Jones, "Ultra Vires Swaps: The Common Law and Equitable Fall-Out" (1996) 55 CLJ 432.

[220] E. O'Dell, "Unjust Enrichment and the Remedial Constructive Trust" (2001) 8(1) DULJ 71.

[221] Dublin Corporation v. Building and Allied Trade Union (High Court, Unreported, 6 March 1996, Budd J.), p. 119.

[222] HKN Invest OY v. Incotrade PVT Ltd. [1993] 3 IR 152.

[223] Ibid, at 155 (per Costello J.): they left "a number of angry creditors and a cluster of legal problems."

Costello J. relies on equity, and specifically the model of the constructive trust, to determine the crucial issue of the beneficial ownership of the money.[224] He indicates that the proprietary remedy of a constructive trust will arise either if the recipients were under a fiduciary duty to the owner company or if they received the property as constructive trustees.[225] There was no fiduciary relationship between the promoters and the company prior to incorporation, so the *Belmont* principle could only apply to those sums received after the company was incorporated.[226] Nonetheless, Costello J. rules that company promoters receive funds under pre-incorporation contracts as constructive trustees for the company.[227] The fact that the promoters never intended to pass the money on to the company constituted a breach of trust. Between the *Belmont* principle and the pre-incorporation constructive trust, the entire sums in the bank accounts were held on trust for the defendant company[228] and the liquidator was entitled to them.[229]

Costello J. enumerates the key points governing the remedial constructive trust. The constructive trust is created by operation of law without any reference to the intention of the parties.[230] Costello J. states that it arises "when the circumstances render it inequitable for the legal owner of property to deny the title of another to it".[231] The law intervenes when "in equity and good conscience" another person should have rights to the property.[232] According to this statement of the law, the

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[224] Ibid, at 161 (per Costello J.).

[225] Ibid, at 161 (per Costello J.).

[226] Ibid, at 161-162 (per Costello J.).

[227] Ibid, at 163 (per Costello J.).

[228] Ibid, at 163 (per Costello J.).

[229] Ibid, at 164 (per Costello J.).

[230] Ibid, at 162 (per Costello J.).

[231] Ibid, at 162 (per Costello J.).

[232] Ibid, at 162 (per Costello J.).

constructive trust could have very wide operation.[233] This reasoning does not emphasise the requirement that the conscience of the recipient be affected. It may be that, although the dicta appear to relegate the importance of unconscionability, Costello J. was influenced by the blatantly dishonest conduct of the promoters and did not intend in omitting it to remove the requirement for misconduct on the part of the legal owner.

There was further endorsement of expansive constructive trust principles in *Murray v. Murray*.[234] Barron J. imposed a trust in the absence of misconduct or any factor affecting the conscience of the legal owner. The defendant had bought a house, but his deceased sister lived in it and paid the mortgage. The defendant had sought to transfer legal title to his sister, but she refused. Her nephew sought to establish that she had a beneficial interest in the property, and Barron J. accepted this argument on the basis of a constructive trust. A resulting trust could not be used because the facts rebutted any presumption that the contributor intended to acquire ownership. Mee criticises the use of the constructive trust to circumvent this obstacle.[235]

Following *Hussey v. Palmer*,[236] Barron J. confidently asserts that a constructive trust is readily available where it would be "unjust and unconscionable" not to allow it and where equity and fairness support it.[237] These statements may be criticised as

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[233] M. Hourican, "The Introduction of "New Model" Constructive Trusts in this Jurisdiction" (2001) 6(2) CPLJ 49, 49: it "arguably went further in the direction of a new model constructive trust as envisaged by Lord Denning."

[234] Murray v. Murray [1996] 3 IR 251.

[235] J. Mee, "Palm Trees in the Rain - New Model Constructive Trusts in Ireland" (1996) 1(1) CPLJ 9: "What is unfortunate about the decision in *Murray* is that, rather than face up to the central flaw in the argument for a conventional resulting trust, Barron J. simply moved the goalposts to a muddier playing pitch."

[236] Hussey v. Palmer [1972] 3 AER 744.

[237] Murray v. Murray [1996] 3 IR 251: it is "quite clear that the law will impose a constructive trust in all circumstances where it would be unjust and unconscionable not to do so [...] in certain circumstances where equity so requires, a debt may well be secured by the device of a constructive trust on the property created by the money involved. [...] What I have to consider is what is fair and

overly vague, and permitting an unconfined judicial discretion. Although Barron J. uses the word "unconscionable", it is not used to characterise the conduct of the legal owner, but rather, to say that it would be unjust or unconscionable for the plaintiff to be denied a remedy. This casts doubt on this use of the constructive trust, because the proper alternative to a proprietary remedy is not no remedy, but a personal one.

Kelly v. Cahill[238] is a critical Irish case which explicitly applies the "new model" constructive trust. It does so in a liberal manner which either ignores or threatens the fundamental criterion of unconscionability.[239] A deceased testator had intended to change his will to leave land to his wife instead of his nephew. On solicitor's advice, he attempted to achieve his aim by transferring the land into his and his wife's joint ownership. This transfer was ineffective, though the deceased had done all in his power to carry it out. The executor asked the court whether the nephew was a constructive trustee of the remainder of the estate for the benefit of the widow. Adopting the reasoning presented in Keane's extrajudicial writing,[240] approving *Hussey v. Palmer,*[241] and quoting also from *HKN Invest OY v. Incotrade*,[242] Barr J. was prepared to accept that the constructive trust formed part of Irish law and proceeded to rule that the present circumstances warranted the application of the doctrine.

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whether it would be unconscionable to deny the deceased any part of the beneficial interest in the premises and, if so, what share therein."

[238] John Kelly v. Nellie (otherwise Ellen) Cahill and Michael Cahill Junior [2001] 2 ILRM 205.

[239] See criticism in O'Dell, "Unjust Enrichment and the Remedial Constructive Trust" (2001) 8(1) DULJ 71; M. Hourican, "The Introduction of "New Model" Constructive Trusts in this Jurisdiction" (2001) 6(2) CPLJ 49, 50: its "significance cannot be overestimated".

[240] R. Keane, "Equity and the Law of Trusts in the Republic of Ireland" (Butterworths, Dublin, 1988), approved by Barr J., in Kelly v. Cahill [2001] 2 ILRM 205, 209-210.

[241] Hussey v. Palmer [1972] 3 AER 744.

[242]HKN Invest OY v. Incotrade PVT Ltd. [1993] 3 IR 152, 162.

Barr J. makes it quite clear that the judgment expressly incorporates the new model, remedial constructive trust into Irish law.[243] However, the express recognition of the new model constructive trust in 2001 is less monumental considering that the Irish courts had, for a quarter of a century, been applying something that, if it was not a new model constructive trust, was barely distinguishable from one.[244]

13.2.3.2.5. The constructive trust as a mechanism against unjust enrichment

In *Kelly v. Cahill*,[245] Barr J. relies on Keane's description of the constructive trust.[246] Keane refers to the increasing interest in the "new model" constructive trust in other jurisdictions and presents it as a remedy which can arise in circumstances where it is appropriate to prevent the unjust enrichment of the recipient of property. This view is easily accepted in so far as it distinguishes between the constructive trust, imposed by the courts in the interests of justice, and other trusts, which are based on intent, be it express or presumed. However, Keane's description, as quoted by Barr J. in *Kelly v. Cahill*,[247] also seems to imply that a constructive trust is coextensive with restitutionary remedies to counter unjust enrichment, which is more doubtful.[248] While unjust enrichment will readily ground a personal remedy, the further step of an equitable proprietary remedy is only warranted in a limited

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[243] "In my opinion a *'new model'* constructive trust of that nature the purpose of which is to prevent unjust enrichment is an equitable concept which deserves recognition in Irish law." Barr J. reinforces this by referring to the judgment of Costello J. in HKN Invest OY v. Incotrade PVT Ltd. [1993] 3 IR 152.

[244] Cf M. Hourican, "The Introduction of "New Model" Constructive Trusts in this Jurisdiction" (2001) 6(2) CPLJ 49, 49.

[245] Kelly v. Cahill [2001] 2 ILRM 205.

[246] R. Keane, "Equity and the Law of Trusts in the Republic of Ireland" (Butterworths, Dublin, 1988).

[247] Kelly v. Cahill [2001] 2 ILRM 205.

[248] The debate is "whether a constructive trust can be said to arise in any circumstances where permitting the defendant to retain the properly would result in his being *'unjustly enriched'*." - R. Keane, "Equity and the Law of Trusts in the Republic of Ireland" (Butterworths, Dublin, 1988), p. 186, cited by Barr J., Kelly v. Cahill [2001] 2 ILRM 205, 209.

subset of cases. Rotherham addresses the tension between "the conventional paradigm of property" in legal culture and judicial modification of property rights.[249]

In *Kelly v. Cahill*,[250] the benefit which was at issue was itself a proprietary interest, rather than personal property, and therefore convenience and the desire to align the remedy with the intention of the testator dictated that the appropriate remedy be an equitable interest in the property, as opposed, for example, to a sum of money which might compensate the widow for the benefit she had not received. In any case, it is difficult to see how common law principles would have given the widow a claim, which suggests that perhaps this is a modern example of legal principle coming second to the desire to grant a remedy to a sympathetic plaintiff.

In fact Keane's analysis, as cited by Barr J. further on in his judgment, makes it clear that the proprietary remedy is only sometimes needed to reverse unjust enrichment. While sometimes a personal common law remedy will suffice, at certain other times, the constructive trust is needed to achieve the restoration of the benefit.[251] This affirmation does not provide a test to aid the court in identifying the extent and nature of those circumstances in which a constructive trust should be imposed. Cardozo's formulation of "the conscience of equity"[252] is not a precise guide.

13.2.3.2.6. When should a constructive trust be imposed?

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[249] C. Rotherham, "The Metaphysics of Tracing: Substituted Title and Property Rhetoric" (1996) 34 Osgoode Hall L.J. 321, 328.

[250] John Kelly v. Nellie (otherwise Ellen) Cahill and Michael Cahill Junior [2001] 2 ILRM 205.

[251] "[S]ometimes the restoration of the benefit can only be achieved by giving the plaintiff an interest in property. Thus, the constructive trust is imposed by the court as an equitable remedy intended to restore to the plaintiff the benefit of which he has been deprived. In the words of Cardozo J *'a constructive trust is the formula through which the conscience of equity finds expression'* (Beatty v. Guggenheim Exploration Co. (1919) 225 NY 380, 386)." – Keane, approved by Barr J. in Kelly v. Cahill [2001] 2 ILRM 205, 210.

[252] Beatty v. Guggenheim Exploration Co. (1919) 225 NY 380, 386.

Such imprecision and the resultant potential for judicial subjectivity are the risk inherent in designing new remedies to achieve just practical outcomes. The fact that awareness of this risk is so well-ingrained in the spirits of jurists is the source of traditional reluctance to develop the law in these areas and has acted as a brake on development. If the remedies are to be fully developed and palm tree justice is to be avoided, more rigorous legal criteria are needed.

Barr J. in *Kelly v. Cahill*[253] does not raise the question of unconscionability. By holding that there is a constructive trust, without addressing the quality of the recipient's actions, he implicitly undermines the importance of the unconscionability test in Irish law. Instead, Barr J. focuses on the acts and state of mind of the deceased, describing as "the kernel of the question" before the court, whether the deceased had a "clear, positive intention" which was defeated by circumstances outside his knowledge. Having determined that this was the case, it is deemed "irrelevant" that the defendant was neither aware of nor responsible for the testator's will being thwarted. This is quite a departure: not only was there no misconduct on the part of the recipient which would make him liable for the discrepancy between the testator's intention and what transpired, the recipient in this case was not even aware of the relevant events. This militates strongly against the unconscionability test.

13.2.3.2.7. Misconduct and unconscionability

In principle, the requirement of misconduct by the legal owner as a condition of the imposition of a constructive trust should limit its availability. Barron J. emphasises in *N.A.D. v. T.D.*[254] that the criterion is not what is fair or reasonable, but whether the defendant's conduct calls for a constructive trust.[255] In contrast, the central

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[253] John Kelly v. Nellie (otherwise Ellen) Cahill and Michael Cahill Junior [2001] 2 ILRM 205.

[254] N.A.D. v. T.D. [1985] ILRM 153.

[255] Ibid, at 162-163 (per Barron J.): "the question is not what was the nature of the improvement nor what reasonable spouses would have agreed nor even what is fair, but whether or not the conduct of the owner of the property has been such that equity ought to impose a trust for the benefit of the contributor."

concern of unjust enrichment might well be said to be with what is fair, within the confines of the rules through which this concern finds expression. The test for a personal unjust enrichment remedy is less demanding than for the constructive trust.

Unconscionability is an important concept. Friel suggests that "unconscionability as a unifying theory for the enforcement of promises without consideration may yet be a strong possibility."[256] The centrality of unconscionable conduct to the constructive trust is reinforced by the analysis of Lord Browne-Wilkinson in *Westdeutsche v. Islington*.[257] While his statement of the law on constructive trusts is obiter, from a jurisdiction which has not yet recognised the new model constructive trust, it is a persuasive analysis of the law as it ought to be.

Lord Browne-Wilkinson summarises the applicable principles. Equity enforces trusts because the conscience of the legal owner is affected, either by awareness of his obligations under an express or resulting trust or "by reason of his unconscionable conduct" in the case of a constructive trust. The legal owner of the property cannot become a constructive trustee until he is aware "of the factors which are alleged to affect his conscience". Equally, he cannot become a trustee unless there is identifiable trust property. This means that unless there is a time at which the property remains identifiable and its owner's conscience is affected, there cannot be a constructive trust.[258]

Burrows challenges Lord Browne-Wilkinson's reliance on the concept of unconscionability.[259] He disputes the justification for effectively penalising the defendant's other creditors for the defendant's unconscionable conduct. He also suggests that a requirement to establish the defendant's knowledge would make the

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[256] R.J. Friel, "Negotiating Liabilities without Benefit: the Pre-Contractual Liability Trap" (2000) 7(8) CLP 188.

[257] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669; [1996] 2 WLR 802, noted by G. Jones, "Ultra Vires Swaps: The Common Law and Equitable Fall-Out" (1996) 55 CLJ 432.

[258] Ibid, at 709 (per Lord Browne-Wilkinson).

[259] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 73.

position of plaintiffs unacceptably uncertain. However, this criticism comes from a jurisdiction where the remedial constructive trust is not recognised. If trusts are to be created by judges' discretion, unconscionability should be required as a condition for their imposition. The choice in Ireland is not between unconscionability and no remedial trust at all, but between unconscionability and a broad judicial discretion for divining constructive trusts wherever it seems fair.

13.2.3.2.8. Unconscionability of receipt or retention?

To speak of unconscionability may refer to two distinct concepts.[260] The more obvious meaning relates to the subjective state of mind and knowledge of the recipient at the moment of receipt, or misconduct affecting the dealings between the parties. It involves judging whether the actions of the recipient, in causing or accepting the benefit, were somehow reprehensible. The alternative sense in which unconscionability might be asserted turns on an assessment that, given the existence of the unjust enrichment, it would be objectively unconscionable for the recipient to retain it in the future. The latter view would dilute the importance of the unconscionability test, as it would be easy in the vast majority of cases for the court to condemn continued retention, after a determination of unjust enrichment, as incompatible with good conscience. This would multiply the proportion of unjust enrichment cases in which the equitable remedy was made available. Yet, it seems that some Irish cases have applied a vague *ex post facto* objective standard of this sort.

There is therefore an important distinction to be drawn between unethical conduct which leads to the receipt and the characterisation of future retention as wrong. *In Westdeutsche,*[261] Lord Browne-Wilkinson criticises the grant of an equitable proprietary claim by Goulding J. in *Chase Manhattan Bank N.A. v. Israel-British*

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[260] See the speech of Lord Browne-Wilkinson, in Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, 698; see also B. Kremer, "Restitution and Unconscientiousness: Another View" (2003) LQR 188, 190; Gummow J., Roxborough v. Rothmans of Pall Mall Australia Ltd 185 ALR 335.

[261] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669.

Bank (London) Ltd.[262] Given the centrality of equity acting on a person's conscience, he could not see how the requirement that the defendant's conscience be affected could be fulfilled when it was unaware of any mistake.[263] Despite his criticism, Lord Browne-Wilkinson indicates that the outcome in *Chase Manhattan*[264] could be supported on the basis that it would be unconscionable of the recipient to retain the benefit once it becomes aware that it was erroneously made.[265] This appears to provide the element of unconscionability which would allow the constructive trust in many unjust enrichment cases. However, if it goes too far, it may entail the problem of misapplying the constructive trust as an automatic remedy in all restitution cases.

The personal remedy offered by restitution law already targets circumstances in which the receipt was not wrongful, but retention would be unjust and contrary to good conscience.[266] This issue was raised in *Kelly v. Solari*,[267] where it was argued that the recipient of a mistaken payment had not acted wrongfully, but the court responded that the reference to good conscience in *Moses v. Macferlan*[268] referred to

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[262] Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd. [1981] Ch. 105.

[263] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, 714 (per Lord Browne-Wilkinson).

[264] Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd. [1981] Ch. 105.

[265] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, 715 (per Lord Browne-Wilkinson): "Although the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust"

[266] Similarly, if promissory estoppel is available as a cause of action, it is because it would be unconscionable to repudiate the promise made: see E. O'Dell, "Contract – Estoppel and Ultra Vires Contracts" (1992) 14 DULJ 123; cf R.J. Friel, "Negotiating Liabilities without Benefit: the Pre-Contractual Liability Trap" (2000) 7(8) CLP 188.

[267] Kelly v. Solari (1841) 9 M&W 54.

[268] Moses v. Macferlan (1760) 2 Burr 1005, 1010, 1012.

future retention.[269] Thus, the idea that it would be unconscionable in future to retain an unjustified benefit is already taken into account by the law of restitution and cannot also provide that extra element which should be required in order to convert the remedy to a proprietary one. If there is no unconscientious conduct at the time of the receipt, surely it is more appropriate to look to restitution law to provide a personal remedy than to seek to expand the condition on which a proprietary remedy ought to be granted. In what circumstances, then, is retention sufficiently unconscionable to justify the imposition of a constructive trust?

Timing is key. Lord Browne-Wilkinson limits the scope of application of his proposed source of unconscionability by emphasising that there must be identifiable trust property at the time when the recipient becomes aware that it is unjustified. An objective test can better be justified if it is applied, as Lord Browne-Wilkinson suggests, not on a prospective basis, from the time of the court's determination, but at an earlier point when the recipient became aware of the unjustified payment: it situates misconduct not in the creation of the circumstances which led to the payment, but in knowingly profiting from them.

Applying these guidelines to general ultra vires cases, awareness of the incapacity is likely only to develop after a judicial determination of the matter, which means that the necessary coincidence of identifiable assets and the knowledge which makes retention unconscionable will not usually exist. If tracing permits the property to be identified after the court ruling, then Lord Browne-Wilkinson's test could be met. It is argued, however, that this ought not to suffice to ground a constructive trust. If the injustice of retaining the payment was not of a character that should have been evident to the recipient before the hearing, then this should not be sufficient misconduct for a constructive trust to be imposed.

There is a risk that the Browne-Wilkinson formulation, whereby retention can constitute misconduct, facilitates this misconception that might equate unjust enrichment with unconscionability. It lends itself to the superficial reasoning that,

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[269] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 7.

the payment being unjustified, the defendant would be wrong to retain it, and therefore a constructive trust should be imposed. If the Browne-Wilkinson measure of unconscionability is applied, it should be emphasised that it refers to wrongful retention in the past, at a time when the property was identifiable. Unless the defendant was aware at that time, not only of the fact of the enrichment, but also of its unjustifiable character, his retention of it should not be deemed misconduct such as to justify the imposition of a constructive trust.

13.2.3.2.9. Misconduct and unconscionability in Irish law

Unfortunately, the Irish authorities seem not to insist on unconscionability in order to impose a constructive trust. Barr J. in *Kelly v. Cahill*[270] dismisses an examination of the conscience of the recipient as the basis for a constructive trust.[271] *Kelly v. Cahill* is problematic from this perspective. O'Dell argues that it can only be accommodated within traditional constructive trust reasoning if a new concept of unconscionability is developed.[272] This could be done by supplementing the test of subjective awareness on the part of the recipient with an alternative objective test as to whether the circumstances justify the creation of a trust, but this would be a radical departure from the current understanding that constructive trusts are imposed because of the recipient's misconduct and it may be that *Kelly v. Cahill* cannot be so accommodated.[273]

There are now a number of Irish cases which argue either explicitly or implicitly against the unconscionability test forming part of Irish law. *In Re Irish Shipping Ltd* [274] establishes a constructive trust in the absence of unconscionability on the part of the recipient. In retrospect, Henchy J. in *Murphy v. Attorney General*, seems

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[270] John Kelly v. Nellie (otherwise Ellen) Cahill and Michael Cahill Junior [2001] 2 ILRM 205.

[271] Ibid, at 210 (per Barr J.): "In my view it is irrelevant that the second defendant was neither aware of or had any responsibility for the error which was made."

[272] E. O'Dell, "Unjust Enrichment and the Remedial Constructive Trust" (2001) 8(1) DULJ 71.

[273] Ibid.

[274] In the Matter of Irish Shipping Ltd (In Liquidation) [1986] ILRM 518.

likewise not to require unconscionability to ground a proprietary, instead of a personal, remedy: he links unjust enrichment directly to the constructive trust.[275]

If, after *Kelly v. Cahill*, Irish law can impose a constructive trust in the absence of misconduct on the part of the legal owner, this development is not a welcome one. This would give the courts a broad and unfettered discretion to impose a trust, which may have major adverse effects not only for the legal owner but also for third parties, and blurs the distinction between the common law personal remedies which automatically flow from a finding of unjust enrichment and the limited circumstances where a constructive trust should be imposed.[276]

On the other hand, the large element of discretion which exists in relation to constructive trusts may allow for a remedy which takes account of all the circumstances to do justice.[277] The Irish courts have emphasised that the obligations weighing on a constructive trustee differ from those imposed in express trusts.[278] Barker welcomes the prospect of making explicit the use of judicial discretion in unjust enrichment law.[279] However, the discretionary character of the remedial constructive trust is perhaps heightened to an excessive degree if the new model constructive trust is released from any misconduct requirement in the Irish courts. As a matter of principle, the law should insist more strongly on the

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[275] "The implicit allegation is that the State was unjustly enriched by those payments and thereby became a constructive trustee of them for the plaintiffs." - Murphy v. Attorney General [1982] 1 IR 241, 317 (per Henchy J.); he also seems to conflate common law and equity in grounding a constructive trust on obention colore officii, 316-317.

[276] See below at 13.3.2: "Limiting the Imposition of Trusts".

[277] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, 716 (per Lord Browne-Wilkinson).

[278] M. Hourican, "The Introduction of "New Model" Constructive Trusts in this Jurisdiction" (2001) 6(2) CPLJ 49, 49.

[279] K. Barker, "Rescuing Remedialism in Unjust Enrichment Law: Why Remedies Are Right" (1998) 57 CLJ 301, 318: "if it is true that discretionary policy factors are indeed affecting decisions about the granting of equitable proprietary relief in unjust enrichment law, overt recognition of the fact would actually do much to clarify the law."

unconscionability requirement to establish a constructive trust. Given that personal remedies are now widely available at common law, there is no need for equity to be twisted to aid a deserving plaintiff. In order to ensure the rational separation of the common law and equity, O'Dell points out that the necessary element of unconscionability cannot be located in the mere fact of the unjust enrichment itself.[280] This circular reasoning should be carefully avoided, and yet it appears that *Kelly v. Cahill* may have fallen into this trap.[281]

13.2.3.2.10. The future of the remedial constructive trust

Mee is strongly critical of the new model constructive trust.[282] Writing in 1996, he considered that "discredited" concept had experienced a "richly deserved" demise and therefore characterised its appearance in *HKN Invest OY v. Incotrade PVT Ltd.*[283] and *Murray v. Murray*[284] as "surprising, and somewhat disturbing".[285] His first criticism, that it was erected by Lord Denning in the absence of authority, may well have been true in the early years, but there is now a body of Irish case law that firmly establishes this form of constructive trust. Mee also highlights the uncertainty and potential judicial subjectivity, coupled with the possible injustice to third parties.[286] These difficulties are connected: a doctrine with illimited scope and dramatic consequences is a dangerous device. However, Mee's arguments, while valid, do not require that the doctrine be abandoned, but instead strongly underline the necessity for criteria to be set out to circumscribe the doctrine's application. The unconscionability test fulfilled this need and it is to be hoped that future Irish cases will revert to it.

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[280] E. O'Dell, "Unjust Enrichment and the Remedial Constructive Trust" (2001) 8(1) DULJ 71.

[281] Ibid.

[282] J. Mee, "Palm Trees in the Rain - New Model Constructive Trusts in Ireland" (1996) 1(1) CPLJ 9.

[283] HKN Invest OY v. Incotrade PVT Ltd. [1993] 3 IR 152.

[284] Murray v. Murray [1996] 3 IR 251.

[285] J. Mee, "Palm Trees in the Rain - New Model Constructive Trusts in Ireland" (1996) 1(1) CPLJ 9, 9.

[286] Ibid; see also G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 615.

13.2.4. Conclusion: the Irish courts will offer a trust as a remedy in void contract cases

Applying to the ultra vires case the approach of the Irish courts to equitable proprietary remedies, it is clear that a plaintiff company would have good prospects of obtaining a proprietary remedy over alienated property. In the first place, the *Belmont* constructive trust is an uncontroversial and straightforward solution which is directly relevant in the corporate context, provided the recipient of the corporate assets has notice of the breach of duty. Furthermore, the Irish courts have shown themselves to be very liberal in imposing remedial constructive trusts, and often do so in the absence of real unconscionability or misconduct on the part of the recipient of the property. Tracing may play a valuable role in pursuing corporate assets through substitutions. All this means that a proprietary remedy is a genuine alternative to the personal remedies which are available through unjust enrichment law.

13.3. A Personal or a Proprietary Remedy?

Recent developments in restitution law indicate that a personal remedy against unjust enrichment would today be readily offered in those cases where a benefit was transferred by one side to a void contract.[287] In addition, it is clear that the Irish courts are liberal in the grant of proprietary remedies. Since both personal and proprietary remedies will be available in ultra vires cases, it is necessary to consider the relationship between the two forms of remedy. The proprietary remedy offers many advantages for prospective plaintiffs, though its unrestricted availability is open to criticism from the perspective of an impartial observer.

The parallel role of common law and equitable remedies as possible responses to a scenario in which unjust enrichment occurs is apparent from the views expressed by Keane, as quoted by Barr J. in *Kelly v. Cahill*.[288] Keane states that the principle

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[287] See above at 11.3.2: "Conclusion: Failure of Consideration Grounds Recovery for Ultra Vires Transfers" and at 12.2.3.1: "Conclusion: mistake should ground recovery in ultra vires cases".

[288] John Kelly v. Nellie (otherwise Ellen) Cahill and; Michael Cahill Junior [2001] 2 ILRM 205.

against unjust enrichment requires the restoration of benefits transferred, and elaborates that such restoration may sometimes be monetary, but in other cases, requires a property right.[289] Thus, the two remedies coexist, but do not necessarily cover the same ground.[290] O'Dell identifies a mistaken "perception that restitution is always equitable and requires a constructive trust" in Ireland.[291] Sometimes the more extensive proprietary remedy will yield the only just result in the circumstances, but most of the time, a personal right to recover the value of the benefit transferred should suffice.[292]

O'Dell points out that one attraction of coupling an unjust enrichment claim with a trust claim is to attract equity's power to award compound interest.[293] The House of Lords is now willing to grant compound interest in unjust enrichment claims where necessary to achieve full restititution,[294] though this step has not yet been taken in Ireland. Thus, *Westdeutsche,*[295] where compound interest was at stake, together with any case where the defendant is insolvent, provide concrete examples of scenarios in which a trust would ensure the plaintiff receives a fuller restoration of what he has transferred.

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[289] R. Keane, "Equity and the Law of Trusts in the Republic of Ireland" (Butterworths, Dublin, 1988), p. 187.

[290] Lister v. Stubbs (1890) 45 ChD 1, 9; E. O'Dell, "The Principle against Unjust Enrichment" (1993) 15 DULJ 27, 45: "the integration of the actions at common law and in equity is one of the most vexed issues faced by the modern law of restitution."

[291] E. O'Dell, "The Principle against Unjust Enrichment" (1993) 15 DULJ 27, 45.

[292] O'Dell observes of Sinclair v. Brougham: "it is strange indeed that, where a personal action failed, a proprietary one should have succeeded!" - E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 28, 60; D.M. Fox, "Common Law Claims to Substituted Assets" (1997) 56 CLJ 30, 32.

[293] E. O'Dell, "Interesting Times: Overpaid Taxes, Restitution and Compound Interest" (2005) 12(1) DULJ 343.

[294] Sempra Metals Ltd v. Inland Revenue Commissioners [2008] 1 AC 561.

[295] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669.

13.3.1. The Insolvency Issue

The existence of a personal remedy would only have served justice to a limited extent in cases such as *In Re Introductions*[296] or *In Re Jon Beauforte*.[297] The practical reality in each case was that the company was in an insolvent liquidation. Its assets were subject to competing claims by various creditors. Given the probability that the company will not have enough assets to pay all its creditors, the difference between being a secured creditor holding valid debentures and an unsecured creditor with a personal claim against the assets of the company will be the difference between being repaid and not.[298] It is in circumstances such as these that one appeal of an equitable proprietary claim becomes clear.[299]

However, the desirability of more extensive or reliable reparation from the plaintiff's perspective does not of itself justify the imposition of a trust, with the inherent severe consequences not only for the defendant but also for third parties, such as other creditors in an insolvency.[300] That the remedy may be strongly desirable for the plaintiff does not answer the question as to when such a trust should be created.[301]

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[296] In Re Introductions, Ltd [1969] 1 AER 887.

[297] In Re Jon Beauforte (London) Ltd (1953) 1 Ch. 131; [1953] 1 AER 634.

[298] D. Milman, "1967-1987: A Transformation in Company Law?" (1988) 17 Anglo-American Law Review 108, 121: "the prevailing ideology favoured equality of misery for unsecured creditors."

[299] See also E. O'Dell, "Fermat's Last Theorem and the Context of Proprietary Remedies" (2005) 19(2) TLI 97, 98.

[300] K. Houston, "Case Comment: Swaps Litigation" (1996) 17(9) Comp. Law. 276, 278: "the monies, if traceable, would be unavailble for the creditors of the recipient [...] This would introduce an element of unascertainable risk in transactions which would be contrary to commercial common sense"; see also E. O'Dell, "Fermat's Last Theorem and the Context of Proprietary Remedies" (2005) 19(2) TLI 97, 101-102; A. Burrows, "Understanding the Law of Restitution: a Map through the Thicket" (1994-1995) 18 U Queensland L.J. 149, 162-163.

[301] Lister v. Stubbs (1890) 45 ChD 1, 15.

In Re Polly Peck International (No. 2): Marangos Hotel v. Stone[302] underscores the English courts' reluctance to recognise a constructive trust where this would prejudice the creditors of a bankrupt or an insolvent company.[303] By contrast, this "insolvency problem" has not blocked the Irish application of the constructive trust in *Re Irish Shipping Ltd*,[304] where Carroll J. held that money in the account of an insolvent company was held on trust for the mistaken payer and was therefore not available for the bank with which it was lodged to set off against the sums owed to it. There is clear competition between the claim to corporate assets by a person seeking to recover an unjustified payment and the claims of other creditors. Insolvency crystallises this problem and makes it possible to identify specific creditors who will be prejudiced if the property is made trust property.[305] However, the interests of other creditors should not be forgotten in other cases out of the desire to grant as full as remedy as possible to the plaintiff. It may even be a contributing factor to the proliferation of the constructive trust that, while the plaintiff is in court to argue his case, the competing creditors who will lose out if he is granted a proprietary remedy have no such opportunity. Burrows advocates considering the position of the competing claims in an insolvency as a test for whether to grant a proprietary remedy.[306] The same rules should apply in cases of insolvency and otherwise, and these rules should be based on sound principle. That the creation of a trust goes further than is necessary to achieve a just result is evident from the potential and "startling" anomaly whereby, under a *Sinclair v.*

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[302] In Re Polly Peck International (No. 2): Marangos Hotel v. Stone [1998] 3 AER 812.

[303] Burrows views this "frosty reception" as "understandable" - A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 74.

[304] In the Matter of Irish Shipping Ltd (In Liquidation) [1986] ILRM 518.

[305] R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561, 584; cf Gill, "Constructive Trusts and the Recovery of Money Paid under Mistakes of Fact – A Novel Irish Development" (1986) 4 ILT 97 for the view that the insolvency made things less straightforward.

[306] A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 69.

Brougham[307] resulting trust, "ultra vires creditors would be in a more favourable position than intra vires creditors."[308]

13.3.2. Limiting the Imposition of Trusts

If it is good policy, as it seems to be, that the grant of a proprietary remedy be dependent on the conduct of the property's legal owner, then this both recommends the constructive trust over the resulting trust, as suggested by Lord Browne-Wilkinson in *Westdeutsche,*[309] and argues for a principled application of the constructive trust in future. O'Dell emphasises the policy considerations that favour caution in the future development of the doctrine.[310] If the constructive trust is imposed to penalise conduct on the part of the legal owner which offends against good conscience, the courts should take into account that this may also penalise other, innocent parties.[311] The effect on innocent third parties must be remembered in the construction of the relevant legal principles as well as in the exercise of the court's discretion in a particular case.[312]

From some judgments, which do not devote much attention to the question of why the remedy should be proprietary, it may appear to be the case that a constructive trust can flow directly from the demonstration of unjust enrichment. Many of the authorities use language from both domains without distinguishing between the

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[307] Sinclair v. Brougham [1914] AC 398.

[308] G. Jones, "Ultra Vires Swaps: The Common Law and Equitable Fall-Out" (1996) 55 CLJ 432, 434.

[309] Westdeutsche Landesbank Girozentrale v. Islington LBC [1996] AC 669, [1996] 2 WLR 802 (HL).

[310] E. O'Dell, "Unjust Enrichment and the Remedial Constructive Trust" (2001) 8(1) DULJ 71.

[311] See A. Burrows, "The Law of Restitution", 2nd ed. (Butterworths, 2002), p. 73.

[312] Westdeutsche Landesbank Girozentrale v. Islington BC [1996] 2 WLR 802 (per Lord Browne-Wilkinson).

world of unjust enrichment and that of the constructive trust.[313] Far from arising wherever there is unjust enrichment,[314] something extra must be required for the proprietary approach to be chosen.[315] O'Dell argues strongly against the conflation of the common law and equitable remedies.[316] Similarly, Birks suggests that the proprietary remedy will be appropriate "in some cases, perhaps in rather few cases".[317] Both principle and practical concerns require clear delineation of the conditions in which the courts should go beyond the recognised option of granting restitution at common law and instead impose a trust.

O'Dell criticises the Canadian authorities in particular, which went down the constructive trust route ahead of Ireland, for failing to distinguish between common law unjust enrichment and equitable constructive trusts.[318] In the Canadian Supreme Court decision of *Pettkus v. Becker*,[319] the parties had been cohabiting for a period of decades and together built up a successful bee-keeping business. When their relationship ended, the Canadian Supreme court upheld an award of half of the business to the female cohabitee. The court first addressed the resulting trust. The

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[313] E. O'Dell, "Unjust Enrichment and the Remedial Constructive Trust" (2001) 8(1) DULJ 71: "the superficial similarity between the language of unjust enrichment and the language of unconscionability and of the remedial constructive trust has erroneously led to their equation."

[314] R. Keane, "Equity and the Law of Trusts in the Republic of Ireland" (Butterworths, Dublin, 1988), p. 196, cited per Barr J., Kelly v. Cahill [2001] 2 ILRM 205, 209: "whether a constructive trust can be said to arise in any circumstances where permitting the defendant to retain the property would result in his being 'unjustly enriched'."

[315] R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561, 579; E. O'Dell, "The Case that Fell to Earth: Sinclair v. Brougham", in E. O'Dell ed., "Leading Cases of the Twentieth Century" (Round Hall Sweet & Maxwell, Dublin, 2000), p. 33: "Sinclair v. Brougham made two entries in the diary of legal madness: denying a legal personal claim, and awarding an equitable proprietary one instead."

[316] E. O'Dell, "Unjust Enrichment and the Remedial Constructive Trust" (2001) 8(1) DULJ 71.

[317] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 38.

[318] E. O'Dell, "Unjust Enrichment and the Remedial Constructive Trust" (2001) 8(1) DULJ 71.

[319] Pettkus v. Becker [1980] 2 SCR 834.

resulting trust required that the court establish a common intention that the parties share the equitable interest in the property[320] but the difficulty of discerning such a "phantom intent" shared by the parties had been criticised by scholars, and the Canadian courts looked for a new approach. On the circumstances in *Pettkus v. Becker,*[321] it was clear that the appellant had never intended that the respondent share in the business.[322] Faced with the artificiality of the common intent test, and the fact that it often deprived of a remedy the person who contributed in cases such as this, the Canadian court turned to the constructive trust for a solution.[323]

Dickson J. describes the constructive trust as "a broad and flexible equitable tool which permits courts to gauge all the circumstances of the case".[324] He also quotes from *Rathwell v. Rathwell*[325] a passage which states that constructive trusts will be applied to attain a "result consonant with good conscience"[326] and fails to distinguish the constructive trust from general personal remedies available in unjust enrichment law. He justifies the constructive trust by reasoning that "the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another."[327] This explanation suggests that a constructive trust would be available wherever a case of unjust enrichment is made out. This impression is confirmed by his subsequent enumeration of the conditions for success, which mirror the principle against unjust enrichment itself.[328]

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[320] Dickson J. cites Murdoch v. Murdoch [1975] 1 SCR 423.

[321] Pettkus v. Becker [1980] 2 SCR 834.

[322] Ibid, at 845 (per Dickson J.).

[323] eg Murdoch v. Murdoch [1975] 1 SCR 423.

[324] Pettkus v. Becker [1980] 2 SCR 834, 843 (per Dickson J.).

[325] Rathwell v. Rathwell [1978] 2 SCR 436.

[326] Ibid, at 455.

[327] Ibid, at 455.

[328] Ibid, at 455: "for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason - such as a contract or disposition of law - for the enrichment."

According to this view, the test for the creation of a constructive trust is no greater than the test for common law restitution for unjust enrichment. While Mee approves of the "scientific" Canadian approach, whereby the unjust enrichment tests must be met for a constructive trust to follow,[329] this approach should be criticised for failing to distinguish between the common law and equitable principles. Unjust enrichment may be a precondition to the imposition of a trust, but it is not a sufficient one.

13.3.3. Tailoring the Personal Remedy

Lord Goff highlights the temptation to use equitable remedies in restitution, and warns of adverse effects on the development of equity itself. He juxtaposes the desire of restitution lawyers to make use of equitable proprietary remedies to counter unjust enrichment with the concerns of equity lawyers that the equitable principles should not be "illegitimately distorted".[330] Instead of reaching for a proprietary remedy, it may be preferable to tailor the effects of common law awards. As a guiding principle, it seems appropriate that in the case of unjust enrichment remedies, "the order in favour of the second defendant should be as fully restitutive as the justice of the case will allow."[331] Otherwise, the recipient would remain unjustly enriched at the expense of the plaintiff, even if only to a reduced extent.

The solution to the overuse of the proprietary remedy may lie in recasting the personal remedies. Smith argues that a plaintiff's desire to obtain the return of specific property can be accommodated without the imposition of a full proprietary remedy.[332] Similarly, O'Dell argues that compound interest should be available for unjust enrichment claims, in order to pay for "the value of the use they have had of the plaintiff's money." Since compound interest is the common commercial rate,

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[329] J. Mee, "Palm Trees in the Rain - New Model Constructive Trusts in Ireland" (1996) 1(1) CPLJ 9.

[330] Westdeutsche Landesbank Girozentrale v. Islington BC [1996] 2 WLR 802 (per Lord Goff).

[331] East Cork Foods Ltd v. O'Dwyer Steel Co Ltd [1978] IR 103, 112 (per Henchy J.).

[332] L. Smith, "Unravelling Proprietary Restitution" (2004) 40 CBLJ 317, 333; cp: R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561, 584; C. Rotherham, "The Metaphysics of Tracing: Substituted Title and Property Rhetoric" (1996) 34 Osgoode Hall L.J. 321, 343.

compound interest should be available to make full restitution.[333] Lord Goff considered that *Westdeutsche* was a case in which it was appropriate for equity to award compound interest.[334] However, in the absence of statute permitting the award of compound interest at common law, the majority in the House of Lords excluded it. The House of Lords subsequently overcame its reluctance to award compound interest in *Sempra Metals Ltd v. Inland Revenue Commissioners,*[335] accepting that principle should not exclude such an award and that the value of the use of another party's money should take account of the reasonable cost of borrowing that sum. However, this step has not yet been taken in Ireland. In *O'Rourke v. Revenue Commissioners*,[336] Keane J. awarded simple interest under Section 22 of the Courts Act, 1981. It is to be hoped that in future, compound interest will be available at common law, and that the proprietary remedy, with its other sometimes harsh consequences, will not be used in order to ensure full restitution.

13.3.4. Conclusion: Respecting the Distinction between Personal and Proprietary Remedies

At the beginning of the twenty-first century, wherever a case of unjust enrichment can be made out, then the plaintiff is entitled as a matter of right to recover the benefit he has transferred. Plaintiffs should no longer grasp instinctively at the constructive trust in order to attain a remedy, and nor should the courts be quite so keen to press the equitable doctrines into service. Justice can be served in many cases through the grant of the common law remedy, and the proprietary remedy can then be reserved for circumstances in which its greater impact is merited by the circumstances. It is to be hoped that, by recognising that the common law and

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[333] E. O'Dell, "Interesting Times: Overpaid Taxes, Restitution and Compound Interest" (2005) 12(1) DULJ 343; see Hobhouse J., Westdeutsche v. Islington LBC [1994] 4 AER 890, 955, endorsed by Lord Goff, in Westdeutsche v. Islington LBC [1996] AC 669, 691.

[334] Westdeutsche Landesbank Girozentrale v. Islington BC [1996] AC 669, 698 (per Lord Goff).

[335] Sempra Metals Ltd v. Inland Revenue Commissioners [2008] 1 AC 561.

[336] O'Rourke v. Revenue Commissioners [1996] 2 IR 1.

equity both now offer well-developed remedies, the desire to ensure practical justice will no longer lead to the distortion of either the substantive law on corporate capacity or the equitable principles which govern proprietary remedies.

Notwithstanding principled objections and hopes for the future development of the law of remedies in Ireland, it can be concluded that the prognosis is very good for any person who loses out by performing a void contractual obligation. Under current principles, a party which has performed under a void contract has a choice of personal and proprietary claims, and would be well advised under current law to make the most of the extensive availability of proprietary remedies. In very many cases, it will be easy to claim restitution or recover the property transferred. This conclusion has important consequences for any evaluation of the ultra vires doctrine itself.

14. REMEDIES AGAINST AN INDIVIDUAL FOR WRONGFUL CONDUCT

14.1. RECOURSE OTHER THAN RECOVERY

While the most direct remedy which a company is likely to seek for the ultra vires alienation of its assets is the recovery of those assets from their recipient, whether through a personal or proprietary claim, it may also have a claim against a person responsible for the action. Such liability is predicated on the commission of a wrong, as opposed to unjust enrichment. Incapacity and breach of duty may often coincide and be pleaded together.[1] The choice of remedies belongs to the plaintiff who has suffered loss due to the failed transaction.[2] In many cases, the party which suffers loss can act against both the recipient and the wrongdoer.[3]

Since limited liability is "sacrosanct"[4] and protects shareholders,[5] the individual who may be liable is likely to be a director responsible for undertaking a void transaction.[6] The principle of limited liability does not preclude a director who is also a shareholder from being held liable for wrongs.[7] Milman points to a growing

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[1] Eg the unsuccessful claims in Re Horsley & Weight [1982] 3 AER 1045.

[2] The proper plaintiff would usually be the company, or the other party to the contract, but not the company's members for loss either to the company or themselves through the loss of share value: O'Neill v. Ryan [1993] ILRM 557.

[3] F.W. Maitland, "Trust and Corporation", in H.D. Hazeltine, G. Lapsley & P.H. Winfield eds., "Maitland – Selected Essays" (Cambridge, 1936), p. 141, 173: the company "may be able both to pursue a piece of land and to attack the trustee who alienated it."

[4] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 180; though Sealy later evokes the interesting departure of "shareholder misfeasance" as a consequence of duties to creditors and stakeholders – Sealy, 182-183.

[5] See In Re Hefferon Kearns Ltd (No. 2), Dublin Heating Company Ltd v. Hefferon and Others [1993] 3 IR 191.

[6] Though where the director is also a shareholder, it may appear similar in effect - O'Keeffe v. Ferris [1997] 2 ILRM 161, 169.

[7] A. Willekes & S. Watson, "Economic Loss and Directors' Negligence" [2001] JBL 217, 220-221.

trend towards the imposition of personal liability on company directors.[8] Sealy describes the director as "a soft target", particularly in small close companies, where he is both owner and manager.[9] However, as a matter of practicality, a personal action against an individual director may not offer much in the way of compensation for financial losses suffered by a company as the result of a void contractual obligation.[10] The proper plaintiff is generally the company as opposed to its shareholders, though shareholders may in some cases bring a derivative action on behalf of the company.[11]

The director's personal liability can lie in equity or common law[12] or under statute, and may generally be characterised as wrong-based.[13] Birks emphasises that civil wrongs encompass more than torts.[14] Thus, a wrong can be understood as a beach of

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[8] D. Milman, "Personal Liability and Disqualification of Company Directors: Something Old, Something New" (1992) 43(1) NILQ 1, 1; D. Milman, "1967-1987: A Transformation in Company Law?" (1988) 17 Anglo-American Law Review 108, 117; L. MacCann, "Personal Liability for Corporate Debts" (Part 1) (1991) 9 ILT 206; R.R. Pennington, "Directors' Personal Liability" (BSP Professional, 1987).

[9] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 180.

[10] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 118: "Too often the directors are economically unable to make good to shareholders the loss caused by acting outside their powers."

[11] R.R. Pennington, "Directors' Personal Liability" (BSP Professional, 1987), p. 218; Pennington cites: Hare v. London and Northwestern Railway Company (1861); Simpson v. Westminster Palace Hotel Company (1860) 8 HLC 712; Spokes v. Grosvenor Hotel Company (1897); Wallersteiner v. Moir (1974).

[12] At common law, agents who exceed their authority are personally liable - A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 96.

[13] D. Milman, "1967-1987: A Transformation in Company Law?" (1988) 17 Anglo-American Law Review 108, 117-118.

[14] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 29.

duty, be it tortious or fiduciary.[15] Often an ultra vires transaction will simultaneously and independently constitute a wrong, whether as a breach of directors' fiduciary duties or a statutory offence, such as fraudulent or reckless trading.[16]

Liability to account as a constructive trustee and remedies for breaches of directors' fiduciary duties are equitable, discretionary remedies, which are personal in nature,[17] lying against the individual responsible for the loss. If the act constitutes a breach of fiduciary duties on the part of the director, a third party may also be liable for knowing assistance in the breach of trust. Knowing receipt[18] is a related cause of action against the recipient of trust property.[19]

14.2. DIRECTORS' DUTIES

Most evidently, there may be a personal remedy against any members of a company's board who conclude an ultra vires transaction if, in doing so, they act in breach of their duties to the company.[20] These duties include both equitable fiduciary duties, related to loyalty, and common law duties, related to skill and

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[15] Ibid, at p. 29.

[16] Section 297A, Companies Act, 1963, as amended by Sections 137 and 138, Companies Act, 1990; see O'Keeffe v. Ferris [1997] 2 ILRM 161; D. Milman, "Personal Liability and Disqualification of Company Directors: Something Old, Something New" (1992) 43(1) NILQ 1, 5.

[17] G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 606.

[18] See eg International Sales v. Marcus [1982] 3 AER 551; Belmont Finance Corporation Ltd v. Williams Furniture Ltd (No. 2) [1980] 1 AER 393.

[19] See above at 13.2.3.1: "The institutional trust, knowing receipt and the Belmont principle".

[20] L. MacCann, "Directors' Duties: To Whom are They Owed?" (Part 1) (1991) 9 ILT 3; L. MacCann, "Directors' Duties: To Whom are They Owed?" (Part 2) (1991) 9 ILT 30; L. MacCann, "Directors' Duties of Care, Skill and Diligence" (1991) 9 ILT 56; L. MacCann, "Directors' Fiduciary Duties" (Part 1) (1991) 9 ILT 80; L. MacCann, "Directors' Fiduciary Duties" (Part 2) (1991) 9 ILT 104; R.R. Pennington, "Directors' Personal Liability" (BSP Professional, 1987), pp. 33-58, 81-91.

care.[21] The breach by a director of his duty does not suppose dishonesty or negligence.[22] The company itself is generally the beneficiary of these duties,[23] and therefore the proper plaintiff if breach is alleged.[24] Shareholders were held, in *Prudential Assurance Company Ltd v. Newman Industries Ltd (No. 2)*,[25] not to have a remedy against directors for the negligent dissipation of company assets.[26] Shareholders may not be able to bring a derivative action under the fraud on the minority exception[27] if the alleged conduct is merely negligence rather than misappropriation.[28]

In Irish law, the nature and scope of directors' duties is defined in case law.[29] Directors have a duty to exercise the skill which they might reasonably be expected

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[21] "At common law, directors owe duties to the company which are normally divided into duties of loyalty based on fiduciary principles developed initially by the courts of equity and duties of skill and care developed initially by the common law courts from the principles of the law of negligence." – Kavanagh v. Delaney [2005] 1 ILRM 34 (per Finlay Geoghegan J.); see L.S. Sealy, "The Director as Trustee" [1967] CLJ 83.

[22] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), p. 29.

[23] Cf In Re Frederick Inns Ltd [1994] 1 ILRM 387.

[24] Russell v. Wakefield Waterworks Co. (1875) L.R. 20 Eq. 474, 479; 32 L.T. 685; 23 W.R. 887; Percival v. Wright [1902] 2 Ch. 421; V. Finch, "Company Directors: Who Cares about Skill and Care?" (1992) 55 MLR 179, 187.

[25] Prudential Assurance Company Ltd v. Newman Industries Ltd (No. 2) [1982] Ch. 204.

[26] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 177.

[27] Foss v. Harbottle (1843) 2 Hare 461.

[28] V. Finch, "Company Directors: Who Cares about Skill and Care?" (1992) 55 MLR 179, 187; R.R. Pennington, "Directors' Personal Liability" (BSP Professional, 1987), p. 222, citing Prudential Assurance Company Ltd v. Newman Industries Ltd (No. 2) [1982] Ch. 204.

[29] See In Re City Equitable Fire Insurance Co Ltd [1925] Ch. 407, 426-429 (per Romer J.); Dorchester Finance Company Ltd v. Stebbing [1989] BCLC 498; L. MacCann, "Directors' Duties of Care, Skill and Diligence" (1991) 9 ILT 56; in the UK, the Companies Act 2006 for the first time enumerates the duties of company directors.

to possess and to act diligently.[30] The level of skill and diligence expected is unclear, and much depends on the individual circumstances of each company.[31] Generally, the standard required has not been high.[32] Trebilcock[33] identifies "managerial incompetence" as a more pervasive problem than fraud.[34] In acting on behalf of the company, directors should exercise the same prudence as an ordinary man would in his own affairs.[35] An error of judgment is insufficient to constitute breach of duty.[36] A recent addition to the duties of directors is that they must inform themselves about the company's affairs and play a part in supervising them.[37] However, a director is entitled to rely on the assurances of experts.[38] *In Re Frederick Inns*[39] has imposed a new duty on directors of insolvent companies to take account of the interests of creditors.[40] The ramifications of this duty have yet to

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[30] In Re City Equitable Fire Insurance Co Ltd [1925] Ch. 407, 428-429; Marquis of Bute's Case [1892] 2 Ch. 100; Jackson v. Munster Bank Ltd, ex parte Dease (1885) 15 LR Ir 356; Land Credit Company of Ireland v. Lord Fermoy (1870) 5 Ch. App. 763; L. MacCann, "Directors' Duties of Care, Skill and Diligence" (1991) 9 ILT 56.

[31] In Re City Equitable Fire Insurance Co Ltd [1925] Ch. 407, 427 (per Romer J.); V. Finch, "Company Directors: Who Cares about Skill and Care?" (1992) 55 MLR 179.

[32] "The common law operates to give directors a remarkable freedom to run companies incompetently" - V. Finch, "Company Directors: Who Cares about Skill and Care?" (1992) 55 MLR 179, 179; "Directors were long treated as well meaning amateurs" – ibid, 200.

[33] M.J. Trebilcock, "The Liability of Company Directors for Negligence", (1969) 32 MLR 499.

[34] Ibid, at 499.

[35] Dorchester Finance Company Ltd v. Stebbing [1989] BCLC 498, 501.

[36] In Re City Equitable Fire Insurance Co Ltd [1925] Ch. 407, 429 (per Romer J.); In Re Mont Clare Hotels Ltd; Jackson v. Mortell (High Court, Unreported, 2 December 1986); L. MacCann, "Directors' Duties of Care, Skill and Diligence" (1991) 9 ILT 56, 58-59.

[37] Kavanagh v. Delaney [2005] 1 ILRM. 34, approving In Re Barings plc. (No.5) [1999] 1 B.C.L.C. 433.

[38] L.S. Sealy, "The Director as Trustee" [1967] CLJ 83, 92.

[39] In Re Frederick Inns Ltd [1994] 1 ILRM 387.

[40] D. Milman, "Personal Liability and Disqualification of Company Directors: Something Old, Something New" (1992) 43(1) NILQ 1.

be fleshed out.[41] Directors' fiduciary duties demand that they also act honestly and in good faith for the benefit of the company.[42] These duties focus on the misapplication of company property.[43] Where a director exceeds the powers and authority conferred on him, he must account to the company for losses.[44] The court will respect the director's honest business judgement as to the interests of the company.[45]

A company may choose to ratify conduct which constitutes a breach of duty, provided it is within the company's capacity, or to release a director from personal liability.[46] MacCann states that the company has the power to absolve its directors from the consequences of a breach of fiduciary duty in the form of an ultra vires act, although the act itself remains void.[47]

14.2.1. Incapacity and Directors' Duties

There is some support for the view that engaging a company in ultra vires conduct necessarily constitutes a breach of directors' duties.[48] MacCann and Boyle and Birds argue that this is so.[49] It seems that the directors could be exempted from this

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[41] See Jones v. Gunn [1997] 2 ILRM 245; V. Finch, "Company Directors: Who Cares about Skill and Care?" (1992) 55 MLR 179, 194.

[42] Rolled Steel Products Ltd v. British Steel Corporation [1986] Ch. 246, 281; Howard Smith Ltd. v. Ampol Petroleum Ltd. [1974] AC 821; L. MacCann, "Directors' Duties of Care, Skill and Diligence" (1991) 9 ILT 56, 56.

[43] L.S. Sealy, "The Director as Trustee" [1967] CLJ 83, 91.

[44] Ibid, at 91.

[45] Ibid, at 91-92.

[46] Horsley v. Weight [1982] Ch. 442, 454; L.S. Sealy, "The Director as Trustee" [1967] CLJ 83, 102-103.

[47] L. MacCann, "Directors' Fiduciary Duties – Part 1" (1991) 9 ILT 80, 81.

[48] See above at 4.4.2.1: "Ultra vires acts as breaches of directors' duties".

[49] L. MacCann, "Directors' Fiduciary Duties – Part 1" (1991) 9 ILT 80, 80; J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 97, citing: In

assumed liability if the court deemed them to have acted honestly and reasonably.[50] The decision of Blayney J. in *Re Frederick Inns Ltd*[51] also implies that ultra vires acts are always breaches of directors' duties, as, "being ultra vires, they constituted a misapplication by the directors of the companies' funds"[52] As a general principle, this need not necessarily be so. The fact that a particular transaction is both ultra vires and a breach of fiduciary duties does not indicate that all ultra vires transactions are therefore automatically in breach of such duties. A diligent and honest director may unwittingly, and excusably, enter an ultra vires transaction.[53] Exceeding the company's capacity does not equate to either disloyalty or incompetence. Sealy thus prefers the view that "liability for misapplications is dependent on whether the director has acted honestly, or with reasonable care."[54]

In the past, when the use of a corporate power for a purpose which was not in the company's interests or connected to its main business was considered ultra vires, there was an overlap with directors' duties in such cases.[55] Now such transactions are properly viewed as intra vires, though still a breach of directors' duties.[56] The

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Re Sharpe [1892] 1 Ch. 154; Cullerne v. London & Suburban Building Society (1890) 25 QBD 485, 490.

[50] In Re Claridge's Patent Asphalte Company [1921] 1 Ch. 543.

[51] In Re Frederick Inns Ltd [1994] 1 ILRM 387, 399.

[52] In Re Frederick Inns Ltd [1994] 1 ILRM 387, 399.

[53] "There has not been any case of fraud proved, and the transaction appears to have been bona fide on the part of the Directors and intended for the benefit of the Company, and it is stated o have been entered into with the advice of counsel" - In Re Balgooley Distillery Company (Weekes' Case) (1886) 17 LR Ir 239, 246; "the good faith and honesty of the Directors has not been impeached", ibid, 254; "I discern no moral obliquity in the deeds and omissions of the [...] directors" - In Re S.M. Barker Ltd [1950] IR 123, 135 (per Gavan Duffy P.).

[54] L.S. Sealy, "The Director as Trustee" [1967] CLJ 83, 93.

[55] In Re Lee, Behrens & Co Ltd [1932] 2 Ch. 46; see above at 6.2: "Subordinating Powers to Pursuit of the Company's Objects".

[56] Rolled Steel Products Ltd v. British Steel Corporation [1984] BCLC 466; [1986] Ch. 246; K.W. Wedderburn, "Ultra Vires or Directors' Bona Fides?" (1967) 30 MLR 566, 569 - applying the test

connection drawn between incapacity and breach of fiduciary duty may be an extension of the proper purpose doctrine: where the director uses his powers for a purpose which is outside the company's capacity, the argument is that this necessarily constitutes using them for an improper purpose. MacCann reminds us that Buckley J. in *Re David Payne*[57] canvassed the possibility of personal liability in damages to the company for loss suffered through the directors exercising their powers for an improper purpose.[58] However, the proper purpose doctrine relates to the director exceeding the authority granted to him by the company, which is necessarily contrary to its interests. The same rationale does not necessarily apply where the director, for the good of the company, attempts to engage it in an enterprise which is condemned as ultra vires.

Blayney J.'s remark in *Re Frederick Inns Ltd*[59] was likely directed particularly to the context of the case before him, where the payments by an insolvent company breached the duties owed by the directors, not to the shareholders, but to creditors. In the context of a gratuitous disposition by an insolvent company, it is more likely to be the case that the ultra vires act may be assumed also to be a breach of fiduciary duty.

Simmonds v. Heffer[60] adopts a disquieting approach to the personal liability of directors. The executive committee which made an ultra vires donation was summarily ordered to "repay" the amount of the donation to the society.[61] This was based solely on the finding of incapacity, as allegations of breach of fiduciary duty were dropped.[62] An alternative claim was for a tracing remedy against the

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enunciated by Lord Greene M.R., In Re Smith and Fawcett Ltd [1942] Ch. 304, 306; see above at 7.2: "Rolled Steel: the Nail in the Coffin for Corporate Benefit".

[57] In Re David Payne and Company Ltd [1904] 2 Ch. 608.

[58] L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 85.

[59] In Re Frederick Inns Ltd [1994] 1 ILRM 387, 399.

[60] Simmonds v. Heffer [1983] BCLC 298.

[61] Ibid, at 304.

[62] Ibid, at 300.

recipients, but they had offered to repay the money if an order was made against the executive committee. This may have clouded the issue. The liability of the executive committee was not grounded in any misfeasance, and so may implicitly support the proposition that pursuing ultra vires transactions automatically renders directors open to personal liability.

This would be a harsh rule, given the risk that careful and blameless directors may unwittingly exceed the company's capacity. That they should be liable for potentially large sums which they have not themselves received would be an unduly punitive response to an excusable error. Despite this authority, it seems preferable to assume that the directors' actions must come within the authorities on fiduciary duties in order to constitute a breach of these as well as an excess of the company's capacity.

14.2.2. Knowing Assistance of Breach of Trust

As an ultra vires act may independently constitute a breach of fiduciary duty, the law on knowing assistance may also come into play.[63] Where a third party assists a trustee in actions which constitute a breach of trust, he can be held liable. The mental element of dishonesty requires that the person's conduct fall below accepted standards of honest conduct and that he realise this.[64]

A director who acts wrongfully may be ordered to account "as a constructive trustee". This commonly arises where he profits from his position in breach of his fiduciary duties.[65] In *Agip (Africa) Ltd. v. Jackson*,[66] this mechanism was

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[63] Barnes v. Addy (1874) LR 9 Ch. App 244; Selangor United Rubber Estates Ltd v. Cradock (No. 3) [1968] 1 WLR 1555, 1580; See M. Ashe & P. Reid, "Equity and the Pursuit of Hot Money - Warning to Banks" (1997) 4(8) CLP 188.

[64] Bank of Credit and Commerce International (Overseas) Ltd. v. Akindele [2001] Ch. 437; Twinsectra Ltd v. Yardley [2002] 2 AER 377; following Royal Brunei Airlines v. Tan [1995] 1 AC 378; criticised by R. Thornton, "Dishonest Assistance: Guilty Conduct or a Guilty Mind?" [2002] CLJ 524 ; See also A. Berg, "Accessory Liability for Breach of Trust" (1996) 59 MLR 443.

[65] Phipps v. Boardman [1967] 2 AC 46, 84-85 (per Dilhorne VC): "Equity, may, where there has been some impropriety of conduct on the part of a person in a fiduciary relationship as, forinstance, a

considered in relation to a party which assisted in the impugned transaction but did not receive the company's assets.[67]

Despite appearances, it may be doubted whether some of cases which refer to "liability to account as a constructive trustee" involve a trust.[68] The phrase may be parsed to mean "in the same way as" a constructive trustee. This view is advanced by Birks, who states definitively that the words "have no proprietary connotation".[69] He points out that liability to account is simply the means employed by the chancery courts to award damages, in spite of their historical denial that they did so.[70] If this is the correct interpretation, then what is at issue is a personal remedy against a person who knowingly assists in the alienation of company assets; not the imposition of a trust.[71] This is a fine distinction which has not necessarily been to the fore each time the term is used.[72]

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trustee purchasing trust property, require that person to account."; Regal (Hastings) Ltd. v. Gulliver [1942] 1 AER 378.

[66] Agip (Africa) Ltd. v. Jackson [1990] 1 Ch. 265.

[67] "A stranger to the trust will also be liable to account as a constructive trustee if he knowingly assists in the furtherance of a fraudulent and dishonest breach of trust." - Agip (Africa) Ltd. v. Jackson [1990] 1 Ch. 265, 292 (per Millet J.).

[68] R. Grantham, "Doctrinal Bases for the Recognition of Proprietary Rights" (1996) 16 OJLS 561, 581; A. Berg, "Accessory Liability for Breach of Trust" (1996) 59 MLR 443, 448; G. Virgo, "The Principles of the Law of Restitution", 2nd ed. (Oxford, 2006), p. 606; see also above at 13.2.3.1: "The institutional trust, knowing receipt and the Belmont principle".

[69] P. Birks, "The Foundations of Unjust Enrichment: Six Centennial Lectures" (Victoria University Press, Wellington, 2002), pp. 31-32.

[70] Ibid, at p. 32.

[71] See Coleman Taymar Ltd v. Oakes [2001] 2 BCLC 749: liability to account is treated as damages and statutory exemption applied.

[72] See Murphy v. Attorney General [1982] 1 IR 241, 315-316 (per Henchy J.): "an account of money held as a constructive trustee".

14.3. TORTIOUS LIABILITY?

14.3.1. Negligent directors: Company Law or Tort?

Furthermore, if the actions of any individual constitute a wrong, then they may be liable in tort.[73] The outside party to an ultra vires transaction could be negligent.[74] Similarly, it is considered evident that employees can be liable in negligence, but the liability of directors is more difficult, which creates a potential anomaly.[75] Directors may potentially be liable for negligence as well as breach of duty, though the boundaries of the two concepts are unclear.[76] Discussion of the tortious liability of directors often focuses on the scenario where the company has committed a tortious act and the personal liability of the director is urged for his personal contribution to the company's wrongdoing.[77] The issue addressed here is different: if a company loses financially as a result of entering into a void transaction, can the creation of this situation by a possibly negligent director give the company a right of action in tort against its director?

While many of the authorities addressing negligence are treated as concerning the common law duties of care owed to a company by its directors, there are also plenty of cases which may be viewed as tortious liability. Milman introduces this liability in the context of torts, despite the references of the authorities he cites to

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[73] See R.J. Friel, "Negotiating Liabilities without Benefit: the Pre-Contractual Liability Trap" (2000) 7(8) CLP 188.

[74] Selangor United Rubber Estates Ltd v. Cradock (No. 3) [1968] 1 WLR 1555.

[75] C. Gosnell, "The Personal Liability of Corporate Agents: Who Should Bear Pure Economic Losses?" (1997) 55 U. Toronto Fac. Law Rev. 78, 79.

[76] See eg In Re City Equitable Fire Insurance Co Ltd [1925] Ch. 407, 430 (per Romer J.); Pennington explains that the rules on directors' duties were developed by equity because the common law courts were not asked to judge negligence cases - R.R. Pennington, "Directors' Personal Liability" (BSP Professional, 1987), p. 82.

[77] See D. Milman, "Personal Liability and Disqualification of Company Directors: Something Old, Something New" (1992) 43(1) NILQ 1, 2.

"misfeasance".[78] Certain authorities held that, provided directors did not breach their duties to the company, they would not be held to account for incompetence. Trebilcock quotes Lord Hatherley L.C. in *Turquand v. Marshall*,[79] who articulated this laissez-faire approach, saying,

> "however ridiculous and absurd their conduct might seem, it was the misfortune of the company that they chose such unwise directors".[80]

Such a dictum does not seem to hold out much hope for holding to account directors who unwisely undertake an ultra vires action. Many older cases indicated that the director would only be liable for something like "gross negligence".[81] In *Overend Gurney & Company v. Gibb,*[82] an action for personal liability was brought against directors who had foolishly taken over an insolvent bank and made bad loans. Lord Hatherley required that directors be guilty of gross negligence in order to be liable. They would have to have been aware of circumstances so obviously risky that no reasonably prudent man would have conducted his own affairs as they did the company's.[83] Given the confusion often surrounding the interpretation of corporate objects and determination of companies' capacity, this would be a difficult test to meet in the context of ultra vires transactions.[84]

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[78] Ibid, at 3.

[79] Turquand v. Marshall (1869) LR 4 Ch.App. 376.

[80] Ibid, at 386 (per Lord Hatherley LC), quoted in M.J. Trebilcock, "The Liability of Company Directors for Negligence", (1969) 32 MLR 499, 500.

[81] M.J. Trebilcock, "The Liability of Company Directors for Negligence" (1969) 32 MLR 499, 500.

[82] Overend Gurney & Company v. Gibb (1872) Lr 5 HL 480; L. MacCann, "Directors' Duties of Care, Skill and Diligence" (1991) 9 ILT 56, 58.

[83] Overend Gurney & Company v. Gibb (1872) Lr 5 HL 480, 487 (per Lord Hatherley LC): "circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men of any degree of prudence, acting on their own behalf, would have entered into such a transaction"

[84] The test "is so minimal that directors should have no difficulty, unless they are virtual simpletons" - L. MacCann, "Directors' Duties of Care, Skill and Diligence" (1991) 9 ILT 56, 58; see also PMPA Insurance Co Ltd v. New Ireland Assurance Co Ltd (High Court, ex tempore judgment, 22 October 1975, reported in the Irish Times, 23 October 1975).

The threshold has since been lowered from gross negligence. *Dorchester Finance Company Ltd v. Stebbing*[85] also saw a company sue its directors for negligence. They had signed blank cheques and neglected to conduct any oversight.[86] They argued that the test for liability was gross negligence, but Foster J. considered the distinction between negligence and gross negligence unimportant.[87]

14.3.1.1. Tortious liability for concluding an ultra vires contract

Applying these principles to a director who enters into a contract which is outside the capacity of the company, he would have to be negligent in failing to appreciate that the company lacked capacity, which is not necessarily the case, especially given the difficulty in determining from a company's objects clause the precise extent of its capacity. If the company itself wished to sue its director for negligence which caused it loss, it would be more usual and easier for it instead to establish breach of the director's duty of due skill and care. The primacy of the law on directors' duties over tort in this context is indicated by Trebilcock's article on directors' negligence,[88] with its focus on the authorities on directors' duties.

14.3.1.2. The company representative's tortious liability to the outsider

If the director is to be held personally liable for negligence in causing loss to the party that performs its side of a void bargain, can he be liable to either the company or the outsider? Each would seem to have an equally valid claim subject to the recognition that this tort claim is unlikely to be the best mechanism to seek a remedy. However, tort law presents obstacles to the outsider's claim for negligence against the director. Generally, the outsider's dealings will be viewed as with the

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[85] Dorchester Finance Company Ltd v. Stebbing [1989] BCLC 498.

[86] Dorchester Finance Company Ltd v. Stebbing [1989] BCLC 498, 505: "they not only failed to exhibit the necessary skill and care in the performance of their duties as directors, but also failed to perform any duty at all as directors".

[87] Ibid, at 501-502.

[88] M.J. Trebilcock, "The Liability of Company Directors for Negligence" (1969) 32 MLR 499.

company rather than individual directors.[89] Company directors are presumed to be immune from personal liability for negligence in their acts on behalf of the company unless they assume personal responsibility. This may be justified on company law principles or by reference to liability for pure economic loss.[90] The assumption of responsibility that will ground a claim for economic loss requires the individual to act "with the skill and care of one in the profession", which means that the standard which must be met is an objective one.[91] For an outsider to the company, proof of negligence would be difficult. In addition, it would have to show that the director had assumed personal liability through his actions, and that the transaction caused loss. This would be a complicated path to compensation.

If the company or its agent misrepresents its capacity to a contracting partner, this may give rise to an action for damages in misrepresentation, without giving validity to the void agreement.[92] An outsider might also sue a company's representative for deceit.[93] The tort involves an untrue statement of fact, made by someone who either

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[89] R. Grantham & C. Rickett, "Directors' 'Tortious' Liability: Contract, Tort or Company Law?" (1999) 62 MLR 133, 139; A. Willekes & S. Watson, "Economic Loss and Directors' Negligence" [2001] JBL 217; C. Noonan & S. Watson, "Directors' Tortious Liability – Standard Chartered Bank and the Restoration of Sanity" [2004] JBL 539, 541, citing White Horse Distillers v. Gregson Associates Ltd [1984] RPC 61; cf Trevor Ivory v. Anderson [1992] NZLR 517, 520 (per Cooke P.): "an officer or servant of a company, whether as senior as a governing director or lower in the hierarchy [...], may in the course of activities on behalf of the company come under a personal duty to a third party, breach of which may entail personal liability."

[90] R. Grantham & C. Rickett, "Directors' 'Tortious' Liability: Contract, Tort or Company Law?" (1999) 62 MLR 133, 139; Williams v. Natural Life Health Foods Ltd. [1998] 2 All ER 577, [1998] 1 WLR 830, citing Hedley Byrne & Company Ltd v. Heller & Partners [1964] AC 465; see Griffin, "Case Comment" (1999) 115 LQR 36.

[91] A. Willekes & S. Watson, "Economic Loss and Directors' Negligence" [2001] JBL 217, 239.

[92] "It was considered that estoppel by representation did not enlarge the company's powers, and this is no doubt correct; but it does not follow that the company cannot be held liable for the misrepresentation" - Lloyd v. Grace Smith & Company [1911] 2 KB 489, 511-512 (per Farwell LJ), cited by Ronan LJ, in Byrne v. Rudd [1920] 2 IR 12, 39-40.

[93] R.J. Friel, "Negotiating Liabilities without Benefit: the Pre-Contractual Liability Trap" (2000) 7(8) CLP 188.

knows it to be untrue or is reckless about its accuracy, which is relied upon by the other listener, who suffers loss as a result.[94] The element of intention here may in practice preclude this action in many ultra vires cases: a company director who knew there was a difficulty about capacity would initiate steps to extend the company's objects. It is likely that if an action in deceit ever were to lie, it would arise through recklessness.

14.3.2. Agency

Noonan and Watson favour agency as the mechanism for establishing personal liability. They distinguish between directors' internal management functions and those "where they engage with the outside world on behalf of the company".[95] For internal management, the director acts as the company, but in external dealings, "the directors are typically employees or agents of the company", and so their potential liability can be determined according to the principles of agency.[96] Noonan and Watson prefer agency as the basis because it leaves the individual always liable for intentional torts.[97]

14.3.3. The Consequences of Individual Liability

Negligence on the part of directors can give rise to the award of damages in favour of the company.[98] In Ireland, case law continues to govern personal liability of this kind. Part 11 of the UK Companies Act 2006 makes it easier for shareholders to bring a derivative action against directors for negligence.[99] Shareholders can challenge proposed or existing acts which constitute negligence, default, breach of

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[94] Derry v. Peek (1889) 14 App. Cas. 337; [1886-90] AER 1.

[95] C. Noonan & S. Watson, "Directors' Tortious Liability – Standard Chartered Bank and the Restoration of Sanity" [2004] JBL 539, 548.

[96] Ibid, at 548.

[97] Ibid, at 545.

[98] Dorchester Finance Company Ltd v. Stebbing [1989] BCLC 498, 500.

[99] R. Craig, "The enormous turnip - Discussion on the UK Companies Act 2006 which, like Topsy in the child's fairy tale, is still growing" (2008) 15(4) CLP 86.

trust or breach of duty. Their action will result in the award of damages to the company. This statutory tidying up does not clarify whether directors' negligence should be treated as a matter of directors' duties or tort.

There is a difference between the affirmation that directors might be liable in principle to pay damages for their conduct, and their real capacity to deliver compensation. Individual liability may be useful in order to recover damages in the circumstance that the company itself is insolvent, but equally, the losses suffered due to a void commercial contract may far exceed the ability of any individual to redress. Trebilcock emphasises that individual liability can be more punitive than compensatory.[100] He indicates that personal liability will likely always remain secondary, as it is unlikely to be a "fruitful" approach to investor protection.[101] In addition, there are policy concerns that exposing managers to personal liability could make them excessively risk averse or even lead to resignation.[102]

The disproportion between potential losses and the resources of an individual raises the issue of directors' insurance.[103] The English Companies Act 1989 authorised the purchase by companies of indemnity insurance cover for directors.[104] Sealy suggests that care should be taken in exposing directors to expanding personal liability not to allow insurance premiums to become prohibitively expensive and so deter prospective directors.[105]

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[100] M.J. Trebilcock, "The Liability of Company Directors for Negligence" (1969) 32 MLR 499, 512-513: "to impose liability [...] where this can have little or no real compensatory effect, but will merely ruin the directors – is to use what is primarily a compensatory remedy for a largely punitive end".

[101] Ibid, at 513.

[102] C. Gosnell, "The Personal Liability of Corporate Agents: Who Should Bear Pure Economic Losses?" (1997) 55 U. Toronto Fac. Law Rev. 78, 129.

[103] See Ibid, at 131.

[104] Section 137, Companies Act, 1989 (UK); the previous position caused concern – J. Birds, "Director's Insurance and s310" (1986) 7(5) (1986) 209.

[105] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 186.

14.4. STATUTORY LIABILITY

The individual officer responsible for causing the company to enter into a transaction which exceeds its capacity may be liable either directly for that fact, or because the transaction also constitutes a breach of the statutory provisions prohibiting fraudulent or reckless trading. Section 8(1) of the Companies Act, 1963 provides that any director or officer who causes the company to act in excess of its powers shall be liable to the company for any loss suffered by it.[106] This applies to all companies registered under the Companies Acts, but not to other corporations.[107] It provides a clear statutory claim against the individuals responsible for ultra vires transactions.

In addition, Section 298 of the Companies Act, 1963[108] provides a statutory foundation for the liability of any officer of a company which is being wound up who is guilty of misfeasance or breach of trust.[109] The wrongdoer can be obliged to reimburse or compensate the company, at the discretion of the court. Keane J. emphasises that the statutory liability is simply a restatement of the existing rule.[110]

14.4.1. Disqualification of Directors

The restriction or disqualification of company directors for fraud, breach of duty or fraudulent or reckless trading may also arise in the context of incapacity. It is more

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[106] See also Section 35(3), Companies Act, 1985 (UK): directors have a statutory duty not to act ultra vires.

[107] Section 2(1), Companies Act 1963 (Ireland).

[108] Section 298, Companies Act 1963, as inserted by Section 142, Companies Act 1990 (Ireland).

[109] See In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8; Milman points out that under Northern Irish law individual creditors of an insolvent company can sue company directors for misfeasance - D. Milman, "Personal Liability and Disqualification of Company Directors: Something Old, Something New" (1992) 43(1) NILQ 1, 4, citing Article 176, Insolvency (Northern Ireland) Order, 1989.

[110] In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8, 25: "it provides a summary form of remedy for the recovery of monies which the persons named in the section would in any event be liable to repay, or account for, to the company."

properly regarded as a tool to protect the public than a means of punishing an individual.[111] Nor will it provide compensation to those who have suffered loss. An excess of capacity in breach of duty could theoretically result in a disqualification order, as the courts take account of the directors' compliance with formal statutory obligations, commercial management as insolvency approaches, and respect of the duty owed to creditors.[112] The seriousness and frequency of transgressions come into play.[113] Absent fraudulent intent, or a track record of incompetence, a single instance of "commercial misjudgement" is unlikely to suffice[114] unless it constitutes "gross mismanagement".[115] However, an honest director can be restricted if the failure to observe the directors' duty to creditors in a single incident is sufficiently serious.[116]

14.4.2. Conclusion: Individuals' Personal Liability for Misconduct

Firstly, in every ultra vires case where the company suffers a loss, it has a statutory right to claim damages from the officers responsible.[117] Furthermore, there is likely in many incapacity cases also to be a breach of directors' duties, giving rise to personal liability. There may be breach of the director's duty to creditors in an insolvent company. Knowing assistance to a director's breach of fiduciary duty may

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[111] Section 150, Companies Act, 1990 (restriction); Section 160(2)(h), Companies Act 1990 (as amended by section 42(b) of the Company Law Enforcement Act, 2001 - disqualification); D. Milman, "Personal Liability and Disqualification of Company Directors: Something Old, Something New" (1992) 43(1) NILQ 1, 13; H. Linnane, "Restrictions on and Disqualification of Directors" (1994) 12(6) ILT 132; L. MacCann, "Personal Liability for Corporate Debts" (Part 1) (1991) 9 ILT 206, 209.

[112] In Re Swanpool Ltd, McLaughlin v. McLannen [2006] 2 ILRM 217, 223.

[113] Ibid, at 224.

[114] D. Milman, "Personal Liability and Disqualification of Company Directors: Something Old, Something New" (1992) 43(1) NILQ 1, 14; Business Communications v. Baxter and Parsons (Unreported, High Court, Murphy J., 21 July 1995); In Re Lo-Line Motors Ltd [1988] Ch. 477, 485.

[115] In Re Swanpool Ltd, McLaughlin v. McLannen [2006] 2 ILRM 217, 223.

[116] Ibid.

[117] Section 8(1), Companies Act 1963 (Ireland).

ground a claim in damages against a third party. There is also a possibility of tortious claims against responsible persons, whether for negligence or deceit. Tort is not the most direct approach for the company itself: it would rank below the statutory claim and an action for breach of directors' duties. The outsider may also be able to establish a tort claim, though, in the case of negligence, this is constrained by the law on pure economic loss. Finally, statutes provide for both compensation and punishment in the case of wrongful conduct, especially where a company is insolvent.

Recourse against company directors presupposes the company's willingness to pursue them, though if the company is wound up, the liquidator may provide the necessary impetus. In all cases, and principally for pragmatic pecuniary reasons, the best remedy would appear to be a claim directed at the recipient of the company's property, whether a personal claim in unjust enrichment or a proprietary claim to the assets in question. It would only be in particular circumstances, where such a claim was either insufficient or unavailable, that the emphasis should shift to the individual liability of the persons responsible.

15. JUDGING THE ULTRA VIRES DOCTRINE

Sealy wrote at the time of the Prentice Report that, "old notions and prejudices do die hard".[1] The irony is that today, the orthodox view, unchallenged for decades, is that ultra vires must ultimately be reformed or abolished.[2] Criticism of the doctrine has been long, consistent and fierce.[3] A series of official advisory reports in the United Kingdom and Ireland have disapproved of the doctrine.[4] Legislative moves in many jurisdictions have favoured reform or abolition.[5] The various approaches adopted include enacting protections for outsiders, reducing capacity to an internal matter, expressly permitting transactions which are not in the corporate interest, abolishing objects clauses and granting companies unlimited capacity. Some measures target specific classes of corporation, whereas others are more general. In the United Kingdom, the doctrine was virtually abolished for registered companies in the mid-1980s, and the new Companies Act goes further towards fully excising it.[6] Now it is proposed to abolish limits on the capacity of private companies in Ireland.[7] Ireland's Company Law Review Group[8] has proposed that private

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[1] L.S. Sealy, Editorial, (1986) 7 Company Lawyer 90, 90.

[2] See eg T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 342: "In fact the doctrine often does more harm than good."; G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 98; "The doctrine has faced criticism over many generations of company lawyers." - S. Davis, "The Ultra Vires Rule" 136 NLJ 907, 907.

[3] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 118: it provoked the "widespread dissatisfaction of the legal profession".

[4] Ibid, at 117-118: it also provoked the "widespread dissatisfaction of the legal profession"; K. Polack, "Company Law – Allegation that a Contract is Ultra Vires the Plaintiff" [1966] CLJ 28, 30.

[5] S. Davis, "The Ultra Vires Rule" (1986) 136 NLJ 907; see below at 16.1.2: "Legislative Reform in the Common Law World".

[6] Companies Act 2006 (UK).

[7] Company Law Review Group, First Report (Dublin, 2001).

[8] Established under Section 67, Company Law Enforcement Act, 2001; see http://www.clrg.org/.

companies no longer be required to register objects clauses, which would result in their acquisition of the full legal capacity of a natural person.[9]

Arguments against the ultra vires doctrine respond both to the imperfections of the law revealed through its application in the cases and a growing sense that the doctrine ignores shifts in the legal and commercial environment. Few questioned its original introduction, and the principle soon became firmly entrenched.[10] Resistance from companies took the form, not of public pleas for reform, but of technical devices included in memoranda to stretch their individual capacity.[11] Their many successes in expanding their legal capacity - provided they inserted the requisite terms - did not negate the need for legislative reform.[12] The modern objects clause was "the single most effective cause for the demise of *ultra vires*",[13] but it could not root out the doctrine. By undermining the logic that the clause should be informative, it exacerbated the discontent. As the case law modified the scope of the doctrine's effect in patchwork fashion, it left anomalies and potential pitfalls. Much criticism of the ultra vires doctrine juxtaposes the allegation that it serves no useful purpose with the risk and burden created for outsiders dealing with companies.[14] Critics point to the unjust outcomes on the pages of the law reports. The "manifest

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[9] See A. O'Neill, "Company Law Update" (2007) 14(8) CLP 181.

[10] See above at Chapter 3: "The Initial Application of the Doctrine of Ultra Vires to the Registered Company".

[11] See above at Chapter 5: "The Interpretation and Drafting of Objects Clauses".

[12] K. Polack, "Company Law - Ultra Vires - Construction of Objects Clauses" [1966] CLJ 174, 177.

[13] G. Shapira, "Ultra Vires Redux" (1984)100 LQR 468, 468.

[14] "Cohen Committee Report", Report of the Committee on Company Law Amendment (1945) Cmd. 6659/45, para. 12; J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 270, 273; A. Griffiths, "Contracting with Companies" (Hart, 2005) p. 168; L.S. Sealy, "The Bell Tolls for Ultra Vires" (1986) 7 Company Lawyer 90, 90; Anonymous, "News: IOD Urges Removal of Ultra Vires Rule" (1986) 7 Company Lawyer 127; J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" [1963] JBL 143, 143-144: "The operation of the doctrine has imposed great hardship upon third parties dealing with a company, requiring them to choose between the inconvenience involved in examining the memorandum to ascertain that the proposed transaction is *intra vires*, or the risks that the transaction may subsequently be invalidated".

injustice and inconvenience"[15] of *In Re Jon Beauforte (London) Limited*[16] is emblematic. Thus, it is alleged, not only does the doctrine fall short of its laudable policy aims of protecting shareholders and creditors, but it seems instead perversely to operate to their detriment. Statutory measures designed to protect the innocent outsider from the effects of corporate incapacity carved out precise exemptions, leaving the doctrine's unsatisfactory effects applicable to all who could not avail of the protective terms.[17] The case against the ultra vires doctrine might seem overwhelming.

Yet, a thorough appraisal of the ultra vires doctrine in the modern legal and societal context suggests that the calls for abolition are not convincing. If the arguments in favour of limited capacity are not conclusive, nor are those against it. Properly understood and applied, the ultra vires doctrine is not the bugbear it is perceived to be. This is because, in the last quarter century, significant changes to the law in two distinct areas have effectively solved the problems associated with the doctrine.

Firstly, within the substantive law on corporate incapacity, the rejection of the corporate benefit test for the exercise of express powers has addressed the cause of much of the difficulty which surrounded the doctrine.[18] The modern *Rolled Steel*[19] analysis strips away external restrictions on corporate capacity and returns the proper emphasis to the objects clause itself. This re-establishes the ultra vires doctrine on a sound theoretical and practical footing. It restores to companies and their shareholders that control of corporate actions which the courts had arrogated to themselves. It eliminates the confusion and uncertainty and reduces the threat to the security of transactions which developed under the old *Lee Behrens*[20] approach. It

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[15] Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221, 228.

[16] In Re Jon Beauforte (London) Ltd [1953] 1 AER 634.

[17] See above at 8.3: "Legislative Reform to Protect the Outsider ".

[18] See above at Chapter 7: "The Decline and Fall of the Corporate Benefit Test".

[19] Rolled Steel (Products) Holdings Ltd v. British Steel Corporation [1986] Ch. 246.

[20] In Re Lee, Behrens & Co Ltd [1932] 2 Ch. 46.

opens up a new vista, where objects clauses can say what they mean, and mean what they say. From now on, it should be far simpler to determine whether or not a company has sufficient capacity for a particular transaction by referring to the terms of its objects clause. All these benefits are contingent on the *Rolled Steel*[21] approach forming part of Irish law. Admittedly, there is currently room for doubt on this central question, but it is to be hoped that the courts will confirm the modern approach to incapacity at the first opportunity.[22]

The second area in which recent advances challenge the hostile consensus on the ultra vires doctrine lies outside the doctrine itself, and even outside the field of company law. The rapid evolution of the law of remedies in recent decades guarantees that the unjust results which have so bedevilled the ultra vires doctrine in the past have now been emphatically left behind. The modern law of restitution, underpinned by the principle against unjust enrichment, is a ready source of personal remedies. Both failure of consideration and mistake should ground an action arising out of a contract which is void for lack of capacity. Furthermore, equity will offer a proprietary remedy in many cases, either through the institutional *Belmont* constructive trust, or the new model remedial constructive trust, which has fallen on fertile ground in this jurisdiction. Any party which has transferred benefits under the void agreement will be granted sufficient and appropriate remedies, be they personal or proprietary. The full picture of the ultra vires doctrine takes account of these remedies. Their existence rebuts the perception of harshness and injustice which spurs calls for the reform of the substantive law on corporate capacity. It seems that the thorny question of the outsider's plight[23] has been addressed with little fanfare. This puts in doubt the widespread assumption that ultra vires must be expunged in order to prevent injustices resulting from the invalidation of part-executed contracts.

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[21] Rolled Steel (Products) Holdings Ltd v. British Steel Corporation [1986] Ch. 246.

[22] See above at 7.3: "Rolled Steel and the Law in Ireland".

[23] See above at Chapter 8: "The Effect of the Ultra Vires Doctrine on the Innocent Outsider".

Thus, just as every ultra vires case must involve two stages of inquiry, into the question of capacity and then into the legal remedies which might arise, so must the evaluation of the doctrine as a whole. It is now fully possible to reconcile theory and justice by affirming that an ultra vires transaction is indeed void, but that this is not the end of the matter. It is time for a comprehensive and up to date reevaluation of the merits of the ultra vires doctrine.

Yet, it seems that opposition to the ultra vires doctrine has not been touched by these radical developments, which have the potential to undermine profoundly the case for reform. Although the corporate benefit test should no longer be law,[24] it has, unfortunately, left deep tracks in the manner in which this area of law is understood, discussed and applied. Because statutory reform in the United Kingdom came so soon after the revolutionary effect of the decision of the Court of Appeal in *Rolled Steel*, the revolutionary impact of that decision on the structure of the law on corporate capacity seems not to have been fully appreciated. Equally, there is little sign that those who judge the ultra vires doctrine unkindly are taking into account the new law of remedies, which completely alters the context in which incapacity operates. In order to judge afresh what place the ultra vires doctrine should have in modern company law, it is important to look beyond the traditional criticisms. It is necessary to put in the balance both the justifications for the doctrine as well as the charges levelled against it.

This analysis must occur against the broader canvas of contemporary company law, commercial practice and prevailing perspectives on corporate theory. Radical changes in law and society have occurred in the past century and a half. Changed circumstances require new laws.[25] Even if the reasons for the limitation of registered companies' capacity in *Ashbury* were legally defensible in 1875 and "made sense at

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[24] Admittedly, this needs definitive clarification in Ireland; see above at 7.3: "Rolled Steel and the Law in Ireland".

[25] See R.S.T. Chorley, "The Conflict of Law and Commerce" (1932) 48 LQR 51.

that time",[26] they may be obsolete in the altered commercial and legal environment a century and a half later. Attitudes to the corporation have transformed since the nineteenth century. Danckwerts observes that the "early cases in the history of company law "are not necessarily bad law for that reason".[27] However, it must be acknowledged that changes in the legal, social and commercial environment and values might render obsolete the choices made in the earliest days of company law.[28]

The law must evolve to respond to changes in the society in which it operates and the broader legal context which surrounds it. Both the doctrine of ultra vires and the law relating to remedies show the dynamic nature of the law. Society changes, legislation changes and judicial philosophy and decision-making change. All these changes interact in a complex pattern. The extension of ultra vires to the limited company was a judicial response to the legislative spur provided by the new form of incorporation. The subsequent evolution and softening of the doctrine reflects a gradual change in society's attitude to the registered company. The evolution of the law governing remedies responds to a shift in the balance which judicial thinking strikes between the values of legal certainty and individual justice. The impact which these developments will inevitably have on each other and on other areas of the law is critically important.

In weighing up whether the ultra vires doctrine serves a useful purpose in modern company law, one must consider whether the objectives it serves ought to be protected by the law, whether they might be better protected by alternative legal mechanisms, and whether the adverse effects of the doctrine are sufficiently grave to outweigh its advantages. Ultimately, this evaluation of the principle of limited

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[26] J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 267.

[27] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656, 681 (Danckwerts LJ).

[28] Gower speaks of "sloughing off anachronistic rules no longer in tune with modern conditions", appearing to view ultra vires in this light - L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1399.

capacity is useful in order to inform a response to the current proposals and alternative recommendations for the way forward.

15.1. Revisiting Ashbury: A Nineteenth Century Doctrine in the Twenty First Century

15.1.1. The Nature of the Registered Company

A good place to start is to measure how well the original rationales for the limited capacity of registered companies stand up today.[29] The perception that the gift of corporate personality was a concession from the state, whose boundaries ought to be strictly policed, was an important element of the decision in *Ashbury*.[30] Legal theory was reinforced by pervasive unease at the concept of registered companies, and the danger they posed to the public. Both elements of this outlook have been displaced by the passage of time and the growing familiarity of the private limited company.

15.1.1.1. Changed legal perspectives on the registered company

Today, given the dominance of the registered company, it is no longer tempting to regard it as merely a variety of statutory corporation. If the assimilation of the two forms was ever justifiable, it would be harder to defend now.[31] The gap between the statutory corporation and registered company has increased with the possibility of amending companies' objects clauses.[32] The argument that their legal capacity should necessarily be the same is weak.

Theories of legal personality cannot answer the question of corporate capacity; they may instead merely be used to legitimate the choices made. These theories, while

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[29] See above at 3.3.1: "The Reasons for the House of Lords' Decision".

[30] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[31] C.E. Carpenter, "Should the Doctrine of Ultra Vires be Discarded?" (1923-1924) 33 Yale L.J. 49, 68.

[32] See above at 5.4.1: "The Alteration of Objects Clauses"; cf L.C.B. Gower, "Principles of Modern Company Law", 5th ed. (Sweet & Maxwell, London, 1992), p. 14: it remains necessary for statutory corporations to request Parliament to pass an amending statute.

useful in some ways to penetrate the mystery of the corporation, should not be invoked to impose dogmatic legal rules inconsistent with modern perceptions and the demands of commerce and justice.[33] This objection applies to all academic attempts to conceptualise the nature of corporate personality: each theory is somewhat artificial and should not therefore dictate legal principles which fail to respect business reality or policy objectives.[34]

Furthermore, the fiction or concession theories of corporate personality have declined.[35] O'Neill points to the rejection of concession theory in recent times by Irish courts, which undermines it as a support for limited capacity.[36] Public attitudes may have influenced legal theory in this area. As the registered company became firmly embedded in public consciousness,[37] the individuals behind a company came to be acknowledged as its progenitors, rather than the state.[38] Even if there is still

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[33] "All fictions have been introduced for the purpose of convenience and to subserve the ends of justice. But when they are urged to the intent and purpose not within the reason and policy of the fiction they have been disregarded by the courts." – State v. Standard Oil Company, (1892) 49 Ohio St. 137, 177.

[34] C. Stanley, "Corporate Personality and Capitalist Relations: a Critical Analysis of the Artifice of Company Law" (1988) 19 Cambrian L.R. 97, 107: "Because of its inherent artificiality the concept of corporate personality presents a false representation of reality."; J. Dewey, "The Historic Background of Corporate Legal Personality" (1926) 35 Yale L.J. 655, 669.

[35] In 1909, Frey described the fiction theory of corporate existence as "gradually passing away" - A.B. Frey, "Ultra Vires and Estoppel" (1909) 43 American Law Review 81, 91; S. Worthington, "Shares and Shareholders: Property, Power and Entitlement: Part 1" (2001) 22(9) Company Lawyer 258, 263: they are "now widely conceded to be inconsistent with modern corporate practice".

[36] A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), pp. 24-25; Iarnrod Eireann v. Ireland [1996] 3 IR 321; [1995] 2 ILRM 161; however particular and distinct considerations may justify this approach in a constitutional context; cf P. Ussher, "Company Law in Ireland" (Sweet & Maxwell, London, 1986), pp.17-18, citing PMPS v. Attorney General (High Court, Unreported, 15 July 1981).

[37] Lord Irvine of Lairg, "The Law: An Engine for Trade" (2001) 64 MLR 333, 344: "Since [1844], the company as a business vehicle has taken off as an unequivocal success."

[38] L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1371-1372; S. Worthington, "Shares and Shareholders: Property, Power and

judicial support for the concession theory of corporate personality, it is possible to view the corporation as the creation of the state without deducing that it must therefore have limited capacity. The Company Law Review Group's recommendation of full capacity for most private companies[39] indicates that this is so: the state is willing to grant unlimited capacity to its creations. Limited capacity is a choice, and one which is influenced by a range of factors.

15.1.1.2. Societal attitudes to the company

Ashbury itself clearly reveals the mistrust of the registered company which motivated the introduction of limited capacity.[40] The philosophy which founded limited capacity in the concession theory, along with this initial atmosphere of mistrust, subsided throughout the twentieth century.[41] Incorporation is no longer perceived as "some kind of special privilege".[42] Anderson asserts that the need to

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Entitlement: Part 1" (2001) 22(9) Company Lawyer 258, 263; K. Greenfield, "Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality" (2001) 87 Virginia Law Review 1279, 1312; A. Carver, "Corporate Governance – Capitalism's Fellow Traveller", in F.M. Patfield (ed.), "Perspectives on Company Law: 2" (Kluwer, 1997), p. 80.

[39] Company Law Review Group, First Report (Dublin, 2001)

[40] F.H. Cooke, "Should the Ultra Vires Doctrine be Applied to Business Corporations?" (1894) 28 American Law Review 222, 224-225.

[41] "The restrictive statist approach to the interpretation of corporate power was [...] unreasonable, time-consuming and ultimately futile." - J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 270; citing M. Horwitz, "The Transformation of American Law, 1870-1960" (New York, OUP, 1992), p. 75; C.L. Colson, "The Doctrine of Ultra Vires in United States Supreme Court Decisions" (1935-1936) 42 W. Va. L.Q. 297, 301: "nothing more than a hangover from the early legal prejudice against corporations."; M.A. Schaeftler, "Ultra Vires – Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations" (1983-1984) 9 J. Corp. L. 81, 86, 88-89: "state corporation law was no longer deemed to police corporate activity, but rather, to promote it."; G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 43.

[42] M. Forde, "Company Law", 3rd ed. (Round Hall Sweet & Maxwell, 1999), p. 96; Lord Irvine of Lairg, "The Law: An Engine for Trade" (2001) 64 MLR 333, 344: "Individuals now have the right to incorporate".

adopt a restrictive approach to companies "became obsolete in the ever-evolving commercial world of the twentieth century."[43] Resistance to the practice of a company turning to completely new business is particularly diminished. For Gore-Browne, *In Re Introductions*[44] illustrates the application of the doctrine of ultra vires in a manner which benefits nobody, as it hinders the relaunch of failed companies in new directions.[45] The idea that there is a general public policy interest in restraining companies from unauthorised activities is weakened.[46]

Today, paradoxically, the registered company is both more trusted and more regulated.[47] Specific rules target particular misconduct and risks, but the existence of the company need not be so jealously scrutinised.[48] For Grantham, the interests of the state in regulating corporations are simply to,

> "see that companies are managed efficiently and fairly, are free from abuse, and retain flexibility as a vehicle for commerce".[49]

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[43] J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 265; C.L. Colson, "The Doctrine of Ultra Vires in United States Supreme Court Decisions" (1935-1936) 42 W. Va. L.Q. 297, 336.

[44] In Re Introductions Ltd [1969] 1 AER 887.

[45] A.J. Boyle & R. Sykes (eds), "Gore-Browne on Companies" 44th ed. (Jordans, loose-leaf, 1986), paras. 3.005-6: "it must be conceded that the ultra vires doctrine serves no useful purpose where an empty shell of a company is taken over and, with fresh finance, starts a new economic life."

[46] C.L. Colson, "The Doctrine of Ultra Vires in United States Supreme Court Decisions" (1935-1936) 42 W. Va. L.Q. 297, 301: "it is difficult to work up any enthusiasm over this supposedly paramount interest."; C.E. Carpenter, "Should the Doctrine of Ultra Vires be Discarded?" (1923-1924) 33 Yale L.J. 49, 64.

[47] R. Grantham, "Illegal Transactions and the Powers of Company Directors" (1999) 115 LQR 296, 296: "Despite the influence of libertarian philosophy on the theory of government in recent years, there has been a proliferation of legislation and regulation. This has been particularly so in the field of company law"; cp D. Milman, "1967-1987: A Transformation in Company Law?" (1988) 17 Anglo-American Law Review 108, 129.

[48] Lord Irvine of Lairg, "The Law: An Engine for Trade" (2001) 64 MLR 333, 349.

[49] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 584; Company Law Review Group, First Report (Dublin, 2001), para. 1.7.1.

He points out that these concerns frequently overlap with those of shareholders, though they may diverge on insolvency.[50] Thus, notwithstanding the many imperative rules of company law, the judicial and societal approach to companies may be characterised as more laissez-faire than in the nineteenth century.

Misgivings have shifted from the company itself towards management.[51] The more modern concern is to protect "society from the power of controllers and their army of draftsmen".[52] The internal balance of power between shareholders and directors is not well-served by imperative rules on corporate capacity which transfer the ultimate power to judge transactions from members to the courts. Anderson points to the rise of the shareholder supremacy norm as philosophically inconsistent with the ultra vires doctrine.[53]

15.1.2. Does the Objects Clause Necessitate Limited Capacity?

15.1.2.1. Questioning the Ashbury logic

Theories of corporate personality were never the sole justification for limited capacity. Horrwitz contends it "is not based on any dogmatic concept of a limited company", but rather on the provisions of the 1862 Act.[54] The central line of reasoning in *Ashbury* is straightforward: it would be illogical for the legislature to require companies to list their objects yet tolerate activities which were not

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[50] Ibid, at 586.

[51] "[C]orporate and managerial power has increasingly become a cause for concern for all scholars interested in corporate governance issues" - I. Lynch Fannon, "A Transatlantic Case: The Derivative Action as a Corporate Governance Tool" (2005) 27 DULJ 1, 22; D. Milman, "1967-1987: A Transformation in Company Law?" (1988) 17 Anglo-American Law Review 108, 108-110.

[52] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 213.

[53] J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 273: "shareholders would likely want directors to use equity capital in any lawful way necessary to maximise their return"; K. Greenfield, "Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality" (2001) 87 Virginia Law Review 1279, 1284.

[54] W. Horrwitz, "Company Law Reform and The Ultra Vires Doctrine" [1962] LQR 66, 67-68.

envisaged in the approved list.[55] This argument is persuasive, if not conclusive. Ahern presents it as understandable "in the spirit of the time", when objects were not alterable.[56] Even accepting the logic of the House of Lords' rationale, subsequent developments undermine this approach. Irish companies are still required to state their objects,[57] though it is proposed to change this.[58] The *Ashbury* logic is challenged by companies' ability to alter their objects and the effect on their composition of ongoing struggles between promoters and the courts throughout the twentieth century.[59]

15.1.2.2. The diminished usefulness of the objects clause

The forced acceptance of convoluted objects clauses has undermined the intended benefit of the ultra vires rule. It is now remarkably difficult to ascertain from examination of the memorandum whether a company has scope to carry out a particular transaction or not. This is due to the complexity of objects clauses which seek to enumerate all possible ventures,[60] exacerbated by the risk of the courts interpreting the stated objects restrictively or imposing an external test of corporate benefit.[61] Lord Wrenbury denigrates the "pernicious practice" of drafting objects

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[55] See above at 3.3.2: "The Statutory Foundation".

[56] D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27.

[57] Section 6(1), Companies Act, 1963 (Ireland); cf Companies Act 2006 (UK).

[58] Company Law Review Group, First Report (Dublin, 2001), Chapter 10.

[59] See above at Chapter 5: "The Interpretation and Drafting of Objects Clauses".

[60] Courtney observes that "most companies formed today have in excess of 20 sub-clauses within their objects clause." - T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 346; "To prevent the doctrine restricting unduly the activities of a company, the modern practice is to set out in the memorandum extremely wide and diverse objects and powers, covering every activity which the promoters consider the company might conceivably wish to undertake either immediately or at some future time." - J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" [1963] JBL 143, 143.

[61] See above at 6.2: "Subordinating Powers to Pursuit of the Company's Objects" and at 7.3: "Rolled Steel and the Law in Ireland".

clauses designed, not to disclose, but to bury.[62] Sealy views the prolixity of objects clauses as "an affront to common sense and a shocking waste of paper and professional skills and searchers' time".[63] Advances which could have reassured those drafting corporate objects clauses, thereby encouraging them to simplify, have not had this effect.[64] As MacCann says, "old habits die hard".[65]

Far from its intended purpose of informing the public, the unclear objects clause is now reduced to a device for evading obligations.[66] The purpose of the objects clause is frustrated in a system where a company can ascribe to itself the broadest of purposes regardless of the specific business it intends to pursue.[67] It is no longer the rule that a company must specify a particular limited field of activity, let alone that its "main" business should be evident from the memorandum. Since this can no longer be relied upon, it seems unreasonable to found serious legal consequences on the assumption that this is the case.

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[62] Cotman v. Brougham [1918] AC 515, 523 (per Lord Wrenbury).

[63] L.S. Sealy, "The Bell Tolls for Ultra Vires", (1986) 7 Company Lawyer 90, 90.

[64] Such as the object of "a general commercial company" envisaged by Section 3A, Companies Act, 1985; inserted by Section 110, Companies Act, 1989 (UK); Section 4, Companies Act, 1985, as substituted by Section 110(2), Companies Act 1989 (UK); see D.S. Glass, ""Ultra Vires" – The Saga Continues" (1990) 11(7) Company Lawyer 138, 139.

[65] L. MacCann, "The Capacity of the Company" (Part 1) (1992) 10 ILT 79, 80; Courtney confirms that "this results more from a nervous adherence to practice than from legal necessity." - T.B. Courtney, "The Law of Private Companies" 2nd ed., (Butterworths, Dublin, 2002), p. 356.

[66] Bell Houses v. City Wall Properties Ltd [1966] 2 AER 674, 685; "The only effect of the present rule is to enable, from time to time, either the company or other persons with whom it has purported to enter into a contract, to avoid, by means of a technicality, an obligation that ought to be binding in good faith." - Anonymous, *Notes* (1961) 77 LQR 11, 12.

[67] See above at Chapter 5: "The Interpretation and Drafting of Objects Clauses"; K. Polack, "Company Law - Ultra Vires - Construction of Objects Clauses" [1966] CLJ 174 , 177.

The perception that the objects clause is redundant has inspired proposals to abolish it entirely.[68] This futility of the modern statement of objects undermines both the technical Section 12 reasoning in *Ashbury* and the policy rationale for the doctrine. The assertion that those dealing with a company can identify the scope of the company's business and capacity "has ceased to have any real meaning".[69]

15.1.2.3. The alteration of objects

The Joint Stock Companies Act, 1862 prohibited companies from amending their objects clauses after registration.[70] Legislative changes between 1890 and 1963 opened the door and progressively facilitated such changes.[71] Since 1963, Irish companies may freely amend their objects clauses.[72] This change has a number of consequences for the doctrine of ultra vires. It raises questions about the historical basis of the doctrine. The easy alteration of objects may also have wider consequences for the practice and theory of incapacity law.[73]

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[68] Company Law Review Group, First Report (Dublin, 2001); K.W. Wedderburn, "Some Recent Developments in British Company Law" (1972) 6 International Lawyer 487, 491: "The very core of the ultra vires principle may have received a death blow" in Bell Houses v. City Wall Properties Ltd [1966] 2 QB 656.

[69] H.R. Gray "Cotman v. Brougham and the Ultra Vires Rule" (1960) 23 MLR 561, 563.

[70] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653; Horrwitz argues that the Joint Stock Companies Act 1844 did not restrict alteration of the deed - W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 67.

[71] See above at 5.4.1: "The Alteration of Objects Clauses"; Companies (Memorandum of Association) Act 1890; Companies (Consolidation) Act, 1908, 8 Edw. 7, c.69; Companies Act 1929 (UK); Companies Act 1948 (UK); Section 10, Companies Act 1963 (Ireland).

[72] Section 10, Companies Act 1963 (Ireland).

[73] See B.J. Davies, "Alteration of a Company's Objects Clause and the Ultra Vires Rule" (1974) 90 LQR 79.

It is settled that a company cannot retrospectively validate an excess of capacity by altering its objects,[74] but many prospective transgressions can be avoided.[75] Davies suggests that 1948 Act's easing of restrictions on amendment was a substitute for the abolition of the ultra vires doctrine recommended by the Cohen Committee. It offered an "escape route" to enable companies to avoid the hardship of the rule.[76] According to Davies, this facility rendered ultra vires "less of a nuisance".[77] While the easy alteration of objects helped companies avoid potential capacity problems, it did not completely sideline ultra vires in the case law. Like the technical devices such as independent objects clauses and *Bell Houses* clauses,[78] the problem with the possibility of enlarging a company's capacity to cover an envisaged transaction is that it depends on the individual company taking the necessary steps to protect itself. This potentially leaves some traders arbitrarily exposed to hardship. Despite some claims to the contrary, free amendment of objects was not the death knell for the doctrine of ultra vires at a practical level.

At the level of principle, alteration of objects also damages the rationales for limited capacity. Firstly, if a company's statement of objects is viewed as provisional and changeable, there is less force in the argument that it must be an absolutely binding commitment.[79] Secondly, it diminishes the protection which creditors supposedly

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[74] L.C.B. Gower, "Alteration of a Company's Objects and The Ultra Vires Doctrine" (1951) 67 LQR 41; cf W.B.P. Holt, "Alteration of a Company's Objects and the Ultra Vires Doctrine" (1950) 66 LQR 493.

[75] Northern Bank Finance Corporation Ltd. v. Quinn and Achates Investment Company [1979] ILRM 221; T.M. Ashe, "Case Raises Questions on Notice and Ultra Vires" (1980) 1 Company Lawyer 161.

[76] B.J. Davies, "Alteration of a Company's Objects Clause and the Ultra Vires Rule" (1974) 90 LQR 79, 80.

[77] Ibid, at 94.

[78] See above at 5.3.5: "The Assault on the Main Objects Rule of Interpretation" and at 5.3.6: "The Bell Houses Clause and the Directors' Subjective Appreciation".

[79] C.E. Carpenter, "Should the Doctrine of Ultra Vires be Discarded?" (1923-1924) 33 Yale L.J. 49, 64: "it is clear that the state is not interested in the corporation refraining from doing the particular act, but rather that the powers of the corporation be made a matter of public record."

obtain from examining a company's parameters. Stamp therefore characterises the free alteration of objects as "legislative recognition" that creditor protection is no longer a main aim of the ultra vires doctrine.[80] Thirdly, since it is entirely within the company's own power to change its objects, without the need for court sanction, this deals a further blow to the fiction that the state has granted the company a particular capacity. From a variety of angles, the alteration of objects undermines the principle of limited capacity.

Hutchinson argues that the continued vitality of the ultra vires doctrine despite the removal of the prohibition on altering objects indicates that Section 12 was not the real reason for limited capacity.[81] If the permanence of objects was the only reason for ultra vires, the doctrine would have ended with the Companies Act, 1963.[82] However, this does not necessarily follow. The subsequent repeal of the prohibition on amending the objects clause does not mean Section 12 was not, in 1875, the basis for the extension of ultra vires to registered companies. Section 12 was a necessary statutory basis for the principle, bolstered by other considerations.[83] The retention of the doctrine after the modification of objects became permissible can be explained by factors which developed or grew in significance after the original decision in *Ashbury*.[84] No doubt it was supported by the central role which the doctrine had developed in the case law in the intervening years; it was so deeply embedded that it would have required strong motivations to excise it from the law, and from practitioners' minds. More significantly, the policy reasons which also informed *Ashbury* would have argued for its retention.

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[80] M. Stamp, "Reform of the Ultra Vires Rule: A Consultative Document" (1986) 136 NLJ 962, 971.

[81] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 16: "there never really was, a foundation for the ultra vires doctrine in the prohibition of alteration of objects clauses."

[82] Section 8, Companies Act 1963 (Ireland).

[83] See above at Chapter 3.3.1: "The Reasons for the House of Lords' Decision".

[84] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

Today, the fact that objects must be included in a company's memorandum of association[85] constitutes a good, but not an insurmountable, argument in favour of the retention of the doctrine of ultra vires. The *Ashbury* logic is defensible: the objects clause may logically imply limited capacity, but the objects clause itself is vulnerable. The Company Law Review Group views the objects clause as dispensable. Its proposals envisage the abolition of objects clauses and of the ultra vires doctrine going hand in hand.[86]

15.1.3. Policy and the Ultra Vires Doctrine

15.1.3.1. The protection of shareholders and creditors

The policy justifications of the ultra vires doctrine were always the soundest of its supports.[87] Limited liability dictates that all a company's debts must be met out of the pool of corporate assets. This creates a danger for all those who deal with companies that if the company's assets are wasted, legitimate debts will go unpaid. It is also reasonable that companies should be restrained from unjustifiably dissipating the assets which properly belong to their investors on liquidation.[88] Thus, the arguments relating to the protection of the company's assets for

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[85] Section 6(1) Companies Act 1963 (Ireland).

[86] Company Law Review Group, First Report (Dublin, 2001), para. 10.9.2: "private limited companies should not be required to set out any objects or powers; such companies should be empowered with the capacity of a natural person".

[87] See above at 3.3.5: "The Policy Rationale for the Ultra Vires Doctrine"; C.L. Colson, "The Doctrine of Ultra Vires in United States Supreme Court Decisions" (1935-1936) 42 W. Va. L.Q. 297, 298.

[88] S. Worthington, "Shares and Shareholders: Property, Power and Entitlement: Part 1" (2001) 22(9) Company Lawyer 258, 259: "if the company has funds beyond those needed to meet the legal entitlements of other stakeholders, then those funds "belong" to the shareholders, and must be either distributed to them or reinvested so as to improve their position."; P. Ireland, "Company Law and the Myth of Shareholder Ownership" (1999) 62 MLR 32, 45.

shareholders and creditors represent valid objectives.[89] These aims are so important that they are today manifest in many other rules of company law.[90] Protecting shareholders and creditors from fraud or waste remains a valid interest, but is limited capacity is the appropriate means to advance it?[91]

At a basic level, the logic underpinning the ultra vires doctrine is dubious. The equation of acts outside the domain defined by the objects clause with reckless and impermissible speculation does not hold up. Objects clauses "offer little guidance as to the commercial risks" to which the company is exposed.[92] It is illogical to suggest that restricting transactions by field is the best means of preserving the company's capital, when there is no direct requirement that private companies have a minimum capital.[93]

Furthermore, the ostensible protection which the law on corporate capacity gives to creditors is predicated on the fiction of constructive notice of registered corporate documents. Worse, inspecting the company's constitution moves from being a supposed opportunity to an onerous obligation. The doctrine becomes a risk for the unwary.[94] Despite its inspiration rooted in the protection, albeit indirect, of

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[89] Cf Horrwitz who argues that ultra vires applies equally to limited and unlimited companies, so it cannot be connected to limited liability - W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 69.

[90] See J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 101; Gower identifies investor protection as one of the central aims of company law - L.C.B. Gower, "Some Contrasts Between British and American Corporation Law" (1956) 69 Harv. LR 1369, 1373.

[91] "The truth is, if acts performed by associations of individuals prove hurtful, they can be amply dealt with by the general laws of the land, to the same extent that like acts of mere individuals are now dealt with." - F.H. Cooke, "Should the Ultra Vires Doctrine be Applied to Business Corporations?" (1894) 28 American Law Review 222, 228.

[92] Anonymous, "News: IOD Urges Removal of Ultra Vires Rule" (1986) 7 Company Lawyer 127.

[93] S. Conneely, "The Company Law Review Group Report: What Will We Do With the Small Firm?" (1997) 15(11) ILT 210, 212.

[94] L.S. Sealy, "The Bell Tolls for Ultra Vires", (1986) 7 Company Lawyer 90, 90.

creditors' interests, the rule permits companies to "wriggle out" of obligations at the expense of individual creditors.[95] The 1943 Cohen Report[96] considered the "fallacies" underlying the ultra vires doctrine,[97] and condemned it as "an illusory protection for the shareholders [that] yet may be a pitfall for third parties dealing with the company".[98]

Though often bundled together, the interests of shareholders and creditors involve divergent considerations. For shareholders, weakening the constraints of limited capacity by drafting inclusive objects represents a reasonable trade-off.[99] A protective measure is undermined but flexibility increases. Thompson affirms that, while these developments defeated the doctrine's theoretical protection of members, in practice shareholders benefit from the companies' entry into "more lucrative fields."[100] The advantage to shareholders of corporate freedom depends on the effectiveness of the control they can exercise on management. If shareholders have real control of directors, and the means to challenge oppression by other shareholders, they would presumably prefer that the last word on capacity be in their hands rather than the courts'. It is unlikely that many modern shareholders would feel unduly exposed if ultra vires were abolished completely.[101]

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[95] Anonymous, "News: IOD Urges Removal of Ultra Vires Rule" (1986) 7 Company Lawyer 127, 128.

[96] See Jones, "One Thousand Questions and Answers on Company Law", (Jordan & Sons, London, 1956), para. 13; W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66.

[97] L.S. Sealy, "The Bell Tolls for Ultra Vires", (1986) 7 Company Lawyer 90, 90.

[98] "Cohen Committee Report", Report of the Committee on Company Law Amendment (1945) Cmd. 6659/45, para. 12.

[99] K. Greenfield, "Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality" (2001) 87 Virginia Law Review 1279, 1305: "That shareholders would care which specific activities the corporation engaged in might strike modern investors, accustomed to holding stock in broadly diversified companies, as quaint or even irrational."

[100] J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" [1963] JBL 143, 143.

[101] See below at 15.3: "Alternative Modes of Protecting Shareholders and Creditors".

The position of creditors poses a greater problem. Ousting the ultra vires doctrine does not offer them any intrinsic compensation: it is simply the reduction of a putative protection. In the case of creditors, one must ask: whether the ultra vires principle really protects them from the misapplication of corporate assets, whether it is liable to work a mischief against them which would outweigh this benefit, and whether other mechanisms offer sufficient protection that they would not be unduly prejudiced if the ultra vires doctrine retired from the field.

In the first place, the premise that creditors are protected when companies are restricted to the activities prescribed in their memoranda is open to question. According to the Law Society's response to the Prentice questionnaire, the removal in 1947 of the right of creditors to oppose proposed changes to a company's objects "recognised the unreality" of the proposition that the objects clause offered protection to creditors.[102] The idea that ordinary traders should investigate a company's memorandum as the best means of determining whether to do business with it, instead of more obvious indicators such as reputation and credit history, is far removed from daily life. Thompson views a company's financial records, actual activities, reputation and published statements as more useful to potential trading partners than its objects.[103]

On the outdated view that the ultra vires doctrine permitted judicial intervention to police the benefit accruing to companies from their dispositions, perhaps the creditors as a class did benefit.[104] However, the proposition that solvent companies should be prohibited from making gratuitous dispositions might be a

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[102] Response of the Law Society's Company Law Committee to the Prentice Questionnaire 83 (1986) LSG 1772; see (1986) 136 NLJ 73 for the questionnaire.

[103] J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" [1963] JBL 143, 146-147; see also G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 109.

[104] See above at 6.2: "Subordinating Powers to Pursuit of the Company's Objects".

disproportionate interference with company's affairs for negligible benefit to creditors.[105]

Though some small benefit may accrue to both shareholders and creditors from restricting companies' capacity to their objects, this is not strong enough to justify limited capacity. The doctrine also militates against other policy concerns and comes at a cost. Furthermore, there are other, better means, of protecting corporate assets from waste and abuse.[106]

15.1.3.2. Countervailing policy concerns

The policy considerations which support ultra vires are not the only principles at issue. The security of transactions weighs in favour of not disturbing the apparent bargain which the parties believe they have made.[107] Thompson affirms that public policy requires that bargains be upheld unless compelling substantive reasons dictate otherwise.[108] Legal security of commercial transactions is endangered when seemingly innocuous activities are apt to be declared incurably void.[109] The pressing

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[105] See also below at 17.1.3.2: "Should gratuitous dispositions be permitted?".

[106] The ultra vires doctrine is "the wrong tool for the job" - G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 97; see below at 15.3: "Alternative Modes of Protecting Shareholders and Creditors".

[107] "[P]ublic policy is wounded in the deepest sense when the courts of justice educate men in the breaking of their contracts and the repudiation of their just obligations, on theoretical, speculative and fanciful grounds." – Lilienthal, "Non-Public Corporations and Ultra Vires" (1898) 11 Harvard L.R. 387, cited by C.E. Carpenter, "Should the Doctrine of Ultra Vires be Discarded?" (1923-1924) 33 Yale L.J. 49, 64; "there has long been concern, among common law judges, about what is sometimes called the finality of transactions, and sometimes the security of receipts"- Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 384 (per Lord Goff).

[108] S.D. Thompson, "The Doctrine of Ultra Vires in Relation to Private Corporations" (1894) 28 American Law Review 376, 405: "The highest public policy is concerned in requiring men to keep their contracts when they are not immoral and substantially, not theoretically, opposed to the public interests".

[109] Lord Irvine of Lairg, "The Law: An Engine for Trade" (2001) 64 MLR 333, 334: "The very first need of the business community is legal predictability."; C.L. Colson, "The Doctrine of Ultra Vires in United States Supreme Court Decisions" (1935-1936) 42 W. Va. L.Q. 297, 299; "The narrower

need for certainty may be outweighed if the countervailing policies are strong enough, but cannot be left out of the equation.

Furthermore, the interests of flexibility and simplicity are increasingly important in company law. The law should facilitate "honest trading" instead of hampering it.[110] Ultra vires is out of step with a commercial world which favours flexibility. Temple refers to the law's failure to adapt the doctrine to "the modern commercial environment".[111] Adherence to precedent should not prevent the law from adapting to evolving circumstances and perspectives.[112] Instead, it is good policy that the law should correspond with the "legitimate business habits"[113] of its subjects, unless justice or specific policy concerns demand that people be forced to amend their habits.[114] Good company law is not just intellectually coherent, but also supportive of commercial practice. Wolfman cites ultra vires as illustrative of the law assuming practices which diverge from business custom.[115]

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the objects expressed in the memorandum the less is the subscribers' risk, but the wider such objects the greater is the security of those who transact business with the company." - Cotman v. Brougham [1918] AC 515, 520 (per Lord Parker).

[110] W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 75.

[111] R.M. Temple, "Ultra Vires: The Dual Approach" 137 NLJ 1069, 1069.

[112] Irish Shell Ltd v. Elm Motors Ltd [1984] IR 200, 227: "Since the 26th July, 1966, the House of Lords has recognised that too rigid an adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law."; See also R.S.T. Chorley, "Liberal Trends in Present-Day Commercial Law" (1940) 3 MLR 272, 276, who cites McCardie J. in Prager v. Blatspiel [1924] 1 KB 566, at 570: "The object of the common law is to solve difficulties and adjust relations in social and commercial life [...] It must grow with the development of the nation. It must face and deal with changing or novel circumstances – unless it can do that it fails in its function and declines in its dignity and value. "

[113] N. Wolfman, ""Ultra Vires" Acts of Corporations" (1908-1909) 6 Commw. L. Rev. 218, 218.

[114] See R.S.T. Chorley, "Liberal Trends in Present-Day Commercial Law" (1940) 3 MLR 272, 272.

[115] N. Wolfman, ""Ultra Vires" Acts of Corporations" (1908-1909) 6 Commw. L. Rev. 218, 219.

The prevalence of new forms of company[116] raises questions about the utility of ultra vires and frustrates its logic in various ways. Off the shelf companies are designed to be turned to a variety of ends not envisaged at registration. Subsidiaries and group companies may have negligible capital in the first place. They also diverge from the model of shareholders signing up to a company on the basis of its field of business. Many companies may rely more on loan capital than shareholders' investments.[117]

Twenty-first century company law favours simplicity and an easing of the regulatory burden, as is evident from the report of the Company Law Review Group. Lord Irvine of Lairg L.C., writing extrajudicially, advocates that commercial regulation be minimal, appropriate and relevant.[118] Yet there has been criticism of the "fashionable trend" towards abolition of the doctrine as consistent with a removal of control on business in "the rush into a market ideology".[119] Certainly, it is true that society is no longer so wary of the corporation and that legislators are conscious of the compliance burden, especially for small companies. However, this trend takes place in the context of the steady bolstering of statutory and common law protections for shareholders, creditors and stakeholders. It is not necessarily a fair representation to suggest that the abolition or reform of the law on corporate capacity is excessively in thrall to a liberalising agenda. Furthermore, while abolishing the ultra vires doctrine empowers the company to maximise its profits by pursuing novel opportunities, it also allows it to act altruistically, if it so wishes.[120]

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[116] See L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 169.

[117] Ibid, at 174.

[118] Lord Irvine of Lairg, "The Law: An Engine for Trade" (2001) 64 MLR 333, 343.

[119] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 213.

[120] See below at 17.1.3.2: "Should gratuitous dispositions be permitted?"

Furthermore, the empowerment of shareholders within the corporate structure argues against the ultra vires doctrine,[121] which represents a paternalistic attitude to corporate shareholders. Exercising power within the company is one of the essential features of shareholding.[122] There is a clear trade off between the strictness of capacity restrictions and the freedom and power of shareholders within the company.[123] Sealy asserts, "it is not the director's primary role to take care but to take risks".[124] Nor is it the law's role to intervene to prevent companies from taking risks, even irresponsible risks.[125] Risk is "an ingredient in the generation of economic growth",[126] and the temptation to gamble in the face of insolvency is perhaps best targeted by statutory provisions.[127]

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[121] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 49.

[122] S. Worthington, "Shares and Shareholders: Property, Power and Entitlement: Part 1" (2001) 22(9) Company Lawyer 258, 258; cf P. Ireland, "Company Law and the Myth of Shareholder Ownership" (1999) 62 MLR 32, 48.

[123] A "fine balance between the interests of shareholders, creditors and third parties" - R.M. Temple, "Ultra Vires: The Dual Approach" 137 NLJ 1069, 1069.

[124] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 176; risk-taking is "the essence of the function of the entrepreneur" - L. MacCann, "Directors' Duties of Care, Skill and Diligence" (1991) 9 ILT 56, 56; see also N. O'Hanlon, "The Corporate Form and Reckless Trading: A Modern Pandora and Epimetheus" 28 (2006) DULJ 254.

[125] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 169; See also In Re Hefferon Kearns Ltd (No. 2), Dublin Heating Company Ltd v. Hefferon and Others [1993] 3 IR 191, 225 (per Lynch J.): "It would not be in the interests of the community that whenever there might appear to be any significant danger that a company was going to become insolvent, the directors should immediately cease trading and shut down the business."

[126] S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Company Lawyer 99, 100.

[127] Eg Section 297, Companies Act, 1963 (fraudulent trading); Section 297A, Companies Act, 1963 (reckless trading); Section 298, Companies Act, 1963 (personal liability for misfeasance); Section 160, Companies Act 1990 (as amended by section 42(b) of the Company Law Enforcement Act, 2001 (directors' disqualification).

Indeed, the purpose of the limited liability company is to facilitate business in taking on risks.[128] If the law's role is merely to ensure that these risks are legitimate business risks, conforming to public expectations,[129] it does not follow that the ultra vires doctrine is an appropriate or effective tool to do this. The thinking underpinning ultra vires is that risks outside the defined area of business form no part of the bargain between the company and its shareholders, but the shareholders may specifically wish to leave wide latitude to the company, and either trust in management or reserve to the general meeting the power to oversee the company's business decisions. Surely, it should be within the power of shareholders to choose to engage in risky ventures at the judgement of management, should those in charge spot an unforeseen opportunity and wish to act upon it. In an era of highly professional management,[130] it is more true than ever to say that undertakings in diverse areas unforeseen by the drafters of the memorandum of association are not necessarily foolish and improvident ventures.

Yet, if the interests of shareholders are of primary importance, modern thought may also subordinate them to competing interests in a manner which was unknown in the early days of company law.[131] Worthington questions whether shareholders' entitlement to residual corporate assets on liquidation imposes a legal duty on management to maximise profits.[132] A criticism of the ultra vires doctrine is that it stigmatises transactions that may not be objectionable, being either beneficial[133] or

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[128] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 181.

[129] Ibid, at 181: "that the risks which that company elects to embrace fall within the range of legitimate business risks, consistently with the expectations of all those whose interests are at stake, creditors and members alike"

[130] Ibid, at 165.

[131] See below at 17.1.3.2: "Should gratuitous dispositions be permitted?"

[132] S. Worthington, "Shares and Shareholders: Property, Power and Entitlement: Part 1" (2001) 22(9) Company Lawyer 258, 262.

[133] Such as the transaction challenged in Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656.

benevolent.[134] Modern commentators, influenced by stakeholder theory, are likely to be more favourably disposed towards corporate activity which takes account of interests other than the pursuit of core objects and maximisation of profit.[135] Cohen observes that *Parke*[136] fails to take account of "changed social and political attitudes".[137] Grantham argues that, while company law was initially predicated on the paradigm of ownership by shareholders, based on the partnership model, there has been a steady change over the last century.[138] The importance of the idea of ownership by shareholders has been diminished by the rejection of direct rights over corporate assets, a right to override management decisions, and the idea that companies are run for the sole benefit of shareholders.[139] The recognition of a fiduciary duty owed to creditors of insolvent companies fits this thinking. The consideration of interests other than the shareholders raises important questions, but may argue against the restriction of capacity.

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[134] See Bissell v. Michigan Southern and Northern Indiana Railroad Companies (1860) 22 NY 258, 270 (per Comstock CJ); cited in S. Brice, "A Treatise on the Doctrine of Ultra Vires" 2nd ed. (Stevens & Haynes, London, 1877), pp. 51-52.

[135] C. Stanley, "Corporate Personality and Capitalist Relations: a Critical Analysis of the Artifice of Company Law" (1988) 19 Cambrian L.R. 97, 101: "With the ever-increasing importance of the industrial corporation within modern society it is inevitable that the affairs of the company should be conducted not only with regard to the profit interests of the shareholder owners but also to the interests of national economy, community and employees."

[136] Parke v. The Daily News Ltd [1962] Ch. 927.

[137] D.H.J. Cohen, "Gratuitous Payments to Employees and the Ultra Vires Doctrine" (1984) NLJ 716, 716; D. Milman, "1967-1987: A Transformation in Company Law?" (1988) 17 Anglo-American Law Review 108, 113: "The statutory reversal in 1980 of Parke v. Daily News Ltd., that bête noire of socialist company lawyers [...] constituted one small crumb of comfort..."

[138] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 559-560; S. Worthington, "Shares and Shareholders: Property, Power and Entitlement: Part 1" (2001) 22(9) Company Lawyer 258, 261-262.

[139] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 559-560.

15.2. THE COST OF THE ULTRA VIRES DOCTRINE

In addition to the policy factors which militate against limited capacity, the cost of the rule might count against it. This cost takes two forms: first, the resources which must be expended to ensure that proposed transactions are within the parties' capacity, and second, the effect on parties to transactions which turn out to be void.

15.2.1.1. A burdensome complex rule

The Cohen Report characterised the adverse practical effect of the doctrine as "unnecessary prolixity and vexation."[140] It is common practice to scrutinise companies' memoranda before engaging in significant transactions. Thompson refers to the "great hardship" imposed on third parties, who must "choose between the inconvenience involved in examining the memorandum" and the risk of invalidity.[141] Reducing the risk of incapacity would release lenders to rely on their usual means of determining whether or not to lend to a particular applicant, primarily by focusing on their assets and credit worthiness, rather than investigating capacity. This burden, spread across the commercial world, hinders economic efficiency.[142]

The problem is exacerbated by the notorious difficulty involved in estimating whether a proposed transaction is permitted.[143] A layman must have recourse to professional legal advice, if he is to make any sense of an objects clause. Carr observed that whether a particular contract was ultra vires "cannot be answered by

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[140] "Cohen Committee Report", Report of the Committee on Company Law Amendment (1945) Cmd. 6659/45, para. 12.

[141] J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" [1963] JBL 143, 143-144; A. Griffiths, "Contracting with Companies" (Hart, 2005) p. 168; D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27; J. Beatson & W. Bishop, "Mistaken Payments in the Law of Restitution" (1986) 36 U Toronto L.J. 149, 150: "Mistakes are wasteful, but avoiding them can be expensive."

[142] J. Dean, "The Future of U.K. Company Law" (2001) 22(4) Company Lawyer 104, 105.

[143] see eg Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221.

any reference to a hard and fast rule", because, in between those acts which are obviously either within or beyond the company's capacity, "there is a neutral territory which makes the application of the doctrine appear extremely uncertain and even arbitrary".[144] Experience proved this true. Unfortunately, as the law developed and imposed complex external tests to test the capacity of a company, this area of law became increasingly opaque and confusing. Leigh denounces it as "obscure in its details and capricious in its incidence".[145]

However, if the *Rolled Steel*[146] view reflects the modern law on the matter, then the notorious difficulty of appreciating companies' capacities is diminished. If the reader may be confident that a company's capacity is as defined in its objects clause, and not subject to externally-imposed provisos or qualifications relating to the purpose for which express powers are used, then it becomes simple and clear for companies and those proposing to deal with them to know the scope of their capacity. There is far less risk of transactions which appear on their face to be a valid exercise of corporate powers being deemed void by the courts. This ought in turn reduce the burden of investigating objects, though it is unlikely to have a dramatic effect unless the new position is unequivocally reinforced. Furthermore, the availability of appropriate remedies also protects against the penalty for error being excessive.

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[144] C.T. Carr, "The General Principles of the Law of Corporations" (CUP, Cambridge, 1905), p. 68: he contrasts pairs of mutually inconsistent authorities such as Colman v. Eastern Counties Railway 10 Beav. 1 and South Wales Railway v. Redmond (1861) 10 C.B. (N.S.) 675; 142 Eng. Rep. 619; Gregory v. Patchett (1864) 33 Beav. 595; 10 Jur. (N.S.) 1118 and Wilson v. Miers (1861) 10 C.B. (N.S.) 348; 142 Eng. Rep. 486; Charlton v. Newcastle and Carlisle Railway Company (1859) 5 Jur. (N.S.) 1096; 7 WR 731 and Hare v. London and North Western Railway Company (1861) 2 J. & H. 80; 7 Jur. (N.S.) 1145; Attorney-General v. Andrews (1850) 2 Mac. & G. 225; 14 Jur. 905 and Attorney-General v. Wigan Corporation (1854) 5 De GM&G 52; 18 Jur. 299.

[145] L.H. Leigh, "Objects, Power and Ultra Vires" (1970) 33 MLR 81, 81.

[146] Rolled Steel Products Ltd v. British Steel Corporation [1986] Ch. 246.

15.2.1.2. The unjust effects issue

Significant criticism long focused on the dangers which the ultra vires doctrine posed to outsiders.[147] However, a study of the non-contractual remedies now available to avoid unjust outcomes of this kind establishes that this criticism is no longer convincing.[148] Whereas, just twenty years ago, the remedies available in ultra vires cases were "paltry and arbitrary",[149] now they are comprehensive and principled. Those few remedies which were long recognised in ultra vires cases, such as tracing and subrogation, may now be viewed as applications of a wider principle against unjust enrichment.[150]

The swaps cases proved that benefits transferred under void contracts could be recovered under a range of causes of action under the rubric of unjust enrichment law.[151] *Westdeutsche v. Islington*[152] and *Guinness Mahon v. Kensington*[153] indicate not only that failure of consideration avails, but that recovery for lack of consideration might automatically be available in all cases of ultra vires. This may be explained as the consecration of incapacity as an unjust factor, or as a move beyond unjust factors to a Birksian concept of absence of basis. Either way, lack of consideration grounds recovery, and the total failure of consideration rule is no

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[147] See above at Chapter 8: "The Effect of the Ultra Vires Doctrine on the Innocent Outsider".

[148] See above at Chapters 9 to 14.

[149] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 120.

[150] See Banque Financière de la Cité v. Parc (Battersea) Ltd [1999] 1 AC 221, 231-232 (per Lord Hoffmann); C. Mitchell & S. Watterson, "Subrogation Law and Practice" (Oxford, 2007), pp. 3-4, 19.

[151] S. Hedley, "The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment" (2004) 28 MULR 759, 770: "In a variety of rulings, it became clear that *all* payments made under swap arrangements were recoverable by the payer."

[152] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1994] 1 WLR 938.

[153] Guinness Mahon & Co. Ltd. v. Kensington And Chelsea Royal London Borough Council [1999] QB 215.

barrier to unravelling benefits which have been transferred in both directions. Mistake is an alternative unjust factor which can be availed of in ultra vires cases, provided the mistake of law bar will be definitively abolished in Ireland when the opportunity arises.[154]

In addition, a number of proprietary claims might arise. While the nature of tracing is disputed by commentators, its availability in ultra vires cases is long-established.[155] The *Belmont*[156] principle institutional constructive trust arises from a breach of fiduciary duties, which are independent of,[157] but frequently overlap with, ultra vires acts.[158] It is therefore a straightforward means to a proprietary claim which is likely to avail in very many cases of corporate incapacity.[159] Furthermore, while the *Sinclair v. Brougham*[160] resulting trust approach must be regarded as deeply undermined after *Westdeutsche*,[161] the remedial constructive trust, in contrast, is flourishing in this jurisdiction.[162] A successful proprietary claim confers many advantages on a plaintiff. Though the Irish courts might be criticised for

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[154] Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349; Deutsche Morgan Grenfell Group Plc v. Inland Revenue & Anor [2007] 1 AC 558; cf Duff v. Minister for Agriculture (No. 2) [1997] 2 IR 22; In Re Article 26 of the Constitution and the Health (Amendment) (No. 2) Bill 2004 [2005] 1 IR 105.

[155] See above at 13.1: "Tracing".

[156] Belmont Finance Corporation Ltd v. Williams Furniture Ltd (No. 2) (1980) 1 AER 393; In Re Frederick Inns Ltd [1994] 1 ILRM 387.

[157] Rolled Steel Products Ltd v. British Steel Corporation [1986] Ch. 246, 298.

[158] In Re Frederick Inns Ltd [1994] 1 ILRM 387, 399 (per Blayney J.): "being ultra vires, they constituted a misapplication by the directors of the companies' funds".

[159] See above at 13.2.3.1: "The institutional trust, knowing receipt and the Belmont principle".

[160] Sinclair v. Brougham [1914] AC 398.

[161] Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669; cf In Re PMPA Garage (Longmile) Ltd. [1992] ILRM 337.

[162] See above at 13.2.3.2: "The "new model" or remedial constructive trust".

imposing constructive trusts too easily, without always insisting on the requirement of unconscionability, this fact would be to the advantage of a corporate plaintiff.[163]

Finally, in addition to remedial personal and proprietary claims against the beneficiary, the company has a statutory right to damages against directors and officers who cause it loss by exceeding the company's capacity.[164] Alternatively it may be possible in many circumstances to fix individual directors with liability for breach of their directors' duties or negligence. Others may be liable for knowing assistance of breach of trust. Given the multiplicity of avenues now open, it is clear that the striking injustices which serve as rallying calls against the doctrine have been eradicated. The argument against incapacity based on the potential for injustice is completely defeated.

15.3. Alternative Modes of Protecting Shareholders and Creditors

Given that the ultra vires doctrine does serve a valid policy purpose,[165] albeit at a cost,[166] the next question must be whether those interests might be better served by other rules of company law. Stamp asserts that "the policy behind the rule has disappeared".[167] It is probably more accurate to suggest that the ultra vires doctrine is no longer perceived as the appropriate mechanism to pursue that policy. Bearing in mind the interests which the doctrine aims to serve,[168] more targeted protections

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[163] See above at 13.3: "A Personal or a Proprietary Remedy?"

[164] Section 8(1), Companies Act 1963 (Ireland); see above at 14.4: "Statutory Liability".

[165] See above at 15.1.3: "Policy and the Ultra Vires Doctrine".

[166] See above at 15.2: "The Cost of the Ultra Vires Doctrine".

[167] M. Stamp, "Reform of the Ultra Vires Rule: A Consultative Document" (1986) 136 NLJ 962, 971.

[168] S. Davis, "The Ultra Vires Rule" 136 NLJ 907, 908: "the twofold thrust of the ultra vires rule must be borne in mind when reviewing the need for abolition".

of shareholders and creditors may today eclipse and displace limited capacity as an effective and appropriate means of protecting these groups.[169]

Sealy adverts to the need for new solutions to the problems which concerned the courts in the nineteenth century.[170] Polack reminds us that "the ultra vires doctrine developed when company law was in its infancy".[171] Paradoxically, given the fears engendered by the corporation, today's culture of regulation was then absent.[172] Values and the surrounding legal context have manifestly changed.[173] Though certain policy imperatives remain constant, the nineteenth century solutions to the problem may now be outmoded.

It is evident from the authorities that there is a genuine, serious and relatively prevalent mischief whereby companies transfer their assets to members or related parties at the expense of the company and its creditors. For example, *In Re Comet Food Machinery*,[174] an involuntary creditor sought an order requiring the directors of a new company to be examined on oath in relation to the affairs of the company,

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[169] C.L. Colson, "The Doctrine of Ultra Vires in United States Supreme Court Decisions" (1935-1936) 42 W. Va. L.Q. 297, 299: "if [the shareholder] is sufficiently cared for in other ways, there is certainly no reason why the law should give him this additional protection".

[170] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 164: "the ancient rules and concepts which may have served their purpose well enough when the companies of the 1880s brought their disputes before the courts of the 1880s can no longer cope satisfactorily, even with the same problems, a century further on."

[171] K. Polack, "Company Law – Allegation that a Contract is Ultra Vires the Plaintiff" [1966] CLJ 28, 30; K. Greenfield, "Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality" (2001) 87 Virginia Law Review 1279, 1306.

[172] H.G. Manne, "Our Two Corporation Systems: Law and Economics" (1967) 53 Virginia Law Review 259, 270 refers to the "idea of corporations functioning within a competitive, free-enterprise system, coupled with the 19th century's suspicion of or unfamiliarity with government regulation".

[173] D. Milman, "1967-1987: A Transformation in Company Law?" (1988) 17 Anglo-American Law Review 108, 126: "The main characteristic that strikes an observer of the development of company law since 1967 is how more complex and sophisticated it has become."

[174] In Re Comet Food Machinery Ltd [1999] 1 ILRM 475.

because the company was a phoenix company to which they suspected the assets of their debtor company had been illicitly transferred.

Sealy points to *Rolled Steel*[175] as showing that there is no lacuna if ultra vires is removed.[176] Similarly, Wedderburn argues that the law on directors' duties offers an appropriate and proportionate mechanism for controlling use of corporate assets.[177] Other rules also serve to protect shareholders, including the rules on minority oppression.[178] The Prentice Report found that other company law principles provide adequate protection for shareholders.[179] Murray[180] emphasises a number of other means which the courts could use to invalidate dubious dispositions.[181] These include the statutory concept of fraudulent preference,[182] a duty owed by directors to creditors and the rules of capital maintenance. The rules on fraudulent or reckless trading also serve to protect corporate assets in the interests of creditors.[183] Sealy

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[175] Rolled Steel (Products) Holdings Ltd v. British Steel Corporation [1986] Ch. 246.

[176] L.S. Sealy, "The Bell Tolls for Ultra Vires" (1986) 7 Company Lawyer 90, 90: "the law of agency, of directors' fiduciary duties or abuse of discretionary powers were all at hand to protect the company against the improper dissipation of its assets."

[177] K.W. Wedderburn, "Ultra Vires or Directors' Bona Fides?" (1967) 30 MLR 566, 570-571: "it is suggested that, even if we have witnessed the death of *ultra vires* through subjectively worded objects clauses, the court will still insist, whatever those clauses say, that the fiduciary duty demands good faith in the strictest sense and will refuse to allow that demand to be cast aside by cunning draughtsmanship in the company's documents."; see also Charterbridge Corporation, Ltd v. Lloyds Bank, Ltd [1969] 2 AER 1185, 1188 (per Pennycuick J.).

[178] Section 205, Companies Act 1963 (Ireland).

[179] "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986), Part II, Chapter 6, paras. 25, 28-30.

[180] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26.

[181] See also J. Meade, "Ultra Vires or Directors' Abuses: when can shareholders right a wrong?" (1999) 6(7) CLP 198, 201.

[182] Section 286, Companies Act 1963 (Ireland); Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] 1 ILRM 341.

[183] Section 297, Companies Act 1963 (Ireland); see also Insolvency Act 1986 (UK) for analogous provisions; see also Editorial (1991) 12(5) Co. Law. 82; see O'Keeffe v. Ferris [1997] 2 ILRM 161.

points out that the development of a statutory framework regulating directors' conduct offers new tools for problems that would previously have been regarded as capacity questions.[184]

If the ultra vires doctrine were abolished, would shareholders and creditors thereby be left exposed to the risk of the inappropriate dissipation of corporate assets, or would all these other mechanisms protect them?[185] Certainly, the alternative rules are not coextensive with the doctrine of ultra vires, but perhaps they provide, not only a sufficient substitute, but a better balance of the interests and principles at stake. They target more precisely the risks which are a source of concern.

15.3.1.1. Directors' duties

The law on directors' duties is an obvious alternative to incapacity which might prevent corporate assets being risked on speculative ventures outside the company's proper domain.[186] In *Rolled Steel*,[187] the guarantee of another company's debts in disregard of the company's own interests, though not ultra vires, breached the duty of the company's directors to exercise their powers bona fide, for their proper purpose, and in the best interests of the company.

Directors' duties act at the "central point of tension in company law": relations between shareholders and management.[188] If the problem is identified as a matter of

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[184] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 187: "Most of the instances of irregular conduct by directors in the key cases [...] could have been dealt with under one or other of these statutory provisions had it been in force at the relevant place and time."; D. Milman, "1967-1987: A Transformation in Company Law?" (1988) 17 Anglo-American Law Review 108, 128.

[185] Ahern concludes that there are "alternative and more efficacious" protections - D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27, 30.

[186] Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26; see also above at 4.4.2: "Breach of Directors' Duties" and at 14.2: "Directors' Duties".

[187] Rolled Steel (Products) Holdings Ltd v. British Steel Corporation [1986] Ch. 246.

[188] K.W. Wedderburn, "Some Recent Developments in British Company Law" (1972) 6 International Lawyer 487, 487.

the balance of power within the company structure, there is clearly an important role for the law on directors' duties to protect shareholders if the law on corporate capacity is reformed. In so far as breaches of directors' duties are ratifiable by members if they believe that their interests have not been unduly prejudiced, this area of the law might strike a better balance between the protection of corporate assets from actual misuse, rather than the ultra vires doctrine's somewhat arbitrary exclusion of all acts that do not fall within the objects, regardless of the benefit that they might confer on the company.

In many ways, directors' duties offer a better, more proportionate, solution than incapacity. Baxter concludes that an appropriate outcome would have been achieved in *Re Jon Beauforte*[189] and *Re Introductions*[190] if they were decided on the grounds of knowing assistance of breach of fiduciary duty, resulting in voidable transactions.[191] In so far as directors' duties do not sanction speculative conduct which incapacity would penalise, Sealy defends this on principle. While Sealy notes that the law on directors' duties possesses weaknesses in relation to incompetence and "those who take irresponsible business risks", he also questions whether the latter problem should be a concern of the law.[192]

Babb argues that ultra vires can be used "to enhance corporate accountability of managers".[193] This is counterproductive overkill. Ultra vires takes power out of the hands of shareholders, removing the power of ratification, whereas the law on directors' duties enables them to direct and control management. Ultra vires allows

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[189] In Re Jon Beauforte (London) Ltd [1953] 1 AER 634.

[190] In Re Introductions, Ltd [1969] 1 AER 887.

[191] C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 313.

[192] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 169.

[193] C.A. Babb, "Rethinking the Concept of Ultra Vires in Company Law" (Ph.D. thesis, University of Cambridge, 2004), p. 5.

the courts' assessment of the best interests of the company[194] to trump the views of a unanimous body of shareholders.[195]

15.3.1.1.1. A duty to creditors

Recent years have seen the judicial assertion of a duty owed by the directors of an insolvent company to its creditors.[196] This movement began in Australia and New Zealand[197] and has come to fruition in Irish law.[198] The existence of a duty to creditors arose in both *Parkes*[199] and *Frederick Inns*.[200] Murray criticises the uncertainty inherent in such a duty, and points out that it is unclear whether it applies only in the case of insolvent companies. However, in *Parkes*,[201] Blayney J. indicates his support for the duty where the director knows or ought to know of the insolvency of the company,[202] excluding it in the present case.[203] Lardner J. in the High Court in *Frederick Inns*,[204] seems to imply that any gift by an insolvent

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[194] On the traditional "corporate benefit test" view.

[195] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 76.

[196] See L. MacCann, "Directors' Duties: To Whom are They Owed?" (Part 2) (1991) 9 ILT 30.

[197] See Mason J., Walker v. Wimborne (1976) 137 CLR 1, 7; Cooke J., Nicholson v. Permakraft (N.Z.) Ltd [1985] 1 N.Z.L.R. 242, 249; L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 171.

[198] In Re Frederick Inns Ltd [1991] ILRM 582 (Lardner J., HC), [1994] 1 ILRM 387 (SC); Jones v. Gunn [1997] 2 ILRM 245 approves Winkworth v. Edward Baron Development Ltd [1987] 1 AER 114; West Mercia Safetywear Ltd v. Dodd [1988] BCLC 250.

[199] John C. Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] ILRM 341.

[200] In Re Frederick Inns Ltd [1991] ILRM 582 (Lardner J., HC), [1994] 1 ILRM 387 (SC).

[201] John C. Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] ILRM 341.

[202] Ibid, at 348-349; citing West Mercia Safetywear Ltd v. Dodd [1988] BCLC 250.

[203] Cf objective approach in Nicholson v. Permakraft (N.Z.) Ltd [1985] 1 NZLR 242.

[204] In Re Frederick Inns Ltd [1990] ILRM 582.

company breaches the duty to creditors.[205] Murray points out that, since such a duty cannot, presumably, be ratified by the company in general meeting, this has the same effect as declaring the disposition ultra vires.[206] The effect is exacerbated by the absence in this context of the statutory protection of the outsider which exists in the case of ultra vires transactions.[207] *In Re Frederick Inns*[208] was cited with approval in the 1997 High Court case of *Jones v. Gunn.*[209] The case raised the problem of an insolvent company which had preferred one creditor over another, but had never been wound up, so fraudulent preference could not be invoked.[210] McGuinness J. stated that the principle of a fiduciary duty to creditors was Irish law, having been accepted by the Supreme Court. In an insolvent company, even if it is not in liquidation, the directors owe a duty to the creditors. They may not make payments which benefit either themselves or connected companies at the expense of the independent creditors.[211]

The duty to creditors is conceptually somewhat problematic because it creates two separate duties to groups with competing interests, which may devolve into a "vague obligation to be fair".[212] While Sealy has theoretical concerns about this duty, the fact that it arises at a time of insolvency avoids the potential problem of

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[205] Ibid; Lardner J. cited Kinsela v. Russell Kinsela Pty Ltd (1986) 4 ACLC 215; 4 NSWLR 722; West Mercia Safetywear Ltd v. Dodd [1988] BCLC 250; B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26.

[206] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26.

[207] Section 8, Companies Act 1963 (Ireland).

[208] In Re Frederick Inns Ltd [1990] ILRM 582.

[209] Jones v. Gunn [1997] 2 ILRM 245.

[210] Though since the Companies Act 1990 came into force, its Section 251 would permit the plaintiff in that case to rely on Section 297A of the Companies Act, 1963.

[211] Jones v. Gunn [1997] 2 ILRM 245, 263.

[212] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 175.

the existing creditors to whom a duty was breached having been replaced by new and preferential creditors at the later date when the company is liquidated.[213]

Dawson[214] points out that if companies acquire full capacity, they may freely give gifts which potentially harm creditors' interests.[215] He argues that, with ultra vires abolished, and capital maintenance rules undermined, new rules would have to be developed to fill the gap and protect unsecured creditors of insolvent companies.[216] Dawson concludes that the cases concerning the duties owed by directors to creditors are thus a necessary development if ultra vires is to be abolished.[217] He suggests that this line of reasoning could be extended to bind shareholders as well as directors, deeming them in breach of a fiduciary duty to creditors if they engage in unjustifiable transactions when insolvent.[218]

15.3.1.2. Capital maintenance

The ultra vires doctrine is logically "intimately related" to the law on capital maintenance.[219] Both seek to preserve a fund of corporate assets to meet the claims of legitimate creditors. If the object of the ultra vires doctrine is to protect the assets of the company, then it shares this purpose with the capital maintenance rules. These include the prohibition on financial assistance for the purchase of the company's own shares,[220] the restrictions on the reduction of share capital[221] and the

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[213] Ibid, at 177.

[214] F. Dawson, "Commercial Benefit" (1991) 107 LQR 202, 208.

[215] Ibid, at 208.

[216] Ibid, at 208.

[217] Ibid, at 208-209.

[218] Ibid, at 209.

[219] W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 204; see also above at 4.4.1: "Illegality".

[220] Section 60, Companies Act 1963 (Ireland).

[221] Section 72, Companies Act 1963 (Ireland).

prohibition of making distributions out of capital.[222] Section 60 of the Companies Act, 1963 forbids a company giving financial assistance for the purchase of its own shares.[223] This may be permitted for private companies pursuant to a special resolution[224] coupled with a statutory declaration of solvency made by the directors.[225] In general, limited companies may not reduce their share capital,[226] but they may do so pursuant to a special resolution and subject to confirmation by the court.[227] Creditors may object[228] and in order for the court to approve the reduction in capital, it must be satisfied that the relevant creditors all consent or have had their debts paid off.[229]

Section 45 of the Companies (Amendment) Act, 1983 is another facet of the capital maintenance regime. It prohibits companies from making distributions except out of accumulated profits available for the purpose.[230] Public companies may only make distributions if they can do so without touching their pool of net assets and undistributable reserves.[231] Members are obliged to return any unlawful distributions out of capital, if they ought reasonably to have known the payment was illegal.[232] Although it is uncertain how the common law principle and Section 45 of

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[222] Section 45, Companies (Amendment) Act 1983 (Ireland).

[223] Section 60(1), Companies Act, 1963 (Ireland); H. Linnane, "Financial Assistance: Section 60 Companies Act, 1963" (1993) 11 ILT 216.

[224] Section 60(2)(a), Companies Act, 1963 (Ireland).

[225] Section 60(2)-60(4), Companies Act, 1963 (Ireland); In Re Northside Motor Company Ltd (High Court, Unreported, 24 July, 1985); Lombard & Ulster Banking Ltd v. Bank of Ireland and Brookhouse School (High Court, Unreported, 2 June, 1987).

[226] Section 72(1), Companies Act, 1963 (Ireland).

[227] Section 72(2), Companies Act, 1963 (Ireland).

[228] Section 73(2), Companies Act, 1963 (Ireland).

[229] Section 74(1), Companies Act, 1963 (Ireland).

[230] Section 45(1), Companies (Amendment) Act, 1983 (Ireland).

[231] Section 46, Companies (Amendment) Act, 1983 (Ireland).

[232] Section 50, Companies (Amendment) Act, 1983 (Ireland).

the Companies (Amendment) Act 1983 interact, it seems likely that any gift by an insolvent company to a member, or from which a member may benefit, is prohibited by it. Like ultra vires transactions, such gifts cannot be saved by ratification.

The prohibition of loans to directors may also be viewed as a means of protecting corporate assets.[233] Such transactions may be legitimised if the value of the loan is less than ten per cent of the company's net assets.[234] Guarantees may be permissible if made pursuant to a special resolution and a statutory declaration.[235] Commercial loans on arm's-length terms in the course of the company's business are exempted.[236] Otherwise, they are voidable by the company.[237] A company director may be made personally liable for the debts of an insolvent company in liquidation if loans received by him or connected persons from the company contributed to the insolvency.[238]

The capital maintenance rules may today provide a "sharper instrument" to protect corporate assets than ultra vires ever was.[239] Knight argues that the practical effect of disclaiming ultra vires as a means of policing capital maintenance is minimal, as knowing receipt will ground recovery anyway.[240] Sealy suggests that the capital maintenance regime may be ineffective where many companies are under-

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[233] Section 31, Companies Act, 1990 (Ireland); See Section 26, Companies Act, 1990 for definition of connected persons.

[234] Section 32, Companies Act, 1990 (Ireland).

[235] Section 34, Companies Act, 1990 (Ireland).

[236] Section 37, Companies Act, 1990 (Ireland).

[237] Section 38, Companies Act, 1990 (Ireland).

[238] Section 39, Companies Act, 1990 (Ireland).

[239] B. Murray, "Gratuitous Disposition of Company Assets" (1990) 12 DULJ 26, 46.

[240] W.J.L Knight, "Capital Maintenance" Chapter 4, in F. Patfield (ed.), "Perspectives on Company Law" (Kluwer, 1995), p 49, 60: "those who obtain the return of capital are rarely innocent parties".

capitalised.[241] However, the inadequacy of the pool of corporate assets is no better assured by ultra vires.

Capital maintenance may already have replaced incapacity in policing undesirable gratuitous dispositions, given the displacement of the corporate benefit principle.[242] In *Re Halt Garage Ltd*,[243] the director's remuneration being classified as not genuine, it became an "illegal return of capital to a shareholder".[244] *In Re Greendale Developments*,[245] has been criticised for treating as an issue of ultra vires a distribution of surpluses to members which should more appropriately have been subjected to the capital maintenance rules.[246] The Section 45 rule on gifts out of capital would have applied to the facts in both *Parkes*[247] and *Frederick Inns*.[248] These rules arise in gratuitous disposition cases, though they are somewhat peripheral to the main question of capacity.

15.3.1.2.1. Contributions to corporate assets

Rules providing for contributions to bolster a company's available assets cover both related group companies and officers who commit misconduct. Section 140 of the Companies Act, 1990 provides that related companies may be ordered to contribute to the debts of an insolvent company that is being wound up, where it is just and equitable, due to their contribution to the circumstances leading to the winding

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[241] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 169; S. Conneely, "The Company Law Review Group Report: What Will We Do With the Small Firm?" (1997) 15(11) ILT 210, 212; see also I. Lynch, "Reform in Haste, Repent at Leisure" (1994) 12(8) ILT 189, 190, who argues that imposing capital requirements only on restricted directors is "bolting the stable door after the horse has gone".

[242] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1984] BCLC 466.

[243] In Re Halt Garage Ltd [1982] 3 AER 1016.

[244] Ibid; see also W., "Ultra Vires in Modern Company Law" (1983) 46 MLR 204, 208-209.

[245] In Re Greendale Developments Ltd. (No.2) [1998] 1 IR 8.

[246] M. Forde, "Company Law", 3rd ed. (Round Hall Sweet & Maxwell, 1999), p. 106.

[247] Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] 1 ILRM 341.

[248] In Re Frederick Inns Ltd [1991] ILRM 582, [1994] 1 ILRM 387.

up.[249] Section 298 of the Companies Act, 1963 provides that any past or present officer of the company, who has misapplied or become accountable for any assets belonging to the company, or who has committed misfeasance or breach of duty or trust, may be required to repay or contribute to the company's assets to the extent that the court deems just.[250] However, O'Hanlon notes that the courts may hesitate before enforcing this requirement, which may be viewed as heavily penal.[251] An order may also be of limited use if the officer's personal resources are limited.[252]

15.3.1.3. Statutory protection of creditors from dishonesty

Statute prohibits fraudulent preference of certain creditors by an insolvent company, fraudulent and reckless trading, and fraudulent conveyances. Fraudulent preferences are attempts to protect particular creditors from a scramble for repayment in an imminent liquidation. Their prohibition protects the ordinary creditors from the irregular dissipation of the asset pool. Any disposition made by an insolvent company to a creditor with the intention of favouring that creditor over others, in the last six months before being wound up, is deemed fraudulent and invalid.[253] The test is whether the company at the time of the payment is able to pay its debts as they fall due.[254] In the case of dispositions to creditors who are also connected persons, there is a presumption that payments made within two years of being wound up and insolvent are fraudulent preferences.

The rule would not avail in most ultra vires gift cases. The requirement that the disposition be made in favour of a creditor removes many gratuitous dispositions

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[249] Section 140, Companies Act, 1990 (Ireland).

[250] Section 298, Companies Act, 1963, amended by Section 142, Companies Act, 1990 (Ireland).

[251] N. O'Hanlon, "The Corporate Form and Reckless Trading: A Modern Pandora and Epimetheus" 28 (2006) DULJ 254, 293.

[252] Ibid, at 294: "The imposition of liability on officers will only be effective in circumstances where their assets are of the same order of magnitude as corporate debts."

[253] Section 286 of the Companies Act 1963, as amended by Section 135, Companies Act 1990 (Ireland).

[254] In Re Creation Printing Co Ltd (1981) IR 353; (1978) ILRM 219.

from the scope of the provision. Thus, in *Parkes*,[255] it was not Parkes itself, but the related company of Walshe Kavanagh, which was indebted to the respondent bank, and so fraudulent preference was not committed. The anomalous consequence is that a payment to a legitimate creditor may be invalidated under Section 286, whereas a payment to a third party may not. Murray argues that to avoid this, the corporate veil could be pierced. In *Frederick Inns*, it was originally argued that the sums paid by each company in respect of its own debts constituted fraudulent preferences.[256] However, this argument was withdrawn because the pressure exerted by the Revenue Commissioners on the company ruled out the necessary intention to prefer them to other creditors.[257]

Fraudulent trading is a criminal offence.[258] It involves actively participating in management[259] in a manner which knowingly seeks to defraud creditors or with other fraudulent intent.[260] Fraudulent trading is deliberately framed "in wide terms"[261] with the object of protecting creditors.[262] It no longer only applies where the company is wound up, if a creditor obtains judgment and the company cannot satisfy it.[263] However, Lardner J. stated that gratuitous payments by an insolvent

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[255] Parkes & Sons Ltd. v. Hong Kong & Shanghai Banking Corporation [1990] 1 ILRM 341.

[256] In Re Frederick Inns Ltd [1994] 1 ILRM 387, 392.

[257] Lardner J. attributes the non-reliance on fraudulent preference on the difficulty of "the necessary proof of dominant purpose to prefer" - In Re Frederick Inns Ltd [1991] ILRM 582, 589.

[258] Section 297, Companies Act 1963, as amended by Section 137, Companies Act 1990 (Ireland); see N. O'Hanlon, "The Corporate Form and Reckless Trading: A Modern Pandora and Epimetheus" 28 (2006) DULJ 254.

[259] O'Keeffe v. Ferris [1997] 2 ILRM 161, 166.

[260] Section 297, Companies Act, 1963 (Ireland); In Re Hefferon Kearns Ltd (No. 2), Dublin Heating Company Ltd v. Hefferon and Others [1993] 3 IR 191; L. MacCann, "Reckless Trading Revisited" (1993) 11 ILT 31 L. MacCann, "Reckless Trading: No Looking Back" (Part 2) (1992) 10 ILT 61.

[261] In Re Cyona Distributors Ltd [1967] 1 Ch. 889, 902 (per Denning MR): statement made about the UK provision, but also true here.

[262] O'Keeffe v. Ferris [1997] 2 ILRM 161, 168.

[263] Section 251, Companies Act, 1990; See Jones v. Gunn [1997] 2 ILRM 245.

company "cannot be said to be trading", which may prevent this liability arising in some ultra vires cases.[264] In addition to criminal sanctions, a person who commits fraudulent trading, or the lesser offence of reckless trading, may during liquidation be declared personally liable for any or all of the company's debts.[265] The personal liability imposed is proportionate to the wrong committed, not merely the loss suffered as a result.[266] In addition, the recipient of corporate assets who knowingly participates in the fraudulent act may have to return the assets.[267] Reckless trading expressly includes being a party to carrying on of business that, given the level of knowledge, skill and experience to be expected of a person in that position, one ought to have known would cause a loss to creditors.[268] However, if the person acted honestly and responsibly in relation to the company's affairs, the Court may

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[264] In Re Frederick Inns Ltd [1991] ILRM 582, 589.

[265] Section 297A, Companies Act, 1963, as inserted by Section 138, Companies Act, 1990 (Ireland); O'Keeffe v. Ferris [1997] 2 ILRM 161; See also: In Re William C Leitch Bros Ltd [1932] 2 Ch. 71; In Re Cyona Distributors Ltd [1967] 1 Ch. 889; In Re Kelly's Carpetdrome Ltd (High Court, Unreported, 1 July 1983, Costello. J); In Re Aluminium Fabricators Ltd (High Court, Unreported, 13 May 1985, O'Hanlon J.); In Re Contract Packaging Ltd (High Court, Unreported, 16 January 1992, Flood J.); In Re Hunting Lodges Ltd [1985] ILRM 75.

[266] O'Keeffe v. Ferris [1997] 2 ILRM 161, 166,s169; In Re Cyona Distributors Ltd [1967] 1 Ch. 889, 902 (per Denning MR).

[267] In Re Gerald Cooper Chemicals Ltd [1978] CH. 262, approved in O'Keeffe v. Ferris [1997] 2 ILRM 161, 166.

[268] Section 297A(2)(a), Companies Act, 1963, as inserted by Section 138, Companies Act, 1990 (Ireland); it is the equivalent of UK wrongful trading provisions: Section 214, Insolvency Act 1986 (UK).

relieve him in full or in part of liability.[269] *In Re Hefferon Kearns*[270] indicates that it will be relatively rare for an honest director to be liable for reckless trading.[271]

There are concerns that liquidators are deterred from these actions by the difficulty of proving fault.[272] As Kettle points out, the dissipation of company assets is not always caused by dishonesty, and the excusing of honest conduct saves some "irresponsible trading" from sanction.[273] While the law should not aspire to protect those running companies "from their own folly", creditors deserve protection, even from honest wasteful conduct. It is the directors' duty to creditors, rather than the statutory rules based on dishonesty, which serve to protect from honest dissipation.

In addition to these provisions, there is a broad statutory authority for judges to order the return on quasi-equitable grounds of company property which has been disposed of in a fraudulent manner. Section 139 of the Companies Act, 1990 allows the courts to order the compensation of the company for any assets which have been transferred with the effect of perpetrating a fraud on the company, its creditors or its members, if it is just and equitable to do so.[274] Finally, Section 10 of the

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[269] Section 297A(6), Companies Act, 1963, as inserted by Section 138, Companies Act, 1990 (Ireland).

[270] In Re Hefferon Kearns Ltd (No. 2), Dublin Heating Company Ltd v. Hefferon and Others [1993] 3 IR 191; L. MacCann, "Reckless Trading Revisited" (1993) 11 ILT 31; L. MacCann, "Reckless Trading: No Looking Back" (Part 2) (1992) 10 ILT 61; N. O'Hanlon, "The Corporate Form and Reckless Trading: A Modern Pandora and Epimetheus" 28 (2006) DULJ 254, 260-262.

[271] See also Section 297A(2)(a), Companies Act, 1963, as inserted by Section 138, Companies Act, 1990 (Ireland).

[272] See J. Kettle, "Improper Trading in Ireland and Britain" (1994) 12(4) ILT 91; the lesser offence may be somewhat more attractive to liquidators seeking to recover company assets because of the lower burden of proof - P. Igoe, "Use of Civil Law Remedies to Combat Corporate Fraud" (1997) 15(5) ILT 94, 94.

[273] J. Kettle, "Improper Trading in Ireland and Britain" (1994) 12(4) ILT 91, 91-92; N. O'Hanlon, "The Corporate Form and Reckless Trading: A Modern Pandora and Epimetheus" 28 (2006) DULJ 254, 257; see In Re Patrick Lyons Ltd [1933] 1 Ch. 786 on the equivalent rule in the Companies Act 1929 (UK).

[274] Section 139, Companies Act, 1990 (Ireland).

Conveyances Act (Ireland) 1634 declares void any conveyance made with the intention of defrauding creditors.[275] This antique provision was successfully invoked in *Re Kill Inn Motel Ltd.*[276] It is clear that dishonest transactions can be attacked on many grounds other than incapacity.

15.3.1.4. Minority shareholder protection

The rights of minority shareholders have developed significantly since the early days of the joint stock company.[277] In *Foss v. Harbottle*[278] and succeeding cases, it was established that minority shareholders could only take legal action against a wrong done to the company in exceptionally limited circumstances.[279] The philosophical background to the rule in *Foss v. Harbottle* stemmed from judicial reluctance to intervene in the internal running of partnerships.[280] Recognition of the distinction between ordinary partnerships and large deed of settlement companies led the courts to grant relief in limited circumstances.[281] The rationales for the prohibition of court action by shareholders who believed the company to have been wronged by those in charge were the principle of majority rule and the idea that separate legal personality rendered the company itself rather than shareholders the correct plaintiff.[282] In general, there was little protection or recourse for disgruntled

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[275] See Murphy v. Abraham (1863) 15 IR Ch. 371.

[276] In Re Kill Inn Motel Ltd (1978 - 1987) Vol. 3 ITR 706.

[277] See A.J. Boyle, "The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History" (1965) 28 MLR 317.

[278] Foss v. Harbottle (1843) 2 Hare 461.

[279] A.J. Boyle, "The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History" (1965) 28 MLR 317, 325.

[280] Ibid, at 318: "Since harmony between partners is not to be had by decree, equity would not act in vain."; C. Baxter, "The Role of the Judge in Enforcing Shareholder Rights" (1983) 42 CLJ 96, 99.

[281] A.J. Boyle, "The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History" (1965) 28 MLR 317, 319.

[282] Ibid, at 325; these justifications were bolstered by the practical argument against a multiplicity of actions – Gray v. Lewis (1873) 8 Ch. App. 1035, 1051, quoted by Boyle at 326.

minority shareholders who felt the company was being managed in a manner detrimental to their interests.[283] In the nineteenth century, legal protection against fraud on a minority was limited, but would typically cover the expropriation of company assets.[284] Acts which would benefit the majority at the expense of the company were unratifiable, and the minority could sue on behalf of all the shareholders.[285]

The derivative action for ultra vires acts was one of the few avenues open to individual shareholders to challenge corporate acts. This means that an act would have to be viewed as ultra vires, and not merely oppressive, for shareholders to be able to take legal action to prevent it.[286] This leads to a somewhat circular justification: the ultra vires doctrine protected minority shareholders from misconduct to the extent that it was beyond the company's capacity. It was valuable to shareholders because this was an exceptional circumstance in which they could appeal to the courts. In this context, claiming an oppressive act was ultra vires did offer a measure or protection. Baxter attributes to this desire to circumvent the rule in *Foss v. Harbottle* some of the "sloppiness" in distinguishing ultra vires from other irregularities.[287] However, were it more generally possible to directly challenge oppressive acts, this action would not be dependent on the circumstance of want of capacity.

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[283] Cf Pender v. Lushington (1877) 6 Ch.D. 70 which founds a rival line of authority permitting intervention where the wrong characterised as individual - C. Baxter, "The Role of the Judge in Enforcing Shareholder Rights" (1983) 42 CLJ 96, 105.

[284] I. Lynch Fannon, "A Transatlantic Case: The Derivative Action as a Corporate Governance Tool" (2005) 27 DULJ 1, 15-16; Crindle Investments v. Wymes [1998] 4 IR 567.

[285] Atwool v. Merryweather (1867) LR 5 Eq. 464; Menier v. Hooper's Telegraph Works (1874) LR 9 Ch. App. 350; L. MacCann, "Directors' Fiduciary Duties – Part 1" (1991) 9 ILT 80, 81.

[286] See above at 4.2.1: "Preventing a Company's Excess of Capacity".

[287] C. Baxter, "The Role of the Judge in Enforcing Shareholder Rights" (1983) 42 CLJ 96, 101.

Fraud on the minority might have availed in some ultra vires cases. Baxter argues that *Parke v. Daily News*[288] ought to have been decided on the basis of fraud on the minority.[289] Significantly, there has more recently been a relaxation of the conditions under which shareholders can seek court intervention,[290] as well as the enactment of legislation to counteract minority oppression.[291] Section 205 of the Companies Act, 1963 offers a remedy for the oppression of minority shareholders. Any member who claims that the company's affairs are being conducted or directors are exercising their powers in a manner which is oppressive to any of its members can apply for a declaration,[292] and the court may grant any order it deems fit to resolve the situation.[293] The test is whether the conduct is objectively oppressive, even though it might be honest and in good faith.[294] This protection can cover some of the territory traditionally left to incapacity.

If the sidelining of the ultra vires doctrine, either in favour of directors' duties or by its abolition, may be characterised as returning power from external judicial control to the internal control of shareholders, the adequate protection of the minority is a critical question. Without rules to protect the minority, it would be possible for the majority to sanction conduct which neglected the company's interests. However, if there is sufficient protection for dissentient shareholders, this need not be a concern:

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[288] Parke v. The Daily News Ltd [1962] Ch. 927.

[289] C. Baxter, "Ultra Vires and Agency Untwined" (1970) 28 CLJ 280, 313; Forde considers this may have been the basis of the decision: M. Forde & H. Kennedy, "Company Law", 4th ed., (Round Hall Sweet & Maxwell, 2007), p. 36.

[290] C. Baxter, "The Role of the Judge in Enforcing Shareholder Rights" (1983) 42 CLJ 96, 96-98.

[291] Section 205, Companies Act, 1963 (Ireland); Section 210, Companies Act, 1948 (UK).

[292] Section 205(1), Companies Act, 1963 (Ireland).

[293] Section 205(3), Companies Act, 1963 (Ireland); L. MacCann, "Directors' Duties: To Whom are They Owed?" (Part 1) (1991) 9 ILT 3, 6; In Re Irish Visiting Motorists' Bureau Ltd (High Court, Unreported, 22 January 1972, Kenny J.); In Re Clubman Shirts Ltd [1983] ILRM 323; In Re Westwinds Holding Company Ltd (High Court, Unreported, 21 May 1974, Kenny J.).

[294] In Re Irish Visiting Motorists' Bureau Ltd (High Court, Unreported, 22 January 1972, Kenny J.).

the ratification of defective transactions is legitimate provided the interests of all shareholders are considered.

Babb argues that ultra vires may remain beneficial in enabling minority shareholders to oppose breaches of company law, such as capital maintenance rules, through the courts, using their derivative action.[295] Her argument is less persuasive in relation to creditors, since creditors are limited to either refusing to conclude the agreement in the first place or failing to perform later, in which case they can directly argue illegality.[296] They will presumably base such decisions on their own interests rather than the public interest. These do not seem to offer effective means to enforce company law.

15.3.1.5. The adequacy of these imperative rules of company law

Overall, it appears that shareholders and creditors would suffer little were the ultra vires doctrine to disappear. Other rules systematically, effectively and proportionately protect the company's assets and prohibit potentially dishonest conduct. Many forms of dishonesty are specifically prohibited by statute. Furthermore, the equitable rules establishing a fiduciary duty which extends beyond shareholders to creditors in the case of insolvency provide a flexible tool to respond to the misapplication of company assets. These rules have the advantage of proportionality, in that it is possible for the defect to be cured.

The existence of a battery of regulations designed to protect investors and creditors from dishonest or oppressive conduct shows that company law would not suffer an irreparable loss were the ultra vires doctrine to be erased.[297] At present, these rules exist alongside incapacity, and may be invoked in parallel as appropriate arising

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[295] C.A. Babb, "Rethinking the Concept of Ultra Vires in Company Law" (Ph.D. thesis, University of Cambridge, 2004), pp. 5-6.

[296] Unless Babb means creditors other than the party to the particular transaction, in which case there is no authority for them opposing ultra vires transactions with others.

[297] "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986), Part II, Chapter 6, paras. 25, 28-30.

from the same circumstances. If the ultra vires were to be abolished, these rules would fill much of the gap. They would not sanction every transaction that is currently ultra vires, but perhaps they would more accurately penalise all those which ought to be forbidden. O'Hanlon characterises the rules as based on the distinction between misfortune and misconduct.[298] Whether transactions are automatically wrongful because they fall outside a company's stated objects is open to debate. Furthermore, the rules on directors' duties in particular are preferable to incapacity as a means of condemning a dubious transaction in that they allow the company to exercise the ultimate judgement as to whether it can be justified. Finally, as O'Hanlon points out, the importance of this arsenal of regulations lies not merely in the potential to sanction individual transactions, but in the culture of responsible business which their existence promotes.[299]

15.3.2. Conclusion: Full Capacity is an Option

The picture is perhaps more complex and nuanced than one might initially assume. The case against the ultra vires doctrine scores a number of points. The conditions and values of the twenty-first century no longer dictate that companies must possess limited capacity. Furthermore, the argument that the enumeration of objects mandates such limits is no longer so persuasive. It may easily be swept aside, if desired, by the abolition of objects. The policy grounds for the ultra vires doctrine are also eroded. Although the interests which the doctrine was designed to protect remain important, limited capacity is not necessarily the most appropriate means to serve them. Competing policy concerns, such as legal certainty and business efficiency also argue against the ultra vires doctrine. These points are valid, but none is decisive.

Calls for abolition must be seriously weakened by the affirmation that the ultra vires doctrine is not a harmful or dangerous principle. The strongest rallying call against the doctrine is silenced. The ultra vires doctrine is not a perpetrator of injustices.

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[298] N. O'Hanlon, "The Corporate Form and Reckless Trading: A Modern Pandora and Epimetheus" 28 (2006) DULJ 254, 289.

[299] Ibid, at 287.

Furthermore, the recent evolution of the substantive law on capacity ensures that the doctrine need no longer be the source of complexity and confusion which it became in the past.[300] The evidence does not dictate that there is a pressing need to eradicate the ultra vires doctrine. Instead, the question remains open: should the ultra vires doctrine be reformed, and if so, how?

[300] See above at Chapter 7: "The Decline and Fall of the Corporate Benefit Test".

16. AVENUES FOR REFORM

Few defend the ultra vires doctrine. A comprehensive analysis of the law on corporate incapacity, taking account of modern non-contractual remedies, shows that the case against it is not as conclusive as is generally assumed, but the doctrine has long faced a negative consensus. In 1946, Horrwitz described the recommendation that ultra vires be abolished as "no novelty".[1] If the ultra vires doctrine is viewed as both outdated and dispensable, what alternatives might govern the future of corporate capacity? Various possibilities emerge from the recommendations of official reports and from legislative changes enacted in other jurisdictions. Whichever solution will preferred, there is a strong argument for legislative intervention.

16.1. THE MEANS OF REFORM

16.1.1.1. Starting point: substantively acceptable but uncertain law

Doubt as to the current legal position in Ireland highlights the need for some form of statutory intervention.[2] Although analysis shows that the doctrine, modelled along modern-*Rolled Steel*[3] lines, now has a satisfactory shape, the persisting uncertainty indicates the inadequacy of judicial modification of the law.[4] So much of the difficulty of the ultra vires doctrine stems from perceptions of complexity and risk. This sense of confusion has resulted from the interplay between judges, commentators and practitioners. At a minimum, clarification is needed to affirm that the corporate benefit test is no longer law.

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[1] W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 75.

[2] See above at 7.3: "Rolled Steel and the Law in Ireland".

[3] Rolled Steel (Products) Holdings Ltd v. British Steel Corporation [1986] Ch. 246.

[4] See above at Chapter 7.

At a substantive level, the ultra vires doctrine has evolved to a point which is not self-evidently problematic.[5] *Rolled Steel* affirms that a company has the capacity to exercise all the powers expressed in its objects clause for any purpose.[6] This is a "simpler, more practical and effective basis" for the law on capacity than the assumed corporate benefit test which long distorted the doctrine.[7] It returns the proper focus to the terms of the objects clause itself. Furthermore, the establishment of a full and appropriate set of non-contractual remedies has fatally undermined the injustice arguments against the doctrine.[8]

The problem is the ambiguity which exists on the crucial question of whether the corporate benefit test has been completely excised from Irish law.[9] The Company Law Review Group does not express a view on whether *Rolled Steel* or corporate benefit forms the basis of the law, even though this critical question must bear on any appraisal of the ultra vires doctrine in its current form and consequently on the need for reform.[10]

At a minimum, it is imperative that the modern approach to corporate incapacity be unambiguously confirmed as Irish law. Once this step is clearly and unequivocally taken, the relics of the old corporate benefit test, including the emphasis which is still placed on the distinction between powers and objects and gratuitous dispositions, can be discarded, and the structure of the law on corporate capacity will necessarily emerge as simpler, less confusing and more coherent. Some form of legislative action is required, at least to dispel this doubt. There are, of course, many who call for more far-reaching reform.[11]

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[5] Cf Company Law Review Group, First Report (Dublin, 2001), para. 1.4.4.

[6] Rolled Steel (Products) Holdings Ltd v. British Steel Corporation [1986] Ch. 246.

[7] R.M. Temple, "Ultra Vires: The Dual Approach" 137 NLJ 1069, 1071.

[8] See above at 15.2.1.2: "The unjust effects issue".

[9] See above at 7.3: "Rolled Steel and the Law in Ireland".

[10] Company Law Review Group, First Report (Dublin, 2001).

[11] See below at 16.3: "The Current Irish Proposals".

16.1.1.2. Legislation as the means of reform

Though limited capacity was judicial in origin,[12] and the courts gradually became more receptive towards circumvention by drafters,[13] they never moved to eradicate it. This was ostensibly for reasons of precedent.[14] Griffiths also suggests that judges lacked the will: incapacity offered a useful tool for company liquidators to challenge dubious disposals.[15] Commercial practice ate away at the doctrine, but not in an even or principled manner. Changes effected by those drafting corporate constitutions have aided particular companies at the price of heightened general confusion and danger. Leaving the solution in the hands of promoters also neglects the more general public aspects of the issue.[16] Most authors advocate a legislative solution, despite, or even because of, the inroads which case law has made into the doctrine.[17]

The authorities of the past twenty five years show that judicial improvements cannot bring the required certainty and reassurance. They have not radically altered the habits of those drafting memoranda or dealing with companies. It would now be excessively optimistic to hope for prompt and decisive judicial clarification of the status quo. The progress of case law depends on the confluence of a dispute which

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[12] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 88; see above at Chapter 3: "The Initial Application of the Doctrine of Ultra Vires to the Registered Company".

[13] See Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656; [1966] 2 AER 674, described as "a marked shift in the judicial attitude" in J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 91.

[14] See R.S.T. Chorley, "The Conflict of Law and Commerce" (1932) 48 LQR 51, 51: changing legal rules to respond to new situations despite precedent "is a method so contrary to our modern tradition, which demands an appeal to the Legislature, that it cannot be regarded as practical politics."

[15] A. Griffiths, "Contracting with Companies" (Hart, 2005) p. 168.

[16] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 117.

[17] Ibid, at 117; F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 293.

raises the right questions and counsel who advance the right arguments.[18] Even the strongest declaration by the courts might not have the desired effect on perceptions and behaviour.

In fact, radical reform has consistently been left to the legislature. This entailed the periodical commissioning of official reports in these islands, each of which articulated further opposition and recommended reform or abolition.[19] In addition, most common law jurisdictions have enacted major reforms of the law on corporate capacity.

16.1.2. Legislative Reform in the Common Law World

Reform of corporate capacity has been on the agenda in many common law jurisdictions for a very long time. As early as 1894, Cooke observed that the doctrine was "gradually succumbing" to enterprise's need for freedom.[20] He pointed to West Virginia, where the restrictions on corporate capacity had already been removed.[21] In the early twentieth century, a number of Canadian provinces[22] amended their Companies Acts to expressly endow corporations with the general capacity generally possessed by chartered corporations.[23]

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[18] All depends on "the accidents of litigation" - Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349, 373 (per Lord Goff).

[19] See above at 8.3: "Legislative Reform to Protect the Outsider ".

[20] F.H. Cooke, "Should the Ultra Vires Doctrine be Applied to Business Corporations?" (1894) 28 American Law Review 222, 227: "there are significant proofs that, although the ultra vires doctrine has not as yet been openly repudiated by our courts and legislatures [...] yet it is, so far as concerns business corporations at least) gradually succumbing to the pressure imposed by the necessity for untrammelled development of our vast industrial activities."

[21] Ibid, at 227; Horrwitz cites Section 8, Ohio Corporation Act 1927 - W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 75; C.L. Colson, "The Doctrine of Ultra Vires in United States Supreme Court Decisions" (1935-1936) 42 W. Va. L.Q. 297, 332-333.

[22] Ontario, Manitoba, Saskatchewan, British Columbia.

[23] B. Thompson, "Are Joint Stock Companies Common Law Corporations?" (1922) 42 Canadian Law Times 143, 147-151; (1922) 42 Canadian Law Times 302, 306: Thompson describes this as a "slovenly, inexpert" attempt only intended to equalise the position of companies formed by letters

By now, the ultra vires doctrine has been comprehensively reformed in most common law jurisdictions.[24] These include Canada,[25] Australia,[26] New Zealand[27] and South Africa. The doctrine is now "dead or at least fatally ill" in the United States.[28] The two principal approaches employed are to grant companies unlimited capacity or to allow outsiders to enforce transactions which are in principle ultra vires.[29] Various minor modifications of the doctrine may also be enacted. In addition, some countries establish different regimes for different categories of company, or allow corporations themselves to choose whether to retain specific purposes. If we are to follow many other jurisdictions in making legislative changes

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patent and other companies to act outside their own provinces, and certainly not intended to give all companies full legal capacity; Edwards v. Blackmore (1918) 42 OLR 105; 42 DLR 280, Canadian Bank of Commerce v. Cudworth Rural Telephone Company (1922) 1 WWR 287.

[24] Company Law Review Group, First Report (Dublin, 2001), para 10.3; D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27; L.S. Sealy, Editorial, (1986) 7 Company Lawyer 90; J. Poole, "Abolition of the Ultra Vires Doctrine and Agency Problems" (1991) 12(3) Company Lawyer 43; F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 310-312.

[25] Section 15(1), Canada Business Corporations Act 1985 (Canada): "A corporation has the capacity and, subject to this Act, the rights, powers and privileges of a natural person."

[26] Section 124(1), Corporations Act, 2001 (Australia): "A company has the legal capacity and powers of an individual…"

[27] Section 16(1), Companies Act 1993 (New Zealand): "[…] a company has, both within and outside New Zealand, Full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction […]".

[28] J. Anderson, "The Evolution of the Ultra Vires Rule in Irish Company Law" (2003) 28 Irish Jurist 263, 273; M.A. Schaeftler, "Ultra Vires – Ultra Useless: The Myth of State Interest in Ultra Vires Acts of Business Corporations" (1983-1984) 9 J. Corp. L. 81, 83; A.J. Sulkowski & K. Greenfield, "A Bridle, a Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behaviour" (2005) 79 St. John's L.R. 929, 930 & 945; K. Greenfield, "Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality" (2001) 87 Virginia Law Review 1279.

[29] J. Poole, "Abolition of the Ultra Vires Doctrine and Agency Problems" (1991) 12(3) Company Lawyer 43, 43.

to the law on corporate capacity, the crucial question is which path, of several, to favour.

16.2. THE OPTIONS

16.2.1. Protecting the Outsider

The first possibility is that which has already been followed in Ireland.[30] It leaves the capacity of corporations in principle subject to the traditional ultra vires doctrine, whilst allowing certain classes of outside party by virtue of statutory exemption to enforce the validity of agreements that should, by rights, be void.

This approach was advocated by the 1962 Jenkins Report.[31] Unlike the earlier Cohen Report, the Jenkins Report refrained from proposing that companies be given full capacity, as it considered that this would lead to an imbalance of power in favour of company management, at the expense of shareholders and creditors.[32] Instead, it concentrated on remedying the plight of third parties who deal with companies. It proposed that companies should no longer be able to plead their incapacity to avoid contracts which another party signed in good faith.[33] It further advocated the abolition of the doctrine of constructive notice, so that outsiders would not be penalised for their presumed awareness of companies' lack of

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[30] See above at 8.3: "Legislative Reform to Protect the Outsider "; Section 8(1), Companies Act 1963 (Ireland); First Company Law Directive (68/151/EEC); Article 6, European Communities (Companies) Regulations 1973 (Ireland); cp Section 9, European Communities Act, 1972 (UK); Section 35, Companies Act 1985, as amended by Section 108, Companies Act 1989 (UK).

[31] "Jenkins Report", Board of Trade Company Law Committee Report (1962) Cmnd 1749/62, paras. 35-42; Editorial [1962] JBL 229, 230.

[32] Ibid, para. 39, as set out by J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" (1963) JBL 143, 144-146.

[33] "Jenkins Report", Board of Trade Company Law Committee Report (1962) Cmnd 1749/62, para. 42.

capacity.[34] This emphasis on the protection of third parties dealing with the company in good faith, was shared by the First European Directive and Section 8 of the Companies Act, 1963. These measures allow third parties to rely on the validity of an act, despite the company's incapacity.[35] The act remains void for any person who does not fall within the terms of the saving provision[36] as well as internally within the company, but the outsider acting in good faith can disregard the problem.

This solution strongly favours the outsider, to the detriment of the company and its shareholders.[37] It has been criticised because it leaves "the company defenceless" against its incapacity being used against it.[38] Certainly, it is an incomplete solution: any case not covered by the exception is subject to the full rigours of the ultra vires doctrine. *Northern Bank v. Quinn*[39] and *In Re Frederick Inns* [40] show its limitations. Each set of rules implementing this concept applies in slightly different circumstances. Jenkins addressed the *Northern Bank*[41] problem, by refusing to

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[34] Ibid, para. 42: "the other party, if acting in good faith, shall be entitled to assume without investigation that the company is in fact possessed of the necessary power".

[35] Section 8(1), Companies Act 1963; Article 6(1), European Communities (Companies) Regulations, 1973 (Ireland); Section 9, European Communities Act, 1972 (UK); Section 35, Companies Act 1985 (UK); D.S. Glass, ""Ultra Vires" – The Saga Continues" (1990) 11(7) Company Lawyer 138.

[36] Northern Bank Finance Corporation v. Quinn and Achates Investment Company [1979] ILRM 221.

[37] Poole cites Lord Wedderburn in the House of Lords (OR, 6 April 1989, Col 1282): "these sections always take the part of the third party even when he is not a nice chap; when he knows everything and has grabbed an opportunity [...] I do not think that most people would regard it as sensible commerce." - J. Poole, "Abolition of the Ultra Vires Doctrine and Agency Problems" (1991) 12(3) Company Lawyer 43, 49.

[38] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 118.

[39] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221.

[40] In Re Frederick Inns Ltd. [1994] 1 ILRM 387.

[41] Northern Bank Finance Corporation Ltd v. Quinn and Achates Investment Company [1979] ILRM 221.

remove the protection from those who read an objects clause but fail to understand it.[42] In England, the Companies Act 1989 removed some of the conditions previously limiting the protection[43] and extended the class of outsiders who could rely on the transaction.[44] The principle, however, is constant: all transactions that do not benefit from the artificial statutory validity are governed by the existing law on capacity. This is different in both theory and practice from the alternative of imposing the respect of objects as a purely internal matter with no effect on any outsiders. As a result of the gaps in protection, Ferran doubts whether the 1989 changes[45] reduced ultra vires entirely to an internal issue.[46] Milman observes that the overall effect of the statutory protection of the outsider was to make the law "hideously complicated".[47] The UK approach remained one of incapacity tempered by exceptional validity until the Companies Act 2006.[48] This approach is still law in Ireland.[49]

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[42] See D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27, 29.

[43] E. Ferran, "The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority: Part 2" (1992) 13(9) Company Lawyer 177, 177; F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 298-299.

[44] Section 35A(2)(b), Companies Act 1985 (UK).

[45] Which came into effect on 4 February 1991.

[46] E. Ferran, "The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority: Part 1" (1992) 13(7) Company Lawyer 124, 124.

[47] D. Milman, "1967-1987: A Transformation in Company Law?" (1988) 17 Anglo-American Law Review 108, 121.

[48] J. Poole, "Abolition of the Ultra Vires Doctrine and Agency Problems" (1991) 12(3) Company Lawyer 43, 45; S. Griffin, "Directors' Authority: The Companies Act 1989" (1991) 12(5) Company Lawyer 98, 98; F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 299-300.

[49] Section 8(1), Companies Act 1963 (Ireland).

16.2.2. Statutory Clarification and Modification

Another legislative option which may be adopted while retaining the overall principle of limited capacity is to expressly permit certain categories of transaction which might otherwise be questioned. One option is to grant all companies certain objects or powers without requiring them to be enumerated in their memoranda. South African[50] and Nigerian[51] law has made it unnecessary for companies to list their powers, though their capacity remains limited. New Zealand adopted this approach before the grant of full capacity as a rule made it redundant.[52] The Jenkins Report recommended the elaboration of a standard table enumerating common powers which every company would possess unless it opted out of them, following the Australian model.[53]

Taking this idea further, the Oireachtas could issue guidance for judges in the interpretation of objects clauses in the interest of ensuring that objects become clearer. For example, by expressly excluding the main objects rule, the legislature could eliminate any need for an independent objects clause.[54] The South African Companies Act, 1973 awarded companies extensive default capacity including "unlimited objects ancillary to" the main stated object.[55] A similar provision could

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[50] Section 33(1), Companies Act 1973 (RSA): companies possess by default "unlimited objects ancillary" to their stated objects; F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 309.

[51] Sections 38(1), 39(1), Companies and Allied Matters Decree 1990 (Nigeria); O.V. Onwaeze, "Nigeria: Reforming the Ultra Vires Doctrine" (1996) 17(4) Company Lawyer 120; the effect of the Nigerian reform is unclear: it could be interpreted as an internal management approach, though this is not Onwaeze's view.

[52] Section 15A(1), Companies Act 1955 (New Zealand); cf Section 16, Companies Act 1993 (New Zeaand).

[53] "Jenkins Report", Board of Trade Company Law Committee Report (1962) Cmnd 1749, para. 43; see also R.W. Parsons, "Uniform Company Law in Australia" [1962] JBL 235, 238-239.

[54] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 199.

[55] Section 33(1), Companies Act 61, 1973 (RSA).

see all companies deemed to possess a *Bell Houses*[56] clause by default, with judges instructed to respect the subjective judgement of directors on questions of ancillariness. Such measures would combat the arbitrary manner in which the draftsman's devices benefit only those companies which consciously incorporate them. Allowing companies to opt out would preserve the control of the memorandum's drafters. Obviating the need for many of the devices commonly inserted in memoranda would potentially enhance the clarity and usefulness of objects clauses.

Parliament could also, instead of attacking the ultra vires doctrine, enact provisions to resolve the questions which have arisen in the case law. It could expressly consecrate the simplicity of the *Rolled Steel* approach, by providing that a company possesses the capacity to exercise all the powers set out in its objects clause, regardless of the purpose for which they are used or any question of corporate benefit. This has been done in both Australia and New Zealand.[57] Singapore's legislature expressly conferred on companies the power to make gratuitous dispositions for patriotic or charitable purposes.[58] This shows that the legislature can intervene to dictate its policy choices in relation to corporate capacity. Such a decision can enhance legal certainty and the security of transactions, subject to a policy choice on the part of the legislature to permit the transactions in question.

In this vein, South African law dictates that companies' de facto principal objects also be deemed their main object in the context of the memorandum.[59] If the main

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[56] Bell Houses Ltd v. City Wall Properties Ltd [1966] 2 QB 656; see above at 5.3.6: "The Bell Houses Clause and the Directors' Subjective Appreciation".

[57] Cp Section 124(2), Corporations Act 2001 (Australia): "A company's legal capacity to do something is not affected by the fact that the company's interests are not, or would not be, served by doing it."; Section 17(3), Companies Act 1993 (New Zealand): "The fact that an act is not, or would not be, in the best interests of a company does not affect the capacity of the company to do the act."

[58] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, at 19.

[59] Section 36, Companies Act 61, 1973 (RSA); a new Companies Bill is currently being brought before Parliament in South Africa: Companies Bill 2008 (Bill 61 of 2008) (RSA).

business in fact carried out by the company was not its stated main object, the business actually engaged in was regarded nonetheless as the main object.[60] McLennan criticises this solution for its vagueness. He also regards it as "absurd", if "harmless", that a company's capacity can shift informally and may be entirely different to that enunciated in the memorandum.[61] This is a serious objection. If capacity is no longer to be anchored in the written objects clause, what purpose does it serve and why retain it at all? On the other hand, it may be described as an effective if unsatisfactory solution, since there has been no litigation on corporate capacity since its enactment.[62]

There are many possibilities for statutory changes to the doctrine, each of which would be informed by policy choices. Perhaps this may be disregarded as hypothetical, given the likelihood that abolition will be the preferred route in this jurisdiction, as it has been in many others.[63] However, given that the ultra vires doctrine will continue to apply to various forms of corporation in future, perhaps the overlooked possibility of legislating to modify and clarify remains necessary. If the Company Law Review Group's recommendations are followed, it would be welcome for the legislature to improve and make certain the scope of the ultra vires doctrine's operation in all residual cases.

16.2.3. Objects as an Internal Discipline

Going a step beyond permitting certain parties to rely on a prima facie void act, the next step is to regard corporate capacity as a purely internal matter. This is a radical change to what was the ultra vires doctrine: ultra vires could no longer be described as incapacity.[64] Any ultra vires act would be binding as between the company and

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[60] Section 33(2), Companies Act 61, 1973 (RSA).

[61] J.S. McLennan, "Time for the Final Abolition of the Ultra Vires and Constructive Notice Doctrines in Company Law" (1997) 9 S. Afr. Merc. L.J. 333, 334; F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 309-310.

[62] J.S. McLennan, op. cit., 334-335.

[63] Company Law Review Group, First Report (Dublin, 2001); http://www.clrg.org/companiesbill/.

[64] See above at 4.1: "Ultra Vires is Incapacity".

contracting parties, but the internal aspects of the ultra vires doctrine would operate within the corporate structure. Shareholders could restrain the company from exceeding its capacity and sanction officers who caused it to act ultra vires.[65]

In Singapore,[66] no corporate act is invalid due solely to a company's want of capacity.[67] Similarly, in South Africa, the law was reformed in 1973[68] to provide that incapacity could only be raised as an internal matter between the company, its members and directors.[69] New Zealand and Australia both chose that where companies retain objects, the specification of objects would only operate as a form of internal control. New Zealand companies generally have full capacity.[70] If they choose to restrict their capacity in a constitution, this has internal consequences but does not affect the validity of the act.[71] Likewise, in Australia, those companies which choose to prescribe objects[72] are internally bound to respect them.[73]

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[65] Poole suggests Section 35(2), Companies Act 1985 limits shareholder intervention to prospective restraint - J. Poole, "Abolition of the Ultra Vires Doctrine and Agency Problems" (1991) 12(3) Company Lawyer 43, 46.

[66] See T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17.

[67] Section 25(1), Companies Act, Cap. 185, 1970 (Singapore).

[68] Section 36, Companies Act 1973 (RSA).

[69] J.S. McLennan, "Time for the Final Abolition of the Ultra Vires and Constructive Notice Doctrines in Company Law" (1997) 9 S. Afr. Merc. L.J. 333; the internal control approach is retained in the new Companies Bill: Companies Bill 2008 (Bill 61 of 2008) (RSA).

[70] Section 16(1), Companies Act 1993 (New Zealand).

[71] F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 312; see Sections 26 (option of constitution), 17(2) (shareholder's rights), 17(1) and 18(1) (external validity), Companies Act 1993 (New Zealand).

[72] Section 136, Corporations Act 2001 provides that companies may adopt a constitution; Section 125, Corporations Act 2001 provides that the constitution may specify the company's objects (Australia).

[73] Section 125(2), Corporations Act 2001 (Australia): "If a company has a constitution, it may set out the company's objects. An act of the company is not invalid merely because it is contrary to or beyond any objects in the company's constitution."; Section 140, Corporations Act 2001 (Australia):

Gower proposes an interesting solution in his draft statute for Ghana.[74] He recommends the retention of the objects clause, and making it a ground for winding up if the company does not begin to pursue its stated business within a year. By availing of the facility to amend its stated business, shareholders and creditors would be warned of the shift in direction. Ultra vires would be retained in a modified internal form, so that the company would be prohibited from exceeding its capacity and injunctions could be sought to prevent it. Executed contracts could not be invalidated, but executory contracts would be set aside with compensation.[75] The invalidation of any external contract distinguishes this approach from the fully internal one.

Davis favours an internal approach, because it correctly treats the memorandum as a contract between shareholders and directors, allowing shareholders to restrain breaches of that contract, while avoiding the pitfalls which the rule has historically created for outsiders.[76] The UK Companies Act 1989 expressly retained the right of shareholders to restrain the company from entering ultra vires contracts,[77] though

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"A company's constitution (if any) [...] have effect as a contract: (a) between the company and each member; and (b) between the company and each director and company secretary [...] under which each person agrees to observe and perform the constitution and rules so far as they apply to that person."; The 1989 Act expressly provided that the misuse of corporate powers could be prospectively restrained and give rise to damages for breach of duty: Section 162(1)-(8), Corporations Act 1989 (Australia); this is no longer specified in the Corporations Act 2001 (Australia).

[74] Final Report of the Commission of Enquiry into the Working and Administration of the present Company Law of Ghana, Accra, 1961, 35-36, 181; Sections 16(2)(b) and 247(2)(a); cited in G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 118.

[75] See G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 118.

[76] S. Davis, "The Ultra Vires Rule" 136 NLJ 907, 908.

[77] Section 35(2), Companies Act 1985 (UK).

the criticism was levelled that, in practice, shareholders may be unable to avail of this right, if they learn too late of what is being done.[78]

16.2.4. Full Capacity

The ultimate reform is the grant of unlimited capacity to companies. This has been advocated from the Cohen Report, through the Prentice Report, to the Company Law Review Group.[79] It is not significant whether the new capacity granted to corporations is described as "full" or "unlimited" or likened to that of the natural person.[80] All these descriptors signify the rejection of any limits imposed on a legal person's contractual capacity by reference to the purpose for which it is established. Logically, companies remain inherently incapable of certain acts which can only be accomplished by natural persons.

Abolition of limits on capacity often logically entails the disappearance of the objects clause. The simplest way to avoid any vestiges of a doctrine which limits a company's capacity by reference to its statement of objects is to remove the statement of objects. Unlimited capacity has the advantage of simplicity compared to the internal control approach.[81] Sealy advocates it "to get rid once and for all of the entire notion of corporate incapacity".[82] Horrwitz applauds it as "wholly satisfactory" in practice.[83]

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[78] E. Ferran, "The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority: Part 1" (1992) 13(7) Company Lawyer 124, 127.

[79] F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 302; see also Section 15(1), Business Corporations Act 1985 (Canada).

[80] Section 15(1), Business Corporations Act 1985 (Canada): capacity and powers "of a natural person"; Section 16(1) Corporations Act, 1993 (New Zealand): "full capacity"; Section 124, Corporations Act 2001 (Australia): "the legal capacity and powers of an individual".

[81] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 86.

[82] L.S. Sealy, Editorial, (1986) 7 Company Lawyer 90, 90.

[83] W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 75.

Abolition is a popular answer. The 1943 Cohen Report found no real justification for the ultra vires doctrine,[84] instead highlighting its adverse effects on corporate constitutions and practice. The report's damning criticism was accompanied by a recommendation that the ultra vires doctrine be abolished.[85] Procaccia describes Cohen's complete abolition solution as "radical and clear cut".[86] Ireland's 1958 Cox Report[87] agreed that the purpose of the doctrine had largely been defeated, that it no longer served shareholders and creditors, and so "becomes a waste of time and paper".[88] Its authors therefore inclined towards complete abolition, so that "every company should have the same powers as an individual".[89] However, they stopped short of recommending abolition, deferring to the apparent resistance of British legislators after the Cohen report.[90] In 1985, when Professor Prentice was requested to examine the implications of finally abolishing ultra vires,[91] it was understood

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[84] "Cohen Committee Report", Report of the Committee on Company Law Amendment (1945) Cmd. 6659/45, para. 12 : ultra vires "as now applied to companies, [...] serves no positive purpose".

[85] Unlike many of the other reforms proposed; this is explained by the Board of Trade's concern that such far-reaching reform would delay the Act – Company Law Review Group, First Report (Dublin, 2001), para 10.4.1.

[86] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 118.

[87] Cox Report, Report of the Company Law Reform Committee (PR 4523) (1958); see Company Law Review Group, First Report (Dublin, 2001), para 10.4.

[88] Cox Report, Report of the Company Law Reform Committee (PR 4523) (1958) p. 20, para. 49.

[89] Ibid, para. 49; see D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27; cf Current proposals to grant unlimited capacity to private, but not public companies, allowing private companies to choose to have limited objects: Company Law Review Group, First Report (Dublin, 2002).

[90] Cox Report, Report of the Company Law Reform Committee (PR 4523) (1958) p. 20, para. 50: "we must assume that there were strong reasons for this decision".

[91] "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986); The announcement was welcomed as reforming Company Law to meet "the needs of modern business practice": L.S. Sealy, Editorial, (1986) 7 Company Lawyer 90.

from the outset that ultra vires ought to be abolished,[92] and public consensus supported the report's views.[93] The Prentice Report recommended the complete abrogation of the rule by granting companies the full capacity of natural persons.[94] It found that the utility of the doctrine was completely undermined[95] and that other rules of company law provided adequate protection for shareholders.[96] It pointed out that a company's published accounts are likely to be more informative for a prospective trading partner than its objects clause,[97] and suggested that companies file annual reports describing their activities and business.[98]

Sealy observes that "jurisdictions which have initially settled for something less have invariably ended up going the whole way" and warns against "half-measures".[99] This has been the English experience. The Companies Act, 2006 finally abolished the ultra vires doctrine in the United Kingdom.[100] In Canada,

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[92] This is clear from the study's terms of reference; "He is to be concerned not with establishing the case for abolition but with the implications for commerce and the law of going ahead with it [...] it is now (rightly) taken for granted that this archaic doctrine must go" - L.S. Sealy, "The Bell Tolls for Ultra Vires", (1986) 7 Company Lawyer 90, 90.

[93] J. Birds, "The Demise of Ultra Vires" (1986) 7(5) Company Law 203, 203; Anonymous, "News: IOD Urges Removal of Ultra Vires Rule" (1986) 7 Company Lawyer 127.

[94] "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986), Chapter 4, para. 4.

[95] Ibid, Part II, Chapter 2, para. 6; see above at 5.5: "The Cumulative Effect of These Challenges".

[96] "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986), Part II, Chapter 6, paras. 25, 28-30.

[97] Ibid, Part II, Chapter 5, paras 7, 11.

[98] J. Birds, "The Demise of Ultra Vires" (1986) 7(5) Company Law 203, 204; a view supported by the Institute of Directors - Anonymous, "News: IOD Urges Removal of Ultra Vires Rule" (1986) 7 Company Lawyer 127.

[99] L.S. Sealy, Editorial, (1986) 7 Company Lawyer 90, 90.

[100] Section 39(1), Companies Act 2006 (UK); except for charities: Section 42, Companies Act 2006 (UK); the 2006 Act is being introduced in stages: on enactment, 1 October 2007, 6 April 2008; 1 October 2008 and 1 October 2009.

companies possess the capacity of natural persons.[101] In Australia and New Zealand, the general rule is that companies have no objects clause and possess "full capacity".[102] If they choose to specify objects, this is an internal matter.[103]

While it is not necessary to abolish statements of objects when granting companies full capacity, the two questions have so long been intertwined[104] that it seems logical to remove both statements of objects and limits on capacity at the same time. If a statement of objects is not at all binding on the company, it is not informative. Furthermore, abolishing objects clauses is a clean, unambiguous way of granting unlimited capacity. Thus, the United Kingdom's Companies Act, 2006 no longer requires a statement of objects to be included in a company's memorandum.[105] Though Poole links the 1985 Companies Act's retention of restricted capacity to Article 9 of the First Companies Directive,[106] this did not prevent the abolition of the doctrine in England's 2006 Companies Act.

If full capacity is the clear and simple solution, its potential weakness is that it "throws overboard the doctrine of ultra vires in its totality with all the bad and the

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[101] Section 15(1), Business Corporations Act 1985 (Canada): capacity and powers "of a natural person"; Section 16(1) Corporations Act, 1993 (New Zealand): "full capacity"; Section 124, Corporations Act 2001 (Australia): "the legal capacity and powers of an individual".

[102] Section 124, Corporations Act 2001 (Australia): "A company has the legal capacity and powers of an individual..."; Section 16(1), Companies Act 1993 (New Zealand): "[...] a company has, both within and outside New Zealand, (a) Full capacity to carry on or undertake any business or activity, do any act, or enter into any transaction; and (b) For the purposes of paragraph (a) of this subsection, full rights, powers, and privileges."

[103] Section 125(2), Corporations Act 2001 (Australia): objects in optional constitution; Section 140, Corporations Act 2001 (Australia): constitution takes effect as a contract between the relevant parties; cp Section 161, Corporations Law 1989 (Australia); Section 26, Companies Act 1993 (New Zealand): optional constitution; Section 17, Companies Act 1993 (New Zealand): no effect on validity, rights of shareholders to object.

[104] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[105] Section 8, Companies Act 2006 (UK).

[106] J. Poole, "Abolition of the Ultra Vires Doctrine and Agency Problems" (1991) 12(3) Company Lawyer 43, 43.

good there is in it."[107] Essentially, the benefit which is lost (by contrast with the internal rule approach) is that of permitting shareholders to restrict directors to the pursuit of approved goals.[108] If objects are removed, some informational potential is also lost. Furthermore, the apparent straightforwardness of abolition is reduced, given that, even if all registered companies acquire unlimited capacity, other forms of corporation, such as statutory corporations, will continue to have limited capacity.[109] Fundamentally, however, whether companies ought to have full or limited capacity is a policy decision.[110]

16.2.4.1. Categories of company

Some legislative solutions expressly apply different rules to different categories of company. Thus, the Company Law Review Group's 2001 report recommends the abolition of objects and restrictions on capacity for the majority of private companies.[111] However, limited capacity would continue to apply range of other corporations, including public companies, private companies which choose to have an objects clause, and other entities, such as building societies. This echoes South Africa's Close Corporations Act of 1984, which expressly confers unlimited capacity as of a natural person on small companies with fewer than ten members,[112]

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[107] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 118.

[108] Cp K.W. Wedderburn, "Some Recent Developments in British Company Law" (1972) 6 International Lawyer 487, 491.

[109] Only Canada has completely abolished statements of objects across the board. In other jurisdictions, they remain as an option with internal effect.

[110] See below at 17.1.3: "The Real Question: Limited or Unlimited Capacity?"

[111] Company Law Review Group, First Report (Dublin, 2001), para. 10.9.2.

[112] Section 2(1) Close Corporations Act 1984 (RSA); Section 2(4) Close Corporations Act 1984 (RSA): "A corporation shall have the capacity and powers of a natural person of full capacity in so far as a juristic person is capable of having such capacity or of exercising such powers."; F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 306.

whereas other companies retain internal purpose restrictions.[113] McLennan's recommends that full capacity instead be extended to all companies.[114] The exception approach is not necessarily justifiable in principle. Unless the reasons which justify the abolition of the rule relate specifically to the private limited company, it would seem more appropriate to consider the merits of the rule as a whole, rather than deleting it in one context and retaining it in many others. Furthermore, drawing such distinctions militates against the simplicity and clarity which abolition seeks to achieve.

16.2.4.2. The element of choice

Another variation on the unlimited capacity principle is to permit certain companies to choose to retain objects and restrictions on their capacity. Thus, the default position is full capacity, but corporate promoters may choose to maintain limits. In New Zealand, companies no longer have objects clauses except to state restrictions on their capacity.[115] Where companies opt for such restrictions, this is an internal matter.[116] In Australia, the default position is that companies have no objects and

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[113] Section 36, Companies Act 1973 (RSA); F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 307.

[114] J.S. McLennan, "Time for the Final Abolition of the Ultra Vires and Constructive Notice Doctrines in Company Law" (1997) 9 S.A. Merc. L.J. 333, 335.

[115] Sections 16(1) and 16(2), Companies Act 1993 (New Zealand); L.S. Sealy, Editorial, (1986) 7 Company Lawyer 90, 90.

[116] Section 18(1), Companies Act 1993 (New Zealand): "A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with a person who has acquired property, rights, or interests from the company that - (a) This Act or the constitution of the company has not been complied with [...]"; Section 17(2), Companies Act 1993 (New Zealand): "[...] this section does not limit - (a) Section 164 of this Act (which relates to injunctions to restrain conduct by a company that would contravene its constitution); or (b) Section 165 of this Act (which relates to derivative actions by directors and shareholders); or (c) Section 169 of this Act (which relates to actions by shareholders of a company against the directors); or (d) Section 170 of this Act (which relates to actions by shareholders to require the directors of a company to take action under the constitution or this Act).".

full capacity.[117] Where an optional constitution states the company's objects, these are internally binding.[118] The potential for confusion causing prejudice to outsiders where some companies retain limited objects is avoided by coupling the choice with the internal control approach. To similar effect, the English Companies Act 2006, provides that companies may retain a statement of objects, which will form part of the articles.[119] For those companies which so decide, this has the effect of limiting the powers of officers and enabling the shareholders to protest the use of corporate powers for unapproved objects, though the company itself possesses unlimited capacity.[120]

16.3. The Current Irish Proposals

16.3.1. Full Capacity for Private Limited Companies

Of all the possibilities canvassed, the zeitgeist favours abolition. Ireland's 2001 Company Law Review Group report has resulted in a draft Bill, which is likely to be the basis of reform in this jurisdiction.[121] The focus of the Group's approach was on repositioning the private company at the heart of company law.[122] The Report advocates the simplification of legal requirements to facilitate business.[123] The main thrust of the Report in the area of capacity is the abolition of restrictions on capacity for most private companies. This is achieved by eliminating the statement of objects in the memorandum. An important feature of this approach is the creation of a dual

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[117] Section 124, Corporations Act 2001 (Australia).

[118] See Sections 125 and 136, Corporations Act 2001 (Australia); cf Section 162(1)-(8), Corporations Act 1989 (Australia); see L.S. Sealy, Editorial, (1986) 7 Company Lawyer 90, 90.

[119] Section 31(1) & Section 28, Companies Act 2006 (UK).

[120] Section 40(4), Companies Act 2006 (UK).

[121] See http://www.clrg.org/companiesbill/.

[122] Company Law Review Group, First Report (Dublin, 2001), para. 2.3.1.

[123] Ibid, paras. 1.2.5, 1.4.2, 1.4.3; An aim shared by the UK Companies Act 2006 - R. Craig, "The enormous turnip - Discussion on the UK Companies Act 2006 which, like Topsy in the child's fairy tale, is still growing" (2008) 15(4) CLP 86.

regime. While most companies will have full capacity, the ultra vires doctrine will continue to apply to a range of corporations, including public companies and certain private companies which so choose.

The Group advocates the abolition of ultra vires for private companies, which will have full capacity: "the capacity of a natural person".[124] The Group reasons that the vast majority of private companies are small and closely held. Therefore, private companies should not be required to set out their objects, and they should have the legal capacity of a natural person.[125] Where it is proposed to grant many companies full, unlimited capacity, other legal issues will continue to arise. These include agency,[126] illegality and directors' duties.

However, despite the general headline abolition of ultra vires and a statement of objects for private companies, certain forms of company will retain limited capacity. These include public companies[127] and companies limited by guarantee.[128] Such companies will, unlike private companies, continue to have an objects clause, and be subject to the *ultra vires* doctrine. In addition, certain "special purpose" private companies, whether private companies limited by shares or otherwise, which will be permitted to retain objects and be bound by the *ultra vires* doctrine.[129]

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[124] Company Law Review Group, First Report (Dublin, 2001), para. 10.9.2.

[125] Ibid., para. 10.9.2.

[126] S. Griffin, "Directors' Authority: The Companies Act 1989" (1991) 12(5) Company Lawyer 98; J. Poole, "Abolition of the Ultra Vires Doctrine and Agency Problems" (1991) 12(3) Company Lawyer 43; S.N. Frommel, "Reform of the Ultra Vires Rule: A Personal View" (1987) 8(1) Company Lawyer 11; F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 303.

[127] Company Law Review Group, First Report (Dublin, 2001), para. 10.9.8.

[128] Ibid., para. 10.9.9.

[129] Ibid., para. 10.9.10.

The general aim of current Company law reform in Ireland to reorient the law as better-suited to the small private company is commendable.[130] However, while there is an attraction in reducing the regulation imposed on small companies, it should be borne in mind that restriction and disclosure have traditionally been the price exacted for limited liability.[131] The grant of full capacity represents a significant shift in legislative policy.

16.3.2. Categories of Company with Different Capacity

If the Company Law Review Group's report may be summarised as the abolition of objects and the choice of unlimited capacity, this is not the full picture. An important element of the proposals is that they are not universal. This fragmentation of the law governing corporate capacity may be problematic.

The proposed distinction between public and private companies in relation to capacity merits scrutiny. The report presents the coincidence of ownership and control in many small companies as a reason for such companies, "accordingly", to have full capacity.[132] The implicit assumption is perhaps that, where shareholders are also the decision-makers and therefore, in practice, in a position to freely decide what business the company should engage in, they do not need protection from the

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[130] See S. Conneely, "The Company Law Review Group Report: What Will We Do With the Small Firm?" (1997) 15(11) ILT 210: "Certainly there is an intuitive case for a new legal form in light of the length and complexity of company legislation with its primary focus on the needs and duties of the public, quoted company", ibid, 210; Report of the Task Force on Small Businesses, Government of Ireland, March 1994, Chapter 5; I. Lynch, "Reform in Haste, Repent at Leisure" (1994) 12(8) ILT 189, 190.

[131] See S. Griffin, "Limited Liability: A Necessary Revolution" (2004) 25(4) Comp. Law. 99; S. Conneely, "The Company Law Review Group Report: What Will We Do With the Small Firm?" (1997) 15(11) ILT 210, 210-211: "A law which offers everything and demands little external regulation in return, is destined to be popular".

[132] Company Law Review Group, First Report (Dublin, 2001), para. 10.9.2: "In many instances the directors and shareholders are likely to be the same people or closely connected. *Accordingly* [...] private limited companies should not be required to set out any objects or powers; such companies should be empowered with the capacity of a natural person".

risk of "management" directing the company's resources towards speculative ventures which the owners had not envisaged.

Later, the recommendations deal with "special purpose companies", which are to be allowed to opt out of the full capacity rule.[133] By allowing this opt out for "designated activity companies", the Review Group avoids the risk that, by modelling the law on the factual scenario present in the majority of cases, it could create bad law when applied to particular companies. Paragraph 10.9.10 appears to envisage restrictively, by identifying a limited number of particular instances which arise in commercial practice,[134] the circumstances in which private companies may choose to retain objects. Perhaps this is realistic, and by providing a mechanism for any private company to decide, within a year, to become a "d.a.c.",[135] it avoids being overly restrictive. The UK Companies Act points to another justification for restricted capacity in the case of charitable companies.[136] However, while the availability of exceptions is laudable for handing control to the companies themselves, it does little for overall clarity in the law of corporate capacity.

Public companies will also continue to be subject to the doctrine of ultra vires. One rationale for this is that public companies must state their objects under EU law.[137] The retention of objects does not necessarily impose a limited capacity regime, as the recommendations of the Prentice Report and modern English law demonstrate.[138] However, the Company Law Review Group Report bases the

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[133] Ibid, para. 10.9.10.

[134] Ibid, para. 10.9.10: "a special purpose such as a joint venture or a financing company used in a single specific financing transaction".

[135] "Designated Activity Company".

[136] Section 42, Companies Act 2006 (UK).

[137] Article 2(b), Second Company Law Directive (77/91/EEC): "The statutes or the instrument of incorporation of the company shall always give at least the following information: [...] (b) the objects of the company"; see J. Birds, "The Demise of Ultra Vires" (1986) 7(5) Company Law 203, 203; "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986): an annual statement of activities deemed part of the memorandum would meet this requirement.

[138] "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986).

retention of limited capacity for public companies on both the requirement to state objects, and the reluctant concession that,

> "There may, particularly in the case of companies which have a listing on an exchange, be some rationale for retaining objects so that investors can feel some comfort when acquiring shares in such a company."[139]

Neither of these reasons is conclusive. Certainly, investors may wish to know the nature of the business in which they propose to invest, but it does not follow that they wish the company to be utterly incapable of acting outside those areas, even with their approval. The statement of objects could be viewed as the basis of an internal restriction on executive power rather than necessitating restricted capacity.[140]

The argument for the retention of limited capacity by public companies implicitly assumes that there is some merit to the ultra vires doctrine. This assumption is contradicted by the weight of criticism since the Cohen Report. It is therefore odd that the Report would simultaneously accept that limited capacity should be dismissed and that it should be preserved, and in both cases without explanation.

Certainly, the archetypal public company fits the doctrine's logic of protection. Firstly, the separation of ownership and management means that shareholders do not have immediate control over the actions of the board, which leaves them open to the risk of the misapplication of assets towards unapproved ventures. Secondly, there is the manner in which public companies compete on the stock market for investment. If any public company can engage in any type of business, how are potential investors to choose between them? The record of management and prior activities is not binding. For this reason, such companies may find it desirable, in order to attract investors, to declare which activities they will and will not pursue. Public companies may wish to attract "ethical investors" by affirming that they will not engage in business that is harmful to the environment or related to the arms

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[139] Company Law Review Group, First Report (Dublin, 2001), para. 10.9.10.

[140] "Prentice Report", "Reform of the Ultra Vires Rule" (DTI, 1986), p. 46.

trade, for example. For the company to achieve this, it must have specified objects. But this is not enough: these commitments should be binding, from the point of view of the shareholder. Certainly, shareholders in public companies (unlike most private companies) have the facility to sell their shares in a company which conducts business of which they do not approve, but this is not sufficient power to protect themselves, as the share value may be adversely affected by the company's actions. What form of restriction on the public company's capacity this argument supports is debatable: it could be either an indoor management rule or the full rigours of ultra vires.

The need to make it simple for private companies to do business may also underlie the distinction advocated between public and private companies. In general, public companies may be expected to be capable of fulfilling greater compliance requirements, though the boundary between those companies which can and cannot be expected to bear regulatory burdens does not fall exactly along the public/private divide. However, importantly, the distinction overlooks the fact that those dealing with public companies, who will therefore continue to be required to consider questions of capacity, may themselves be small companies of the type which the scheme of legislation aims to facilitate. Unlike Australia and New Zealand, where incapacity has no external effects, the invalidity may prejudice an outsider if he falls outside the scope of Section 8.[141] Thus, the outside creditor may find himself in an even more confusing position when he is expected to read the objects clause of public companies to ensure the validity of his contracts with them, on top of all the other complexity of capacity law.

While the distinction between public and private companies is comprehensible, it has the further disadvantage of creating an artificial distinction which is somewhat arbitrary at the level of principle. A fundamental attribute of two varieties of the same corporate form, the registered limited liability company, will become different. This leaves little logic in the greater picture: chartered companies and private limited companies would have full capacity; statutory corporations and

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[141] Section 8(1), Companies Act 1963.

public limited companies would have limited capacity. There is no clear line of principle which explains these two categories.

Furthermore, insofar as they provide that ultra vires will continue to apply – without either reform or clarification – to many companies, the current proposals are not satisfactory. They fail to address the need for improvements in the law in all those cases where limited capacity will persist.

16.3.2.1. Conclusion

Having outlined the various approaches to legislative reform which can be observed throughout the common law world, and, in particular, the current Irish recommendations, the final stage of this inquiry is to assess the best approach for the future of the ultra vires doctrine. This discussion must ultimately confront the central policy choice between limited and unlimited corporate capacity.

17. THE FUTURE OF CORPORATE CAPACITY

17.1. WHICH REFORM FOR THE ULTRA VIRES DOCTRINE?

There are four principal patterns of reform available. The first is the current statutory protection of the outsider from the effects of incapacity. The second option is the retention of the ultra vires doctrine coupled with some legislative clarification or modification of the rules. This could enshrine a liberal interpretation of the ultra vires doctrine, in keeping with modern analysis. The other two possibilities are those which are generally advanced as reform of the ultra vires doctrine. The first of these is the devolution of the capacity principle into an internal rule binding management to the pursuit of objects. The final alternative is abolition, granting full, unlimited capacity to companies. This may involve the sweeping aside of objects clauses. In addition, a secondary choice must be made as to whether the same rules should apply across the board, or whether different regimes should be imposed, or allowed. The key underlying choices are whether a company should enumerate objects and whether its capacity should be limited.

There is a real choice to be made, which can only be resolved at a policy level. The traditional arguments against the ultra vires doctrine do not prove convincingly that it must be abolished. The Company Law Review Group proposes abolition, but in doing so, concentrates little on explaining or justifying the need for this reform. Limited capacity is not such a blight on company law that it can be assumed without argument that the most radical reform is the best one.

17.1.1. The Future of the Ultra Vires Doctrine beyond the Private Limited Company

In this discussion, it is essential to remember that, even if the recommendations of the Company Law Review Group are adopted, they do not extend full capacity to all corporations. The ultra vires doctrine does have a future. The continued vitality of the ultra vires doctrine after previous reforms in the United Kingdom is evidenced

by the swaps cases.[1] Under current proposals, public companies, designated activity companies, statutory corporations and other forms of body will be subject to the existing law. The various approaches must therefore be addressed, both in order to judge whether the current proposals are the best possible solution, and because the law on limited capacity ought to be improved and made certain for all those cases where it will continue to apply. Any problems inherent in the ultra vires doctrine must still be addressed even if private companies escape from its ambit. Even if the Review Group's approach is on the right path, it is not a sufficient solution.

Section 8(1) of the Companies Act 1963, as applied in *Northern Bank*, will continue to govern the position of the outsider who deals with a public company in excess of its capacity, but does not apply to other corporations with limited capacity. Davies suggests that outsiders may be reluctant to contract with public bodies due to the risk of incapacity,[2] and therefore calls for reform to ensure the capacity of governmental authorities and remedies where their contracts are ultra vires.[3] In fact, the statutory protection is no longer the only route to recovery, though it may be the most obvious one.[4] This does not negate the need for certainty in the substantive law.

Whether or not the Review Group's recommendations become law, the need remains for the ultra vires doctrine to be clarified and possibly reformed. Unlimited capacity is one possibility, but, there are two major alternatives, as well as the option of minor legislative amendment and clarification.

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[1] Eg Hazell v. Hammersmith and Fulham London Borough Council [1992] 2 AC 1; Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669; Guinness Mahon & Co. Ltd. v. Kensington and Chelsea Royal London Borough Council [1999] QB 215; Kleinwort Benson Ltd v. Lincoln City Council [1999] 2 AC 349.

[2] ACL. Davies, "Ultra Vires Problems in Government Contracts" (2006) 122 LQR 98, 114-115.

[3] Ibid, 122-123.

[4] See above at 15.2.1.2: "The unjust effects issue".

17.1.2. Retaining the Ultra Vires Doctrine

The first reform option is to tidy up the ultra vires doctrine without significantly altering it. Companies would continue to possess limited capacity, circumscribed by their objects clauses. While legislation is necessary to bring certainty to the law and commercial dealings, the reduced scope for the doctrine in its post-*Rolled Steel* incarnation argues against the need for more profound reform. Much of the complexity for which the doctrine has been blamed is no longer necessary. Even without abolition, there is little risk of the ultra vires doctrine being an agent of havoc in future contractual relations. Deserving parties can be assured of a remedy whenever a performed contract is found to be void.

Limited capacity does not fetter commercial activity. Each company can now carve out its desired capacity, and add new powers to its objects clause where necessary.[5] Under the modern law, companies should no longer be at risk of certain of their express objects being disregarded by the courts.[6] Equally, companies can choose to limit their capacity by expressly restricting their powers or objects.

The gap between law and practice can be remedied by legislation. If companies are confident that the courts will give effect to the objects they choose for themselves, it will be possible to return to a system in which each company's memorandum of association gives the reader an indication of its main areas of business, while not unduly restricting its capacity to exercise other powers. A clear statement of objects may be of some use to shareholders in particular. Furthermore, the legislature can improve the brevity and clarity of objects clauses by enunciating powers which all companies will be deemed to possess[7] and insisting that the courts do not interpret objects clauses restrictively. If it so desired, the Oireachtas could also opt to confirm the power of companies to act altruistically.

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[5] See above at Chapter 5.

[6] See above at 7.2: "Rolled Steel: the Nail in the Coffin for Corporate Benefit".

[7] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17.

This approach has the merit of building on the lessons learned from a century and a half of experience. Ahern wisely recommends caution and an eye to the practical consequences of any proposed reform.[8] Ultra vires authorities demonstrate the potential for divergence between a rule's aspirations and effect.

Essentially, there is no compelling reason for this modern form of limited capacity to be radically altered. As a policy choice, it would constitute a strong affirmation that companies, as a distinct form of legal person, should not be deemed equivalent to natural persons. It reflects a legitimate decision that companies are limited to the activities for which they are established, yet released from the old danger of creating injustice and insecurity in commercial relationships. There is no reason why companies should not be tied to a clear statement of their purposes.

17.1.2.1. The Lazarus solution

In theory, one might go even further towards reviving the ultra vires doctrine, through a variation on this theme. This would not involve a return to the pre-*Rolled Steel* confusion. There would be no justification for reinstating the confusion with directors' duties, the debates over objects and powers, and the corporate benefit tests which characterised the doctrine in the past. The clarity which emerged from the *Rolled Steel* decision must be maintained and reinforced.

Instead, the ultra vires doctrine might hypothetically be resuscitated through a rejection of the Section 8 outsider validity exception.[9] Perhaps counter-intuitively, the relatively recent statutory protection of the outsider is an unsatisfactory element of the current law. Its repeal, if possible, would restore the theoretical purity of the capacity principle. It would not be harmful given the ample supply of non-contractual remedies available today. These protections are now redundant.

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[8] D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27, 29.

[9] Section 8(1), Companies Act 1963 (Ireland).

Section 8(1) is unsatisfactory because it creates limited exceptions to the voidness of ultra vires acts. It fails to protect the outsider in many circumstances[10] and ignores the company, which might be prejudiced by its agents purporting to act ultra vires. It imposes a theoretically unjustifiable validity on acts for which the actor has no capacity. This narrow technical cure to the problems historically caused by the voidness of part-performed agreements, competes with and distracts from the general and coherent remedies now provided. These alternative remedies are preferable because they do not distort the fundamental finding that the contract is void for want of capacity. The statutory protections for outsiders could therefore safely be removed. It is no longer necessary to maintain the fiction that an act to which the actor lacked the capacity to consent is nonetheless valid or binding.

Unfortunately, however, this argument can only be theoretical. Despite its attraction in principle, it is not a realistic option for the future. The existing statutory protections of the outsider give effect to the First Companies Directive and cannot be repealed. Article 9 of the Directive requires that acts done beyond the capacity of the company still bind it.[11] Therefore, despite its flaws, for as long as the capacity of companies remains limited, we will have to live with Section 8. The consolation is that the outsider who is excluded from its terms will in future benefit from other common law and equitable remedies.

17.1.3. The Real Question: Limited or Unlimited Capacity?

If the retention of limited capacity is a reasonable and satisfactory approach for the future, it is the underdog in competition with the proposal to grant companies unlimited capacity.[12] Whether companies ought to have limited or unlimited capacity is fundamentally a policy choice. Limited capacity is not a necessary

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[10] Northern Bank Finance Corporation v. Quinn and Achates Investment Company [1979] ILRM 221; In Re Frederick Inns Ltd. [1994] 1 ILRM 387.

[11] See V. Edwards, "Ultra Vires and Directors' Authority – An EC Perspective" (1995) 16(7) Company Lawyer 202.

[12] Company Law Review Group, First Report (Dublin, 2001).

attribute of the corporate person.[13] This is evident from the example of the chartered corporation and the fact that continental law never introduced a doctrine like ultra vires.[14] It was not inevitable that the registered company be deemed to have limited capacity.[15] Modern thinking has abandoned the view that the law should impose as many restrictions as possible on companies. Both the concession theory of corporate personality and the general mistrust of the legal person have declined since *Ashbury*.[16] The operation of the ultra vires doctrine has shown that it limits companies' flexibility in the interests of a doubtful protection for shareholders and creditors.

However, if the case for limited capacity is weak, there is no compelling argument that companies must possess the same capacity as the natural person.[17] Companies are artificial beings, whose existence and nature give rise to significant theoretical difficulties. They possess privileges such as limited liability, which the natural person does not. There is therefore no reason why they should not be subject to greater restrictions than natural persons. The declaration that a contract is void for incapacity may cause inconvenience, but that inconvenience no longer constitutes injustice, and may be justifiable as a matter of policy.

Detailed consideration of two specific issues may cast light on this choice. These questions relate to objects clauses and corporate gifts. A response to these issues may point towards an answer to the larger question, of whether it is appropriate to restrict the capacity of registered companies.

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[13] J. Dewey, "The Historic Background of Corporate Legal Personality" (1926) 35 Yale L.J. 655, 655: "put roughly, "person" signifies what law makes it signify".

[14] W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 66; G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 117.

[15] See above at Chapter 3.

[16] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[17] R. Grantham, "Illegal Transactions and the Powers of Company Directors" (1999) 115 LQR 296, 296: "the more fundamental truth [is] that companies and natural persons are inherently different. Despite the common law's tendency to endow the company with the full range of human characteristics, the law has not yet succeeded in breathing life into the persona ficta."

17.1.3.1. Are objects clauses useful?

If the existence of the objects clause is an argument for limiting the capacity of the corporation,[18] then the keen reformer may brush this argument aside by abolishing the clause itself.[19] The objects clause originally justified the ultra vires doctrine, but can the retention of objects now be justified? It is true that objects clauses have long ceased to provide clear and useful information about companies' areas of activity,[20] but does it follow that the concept is necessarily useless?[21] The potential future utility of objects statements cannot be dismissed on the basis of the complexity and confusion which previously clouded them. Instead, one should consider whether a clear statement of the purposes for which each company is formed is useful in commercial practice.[22]

What is envisaged is a return to a simple, business-like statement of the activities in which a company proposes to engage.[23] To enable a fresh start, this statement of activities might no longer be named the "objects clause". A clear restatement of the law along expansive *Rolled Steel* lines would bring the wondrous benefit of simplicity. It will "make an honest man of the draftsman and allow him to say what he means".[24] The confidence of draftsmen is indispensable for objects to be simplified. We have seen that the general commercial company object has in

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[18] Ashbury Railway Carriage and Iron Company v. Riche (1875) LR 7 HL 653.

[19] Company Law Review Group, First Report (Dublin, 2001), para. 10.9.2.

[20] H.R. Gray "Cotman v. Brougham and the Ultra Vires Rule" (1960) 23 MLR 561, 563.

[21] Cf F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 311.

[22] Roper v. Ward [1981] ILRM 408, 412: a company's constitutional documents "are commercial documents and should be construed to give them reasonable business efficacy."

[23] W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 75-76: "the simple clause at first intended without being overloaded by all sorts of powers which may be thought of by a lawyer with the fertile imagination."

[24] L.S. Sealy, Editorial, (1986) 7 Company Lawyer 90, 90.

practice been adopted in the UK, not as a substitute for long, complex iterations of objects, but as an addition.[25]

In principle, the objects clause serves a useful function, so that "the reader can identify the field of industry within which the corporate activities are to be confined."[26] The publicity of constitutional documents is now dismissed as a fiction in the context of everyday trading relationships, as prospective creditors are unlikely to consult a partner's memorandum. Yet, if the scope of a company's aims, be they focused or expansive, is readily discernable from its objects, this helps all parties to ascertain the "identity" of the company, which is closely tied to its activities.

The objects clause retains particular utility for shareholders and prospective investors.[27] Procaccia suggests that objects can be useful both to promoters who wish to create a company with very limited objects and to investors for whom participation in a particular business area is decisive.[28] Shareholders, he urges, "should be afforded the opportunity of knowing the general business of the company".[29] The proposed retention of objects for public companies acknowledges this benefit.[30] The contemporary phenomenon of shareholder activists[31] seeking

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[25] J. Birds, A.J. Boyle, E. Ferran, C. Villiers, "Boyle & Birds' Company Law" 3rd ed. (Jordan, London, 1995), p. 87; Ferran recommends this approach - E. Ferran, "The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority: Part 2" (1992) 13(9) Company Lawyer 177, 182.

[26] Cotman v. Brougham [1918] AC 515, 522 (per Lord Wrenbury); Ibid., 521 (per Lord Parker): "A person who deals with a company is entitled to assume that a company can do everything which it is expressly authorised to do by its memorandum of association".

[27] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), pp. 197-198.

[28] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 116: he gives as an example of when promoters might prefer narrowly focused objects a recent case where a company was set up to act as agent for one particular manufacturer.

[29] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 117.

[30] Company Law Review Group, First Report (Dublin, 2001), para. 10.9.10.

ethically-acceptable vehicles for their investment,[32] judged by a wide range of subjective criteria, also argues for the retention of defined areas of business. Objects may also be useful in small private concerns. One function of the articulation of objects is that it focuses minds and ensures that all the members are *ad idem* as to the purpose of the company. Furthermore, there may be some cases in which the particular business to be engaged in is a decisive concern for investors. In *McGilligan v. O'Grady*,[33] it was argued that investment was made specifically because the company was not involved in the manufacturing sector.

Abolishing objects may be convenient for promoters, but it means that shareholders are no longer required to address their minds to the purposes of the company, and less information is available to those dealing with companies. They serve a purpose, even if the benefit to creditors was overstated in the past. The filing of a statement of objects is not an unduly onerous burden for those registering a company. Is the small burden of drafting objects really disproportionate to the benefit in "ensuring that certain matters are given some thought before the company is formed"?[34] There is a strong case for retaining the objects clause, not as it is, but in a new, stripped-down form.[35] The present style of clause can safely be laid to rest if the Oireachtas definitively confirms that ultra vires doctrine is no longer the danger it was in the past. If the objects clause is abandoned, it would be useful at least to follow the

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[31] See A.J. Sulkowski & K. Greenfield, "A Bridle, a Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behaviour" (2005) 79 St. John's L.R. 929, 938; K. Greenfield, "Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality" (2001) 87 Virginia Law Review 1279.

[32] B. Clarke, "Advancing Corporate and Social Responsibility - the Softly Softly Approach" (2002) 9(10) CLP 223, 223.

[33] McGilligan v. O'Grady [1999] 1 IR 346; [1999] 1 ILRM 303.

[34] S. Conneely, "The Company Law Review Group Report: What Will We Do With the Small Firm?" (1997) 11(15) ILT 210, 212-213.

[35] Malaysian companies have been instructed to list no more than three objects - Company Law Review Group, First Report (Dublin, 2001), para. 10.3.13.

recommendation of the Prentice Report, so that companies file an annual statement of activities along with their annual report for informational purposes.[36]

In any case, given the continued vitality of the ultra vires doctrine for public companies and other corporations, it is highly desirable for the legislature to introduce measures to enhance the simplicity and effectiveness of objects clauses where they continue to exist.

17.1.3.2. Should gratuitous dispositions be permitted?

The thorny question of companies making gifts provides a useful angle from which to approach the wider question of limited or unlimited capacity. In the past, this question pertained specifically to the now-redundant debate about corporate benefit.[37] Now, it may suggest an answer to the wider central question of whether companies should possess unlimited capacity. This is, in a sense, a microcosm of the whole issue. Articulating a response to the altruism question involves adopting a position as to the purpose of the commercial corporation and the policies to which the law should give effect through its choices on capacity. It involves stepping back from the doctrinal discussion of the extent to which the authorities might uphold corporate gifts and addressing the issue at a broader theoretical level.[38] There may be no real public interest in whether a company pursues new commercial activities, but there are real issues of public concern relating to the pursuit of non-commercial objectives. Should it be possible for a company to make gifts of its assets, subject to the existing protective framework of laws preventing dishonesty?[39]

Company law's traditional approach sets profit maximisation as the general rule, to be "hedged about with restrictions"[40] only where the legislature creates specific

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[36] DTI, "Reform of the Ultra Vires Rule", Part II, Chapter 5, paras 11, 19, 26.

[37] See above at 6.5: "Gratuitous Dispositions and the Corporate Benefit Test".

[38] See B. Cheffins, "Using Theory to Study Law: A Company Law Perspective" (1999) 58 CLJ 197.

[39] See above at 15.3: "Alternative Modes of Protecting Shareholders and Creditors".

[40] E.M. Dodd, "For Whom are Corporate Managers Trustees?" (1932) 45 Harv. L. Rev. 1145, 1145-1147, 1152.

regulations to protect other interests, such as employees[41] or environmental concerns.[42] The ultra vires doctrine fits this mould.[43] Under the traditional corporate benefit approach, it precluded the sacrifice of profit, or the diminution of the company's assets, in favour of the pursuit of external interests. This lesson is clear from *Parke v. Daily News Ltd.*[44] The incapacity authorities[45] condemn "'enlightened' acts of altruism".[46] Murphy J. confidently asserts in *Re Kill Inn Motel Ltd*,[47] that "a commercial body cannot make gifts."[48] Should the law give effect to this proposition?

Evaluating the appropriateness or desirability of non-beneficial transactions by trading companies begins with a view as to the place and role of corporations in

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[41] See Section 52(1), Companies Act, 1990 (Ireland); see also: Section 172(1)(b), Companies Act 2006 (UK); Section 719, Companies Act, 1985 (UK) re provision for employees in connection with transfer of business.

[42] Section 172(1)(d), Companies Act 2006 (UK): directors must take account of the impact of the company's operations on the community and the environment; see also "Modern Company Law for a Competitive Economy" (Department of Trade and Industry, London, 1998), p. 10, cited by B. Cheffins, "Using Theory to Study Law: A Company Law Perspective" (1999) 58 CLJ 197, 215.

[43] As does judicial hostility to resistance to hostile takeovers; see L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 170.

[44] Parke v. The Daily News Ltd [1962] 2 AER 929, [1962] WLR 566; see also Hutton v. West Cork Railway Company (1883) 23 CA, 654; these decisions prompted the statutory provisions - D.H.J. Cohen, "Gratuitous Payments to Employees and the Ultra Vires Doctrine" (1984) NLJ 716, 716.

[45] Eg Hampson v. Price's Patent Candle Company (1846) LJCh. 437; Hutton v. West Cork Railway Company (1883) 23 CA, 654; In Re Lee, Behrens & Co Ltd [1932] 2 Ch. 46.

[46] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 170.

[47] In Re Kill Inn Motel Ltd (High Court, Unreported, 16 September 1987, Murphy J.); (1978 - 1987) 3 ITR 706.

[48] In Re Kill Inn Motel Ltd (High Court, Unreported, 16 September 1987, Murphy J.), at p. 004319; Pickering argues that the law could logically go so far as to make gratuitous dispositions by commercial companies illegal - M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 488.

society. Company law's orthodox assumption is that the only permissible aim of a corporation, unless it is a charitable enterprise, is the maximisation of profit in the interest of shareholders.[49] However, this view is under challenge. There are increasing calls for corporate social responsibility.[50] Public opinion demands that companies take into account other interests, such as the environment, in addition to, and even at the expense of, the maximisation of profit.[51] Dean argues that company law cannot ignore questions of corporate objectives.[52] Since the 1930s,[53] advocates of stakeholder theory stress the need for companies to take account of the interests of those directly involved with the company, such as employees, as well as the wider community in which it operates.[54] Dodd refers to growing sentiment among

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[49] According to Berle, profit-maximisation by corporations is also fundamental to the capitalist economy - A.A. Berle, "For Whom Corporate Managers are Trustees: a Note" (1932) 45 Harv. L. Rev. 1365, 1367-1368; see also: E.M. Dodd, "For Whom are Corporate Managers Trustees?" (1932) 45 Harv. L. Rev. 1145; K. Greenfield, "From Rights to Regulation in Corporate Law",in F.M. Patfield (ed.), "Perspectives on Company Law: 2" (Kluwer, 1997), p. 8.

[50] See B. Clarke, "Advancing Corporate and Social Responsibility - the Softly Softly Approach" (2002) 9(10) CLP 223; B. Clarke, "Corporate Responsibility in Light of Separation of Ownership and Control" (1997) 19 DULJ 50; R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 580; K. Greenfield, "From Rights to Regulation in Corporate Law", in F.M. Patfield (ed.), "Perspectives on Company Law: 2" (Kluwer, 1997), Chapter 1, pp. 1-25; cf M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 510.

[51] See L.S. Sealy, "Perception and Policy in Company Law Reform", in D. Feldman & F. Meisel (eds), "Corporate and Commercial Law: Modern Developments" (LLP, London, 1996), p. 27: "So far as the law is concerned, or more particularly company law, a lot of this is probably wishful thinking."

[52] J. Dean, "Stakeholding and Company Law" (2001) 22(3) Company Lawyer 66, 66; see also K. McGuinness, B. Rees & S. Copp, "Recent Perspectives on Company Law" (1998) Company Lawyer 19(10) 290, 291-293.

[53] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 568; see A.A. Berle, "For Whom Corporate Managers are Trustees: a Note" (1932) 45 Harv. L. Rev. 1365.

[54] B. Cheffins, "Using Theory to Study Law: A Company Law Perspective" (1999) 58 CLJ 197, 211-212; L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and

businessmen that corporate management should voluntarily seek to play a beneficial role in society.[55] In this context, it is not evident that the law should officiously prohibit commercial bodies from acting altruistically.[56] Pennington queries whether, as a matter of policy, it is right that the law should forbid companies from taking account of wider interests other than the maximisation of profit.[57] He proposes that modern views would favour releasing company directors "from this myopia which the law forces on them."[58] It would surely benefit society for companies which so desired to be permitted to give money to charity, or to take into account broader interests than simply shareholder profit.

An alternative policy approach to the traditional view recognises as a general rule that corporate actions which benefit the wider community are not only permissible but may be desirable.[59] Large companies may sometimes be viewed as "quasi-public entities"[60] and so expected to advance more than their narrow commercial interests. Berle describes the managers and shareholders of large modern

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Procedural" (1987) 13 Monash U. L. Rev. 164, 169-170; J. Dean, "Stakeholding and Company Law" (2001) 22(3) Company Lawyer 66.

[55] E.M. Dodd, "For Whom are Corporate Managers Trustees?" (1932) 45 Harv. L. Rev. 1145, 1145-1147, 1153-1154: "our corporate managers who control business should voluntarily and without waiting for legal compulsion manage it in such a way as to fulfill those responsibilities."

[56] J. Dean, "The Future of U.K. Company Law" (2001) 22(4) Company Lawyer 104, 106: "Company Law can send out important signals about managerial responsibilities"; see B. Clarke, "Advancing Corporate and Social Responsibility - the Softly Softly Approach" (2002) 9(10) CLP 223, 223 for a definition of coporate altruism.

[57] R.R. Pennington, "Terminal Compensation for Employees of Companies in Liquidations" (1962) 25 MLR 715, 719.

[58] Ibid, at 719; P. Graham, "Removing the Scrooge Principle from Company Law" (1998) 19(2) Company Lawyer 54, 54: "the government should therefore ensure that the directors of companies which act as good citizens in this respect are not open to the accusation that they are acting in breach of their duties under company law."

[59] O.O. Amao, "Reconstructing the Role of the Corporation: Multinational Corporations as Public Actors in Nigeria" (2007) 14(1) DULJ 312.

[60] B. Cheffins, "Using Theory to Study Law: A Company Law Perspective" (1999) 58 CLJ 197, 212.

corporations as more like "princes and ministers than [...] promoters or merchants".[61] There may be societal expectations of corporate altruism.[62] Beyond acting economically and legally, companies may desire also to act ethically and philanthropically.[63]

It may be neither practical nor desirable for the mechanisms of company law to impose the respect of wider interests than those of the shareholders as a general rule.[64] It would be harmful for shareholders, employees and customers for companies to neglect business efficiency and profitability; and public bodies may be better suited to pursuing public policy aims.[65] However, given modern philosophies, the law should at least remove any unnecessary obstacles to socially responsible actions. The ultra vires doctrine has been an active impediment to socially responsible activity. Even if a company's shareholders are themselves willing to make their financial profit subservient to other principles, the law will not permit them.[66] By long curtailing the right of companies to make gifts even under express powers, the law has significantly reduced companies' freedom to determine their own aims.

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[61] A.A. Berle, "For Whom Corporate Managers are Trustees: a Note" (1932) 45 Harv. L. Rev. 1365, 1366-1367.

[62] P. Graham, "Removing the Scrooge Principle from Company Law" (1998) 19(2) Company Lawyer 54, 54.

[63] J. Dean, "Stakeholding and Company Law" (2001) 22(3) Company Lawyer 66, 67.

[64] L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 176; A.A. Berle, "For whom Corporate Managers are Trustees: A Note" (1932) 44 Harv. L.R. 1365, 1367.

[65] J. Dean, "Stakeholding and Company Law" (2001) 22(3) Company Lawyer 66, 72; B. Clarke, "Corporate Responsibility in Light of Separation of Ownership and Control" (1997) 19 DULJ 50, 68, 73.; K. Greenfield, "From Rights to Regulation in Corporate Law",in F.M. Patfield (ed.), "Perspectives on Company Law: 2" (Kluwer, 1997), p. 24.

[66] J. Dean, "Stakeholding and Company Law" (2001) 22(3) Company Lawyer 66, 71: "The existing law limits any accountability to stakeholders within a framework of, and to the overall purpose of, profit maximisation for shareholders."

Grantham asserts that hostility to stakeholder thinking is due not to the denial that there are wider interests which a company might take into account, or to adherence to the view that ownership entitles shareholders to the fullest benefit of the company's assets and efforts, but instead to concerns that it allows too great a latitude to company directors.[67] However, this concern does not apply to modifying the law on corporate capacity in the interests of social responsibility. It suggests that actions which serve interests other than the profitability of the company should be within the capacity of the company itself, but subject to strict control, to ensure that the company's members are indeed willing to see the assets in which they have a beneficial interest used for a particular purpose. Pickering objects to corporate philanthropy at a philosophical level, disputing that a company, not being a person, can have charitable intent.[68] This is not a convincing argument, because a company manages to do all its other business through its officers and agents, controlled by the shareholders' ultimate authority.[69]

Pickering's point does focus usefully on the issue of decision-making within the company. It seems appropriate to withhold from the directors the power to make gifts out of the company's assets, as it is a potentially detrimental power, and to confer the ultimate power of gift-giving on the members, with the possibility of delegating it through the articles if they wish.[70] In the private company, the management and membership often comprise the same people, and in public companies, there are mechanisms for ensuring that management is answerable to

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[67] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 569; see also A.A. Berle, "For whom Corporate Managers are Trustees: A Note" (1932) 44 Harv. L.R. 1365, cited in L.S. Sealy, "Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural" (1987) 13 Monash U. L. Rev. 164, 175.

[68] M.A. Pickering, "The Company as a Separate Legal Entity" (1968) 31 MLR 481, 488.

[69] See H.L. Bolton (Engineering) v. T.J. Graham & Sons Ltd [1957] 1 QB 159, 173 (per Denning LJ).

[70] B. Clarke, "Advancing Corporate and Social Responsibility - the Softly Softly Approach" (2002) 9(10) CLP 223, 223: "the needs of the non-shareholder stakeholders can be addressed by the shareholders directly rather than by directors".

members. In both cases, it can be argued that the protection of shareholders does not require the imposition of a blanket prohibition on companies making gifts.

However, if corporations are granted full legal capacity, and accorded the right to pursue interests other than purely commercial ones, this raises a spectre of powerful and wealthy corporations wielding disproportionate influence in society, beyond the economic sphere.[71] Berle writes,

> "[u]nchecked by present legal balances, a social-economic absolutism of corporate administrators, even if benevolent, might be unsafe".[72]

Such concerns may play on the minds of observers. Clarke points to the possible ethical concerns of expecting directors to play such a societal role.[73] If we unchain the corporation, how will we control it? Grantham acknowledges such fears in his own argument that shareholders are no longer central to corporate existence. He asserts that the ownership of companies by individual shareholders traditionally legitimated the "economic and political power of the company" because of the acceptance of the extensive personal property rights of natural persons.[74] If company law is not based on the ownership paradigm, the wealth and power of the corporation becomes "deeply threatening to both the individual and the state."[75] Thus, the idea that companies could have free rein to become societal actors with wider interests than simple profit may revive the old fears that the corporation poses

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[71] This is related to the "political theory" of the corporation - E. Ferran, "Company Law and Corporate Finance" (Oxford, 1999), pp. 12-13.

[72] A.A. Berle, "For Whom Corporate Managers are Trustees: a Note" (1932) 45 Harv. L. Rev. 1365, 1372.

[73] B. Clarke, "Advancing Corporate and Social Responsibility - the Softly Softly Approach" (2002) 9(10) CLP 223, 223: "no system of corporate ethics exists to give directors a basis for competently making distributional decisions for society and it is argued that in any case it would be inappropriate for issues of social policy to be determined by companies."

[74] R. Grantham, "The Doctrinal Basis of the Rights of Company Shareholders" (1998) 57 CLJ 554, 554, 578.

[75] Ibid, at 587-588.

a danger to society. The reluctance of the law, under the concession theory,[76] to countenance the enjoyment of constitutional rights by corporations illustrates this fear.[77] Companies might be actors, but we still hesitate to accord them the full privileges of human personality. While the corporate form is central to our economic and commercial life, and the fears of the nineteenth century now seem outmoded and fanciful, similar concerns may be raised by the prospect of releasing them from the profit-maximisation straightjacket. Perhaps in this context it is hypocritical to demand that companies be permitted act as agents for good in relation to communities, employees and the environment, while simultaneously expecting that they would never use their resources for goals which strayed from the universally laudable. How would the limits to companies' actions be set, if they were free to range beyond commercial goals?

There is widespread concern at companies involving themselves in the political process through donations.[78] Lord Atkinson states that it is "not the business" of companies to promote particular parties or policies, reflecting the sentiment that companies should confine themselves to the commercial sphere and not trespass in the political.[79] The irony is that from the company's perspective, this has been legally acceptable in so far as it benefited the company,[80] whereas in the interests of democracy, it should be desirable only to the extent that it is altruistic and beneficial to democracy.

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[76] A. O'Neill, "The Constitutional Rights of Companies" (Thompson Round Hall, Dublin, 2007), pp. 17, 24; Dunnes Stores Ireland Co v. Ryan [2002] 2 IR 60, 100.

[77] See A. O'Neill, op cit; cf Iarnrod Eireann v. Ireland [1996] 3 IR 321; [1995] 2 ILRM 161.

[78] K. D. Ewing, "Company Political Donations and the Ultra Vires Rule" 47 (1984) MLR 57.

[79] Amalgamated Society of Railway Servants v. Osborne [1910] AC 87, 105.

[80] Though the law on capacity may in some instances have been disregarded: "recent revelations during the McCracken Tribunal of Inquiry into Payments to Politicians indicated some basic lack of familiarity with the fundamental principles underlying the concept of corporate personality" – R. Byrne, Editorial, (1997) 15(11) ILT 209.

While political donations are a legitimate cause for concern, it is better to target the mischief feared directly. Grant companies the capacity, as a matter of company law, to make donations – even where this is not in their own interests. Tackle the dangers this might pose to the political system by regulation of the receipt of political donations.[81] Illegality, which is objective and general, is a better tool from protecting public representatives from undue influence than capacity, which turns on the constitutions of particular companies.[82] Companies are already required to disclose donations over €5,080 in their directors' and annual reports, which disclosure serves the interests of shareholders and creditors, [83] though compliance with this requirement does not imply that such donations are necessarily otherwise lawful.[84] According to Ewing, the problem is that such donations tend to be decided by management without reference to shareholders and employees, which brings the necessary focus back to internal decision-making within companies.[85] The difficulty in *Simmonds v. Heffer*,[86] that the objectives of the political party did not align precisely with those of the donor organisation, can best be overcome by requiring shareholder approval of donations. Cane favours the application of the modern

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[81] Section 23(A), Electoral Act, 1997, as inserted by Section 49, Electoral (Amendment) Act, 2001 caps party donations at €6,348.69 per donor (corporate or individual) per annum; certain parties do not accept corporate donations, eg Fine Gael since 2001; the Green Party has called for a ban on corporate donations - see D. Daly, "Over €250,000 declared in political donations" Irish Times, 19/06/2003, consulted online at:

http://www.ireland.com/newspaper/breaking/2003/0619/breaking48.htm, 14 October, 2007.

[82] See Kemp v. Glasgow Corporation [1920] AC 836, 843, 852.

[83] Section 26, Electoral Act 1997 (Ireland).

[84] K. D. Ewing, "Company Political Donations and the Ultra Vires Rule" 47 (1984) MLR 57, 60.

[85] Ibid, at 59.

[86] Simmonds v. Heffer [1983] BCLC 298; see L. Cane, "Ultra Vires and Political Donations" (1984) NLJ 749.

Rolled Steel[87] approach to political donations, as it empowers shareholders to determine whether the donation serves the interests of the company.[88]

Corporate political donations and other acts done with a broader societal purpose ought to be within the capacity of companies, subject to both shareholder approval and public policy-motivated regulation. If the idea of permitting companies to pursue philanthropic interests were accepted as a valid policy choice, this could be given effect either through unlimited capacity or through rules on limited capacity which permit gifts.

17.1.4. Unlimited Capacity

Unlimited capacity is the simple answer. It is a reasonable policy position to adopt, yet it is not an inescapable conclusion. Since there are benefits to retaining objects for information purposes, their removal may be a disadvantage. Unlimited capacity without objects also has the downside of the possible creation of an internal imbalance of power within companies. The argument that the ultra vires doctrine is dispensable is partly predicated on the proposition that directors' duties can fill the gap; if there are no objects, this argument suffers.[89] Procaccia fears that abolition of ultra vires subordinates shareholders to an "omnipotent board of directors."[90]

The benefit of simplicity is undermined when certain categories of corporation will continue to be subject to the ultra vires doctrine, as under current proposals. The proposed retention of both objects and limited capacity for public companies reflects the view of the Company Law Review Group that this is required by the Second Companies Directive. This suggests that Ireland does not have the freedom to grant full capacity to all corporations. However, the retention of objects does not

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[87] Rolled Steel Products (Holdings) Ltd v. British Steel Corporation [1984] BCLC 466.

[88] L. Cane, "Ultra Vires and Political Donations" (1984) NLJ 749, 750.

[89] G.B. Hutchinson, "Ultra Vires: a Tragedy in Three Parts" (LL.M. thesis, University College Cork, 1989), p. 182.

[90] G. Procaccia, "Bell Houses Ltd v. City Wall Properties Ltd" (1967) 2 Israel Law Review 111, 117.

necessitate limited capacity, as the English example shows. Nonetheless, full capacity for all registered companies is not being proposed in this jurisdiction.

17.1.5. The Pursuit of Objects as an Internal Constraint

If it is unthinkable that future reform might change direction and reiterate the principle of limited capacity, a more realistic and appealing proposition is that a company should be limited to the pursuit of its specified objects as an internal matter. Ussher views this idea as the common thread through the official recommendations of the past seventy years.[91] Objects are retained for information and as a restriction on directors, but in all its external dealings, the company's acts bind it.[92] Unlike the current statutory exemption approach, the company's objects would have no effect on any outsider. The ultra vires concept is transformed from incapacity to limits on any actor within the company.

The objects clause would act as a contract between the company and its members and restrict the activities of directors.[93] For Sealy, objects clauses would be "a declaration of the scope of the constitutional authority conferred on corporate organs".[94] Shareholders would know the purposes for which their investment can be applied. They would have the opportunity to ensure that the directors only act towards specified ends. This approach is allowed for as an alternative to the removal of the objects clause in the English Companies Act, 2006. Objects clauses, if retained, form part of the articles of association.[95] Members may bring proceedings to prevent the directors exceeding their powers[96] but the validity of acts may not be

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[91] P. Ussher, "Company Law – Validation of Ultra Vires Transactions" (1981) DULJ 76, 78: "a company's capacity to be to a greater or lesser extent *internalised*, or, in other words to be made a domestic matter between the members for internal policing by them".

[92] J.H. Thompson, "The Ultra Vires Doctrine and the Jenkins Report" [1963] JBL 143, 149.

[93] Ibid, at 149.

[94] L.S. Sealy, Editorial, (1986) 7 Company Lawyer 90, 90.

[95] Section 31, Companies Act 2006 (UK); see L.S. Sealy, Editorial, (1986) 7 Company Lawyer 90, 90.

[96] Section 40(4) , Companies Act 2006 (UK).

challenged on capacity grounds.[97] Currently, "prudence prevails" and companies examine partners' constitutions before major transactions, but this would be unnecessary if objects had no external effect.[98] This transformation of the ultra vires rule into an internal one has much to recommend it.

The current South African Companies Bill adopts this approach.[99] It provides that corporations have "all of the legal powers and capacity of an individual" unless their memoranda provide otherwise.[100] If a company's memorandum restricts its "purposes, powers or activities", this does not render any act of the company void.[101] The shareholders may by special resolution ratify any breach of such restrictions.[102] They also retain the right to seek an injunction to prevent the company from exceeding such limits and may seek damages from persons responsible for transgressions.[103] This is an attractive model, which shows that the internal restriction approach is still a viable alternative.

In addition to the benefits of preserving a statement of objects, retaining internal restrictions offers shareholders a safeguard against management abuses.[104] This echoes the view of the Jenkins Report. Power is in the hands of shareholders, not management or the courts. It is a recurrent theme that shareholders frequently have

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[97] Section 39(1). Companies Act 2006 (UK).

[98] D. Ahern, "Unlimited Corporate Capacity - Plotting the Slow Demise of Ultra Vires" (2004) 11(2) CLP 27, 29; Anonymous, "News: IOD Urges Removal of Ultra Vires Rule" (1986) 7 Company Lawyer 127, 128.

[99] Companies Bill 2008 (Bill 61 of 2008, as at 29 August 2008) (RSA): the South African Department of Trade and Industry announced on 16 October 2008 that it would table the Bill in Parliament that day.

[100] Section 19(1), Companies Bill 2008 (Bill 61 of 2008, as at 29 August 2008) (RSA)

[101] Section 20(1), Companies Bill 2008 (Bill 61 of 2008, as at 29 August 2008) (RSA)

[102] Section 20(2), Companies Bill 2008 (Bill 61 of 2008, as at 29 August 2008) (RSA)

[103] Section 20(5) and Section 20(6), Companies Bill 2008 (Bill 61 of 2008, as at 29 August 2008) (RSA)

[104] W. Horrwitz, "Company Law Reform and the Ultra Vires Doctrine" (1946) 62 LQR 66, 75.

little power to control and direct directors:[105] retaining objects preserves one element of control.[106] Obliging management to respect the objects identified by the company before registration is consonant with the idea that it is the drafters of the corporate constitution, and not the state, that define the ambit of objects. Limited capacity illogically sees the courts enforcing restrictions which were originally the choice of the company, whereas an internal rule allows the company to oversee its own respect of those limits.

Ferran considers that the retention of ultra vires as an internal control instead of simple abolition leads to complexity and confusion, and hesitance on the part of outsiders to confidently assume that the problems are over.[107] Thus, cautious practice continues to require the examination of prospective partners' memoranda. However, this argument is less persuasive when the alternative is not full capacity across the board, but a patchwork of different capacities.[108] Having explored the issues and considered the various possible avenues for reform, it is possible to arrive at a number of conclusions.

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[105] A.J. Sulkowski & K. Greenfield, "A Bridle, a Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behaviour" (2005) 79 St. John's L.R. 929, 937: "The mechanisms through which shareholders influence actual managerial decisions are few indeed."; B. Clarke, "Corporate Responsibility in Light of Separation of Ownership and Control" (1997) 19 DULJ 50, 50.

[106] S. Davis, "The Ultra Vires Rule" (1986) 136 NLJ 907, 908; S.N. Frommel, "Reform of the Ultra Vires Rule: A Personal View" (1987) 8(1) Company Lawyer 11, 16; F.H.I. Cassim, "The Rise, Fall and Reform of the Ultra Vires Doctrine" (1998) 10 S. Afr. Merc. L.J. 293, 311.

[107] E. Ferran, "The Reform of the Law on Corporate Capacity and Directors' and Officers' Authority: Part 1" (1992) 13(7) Company Lawyer 124, 124.

[108] See above at 16.3: "The Current Irish Proposals".

17.2. THOUGHTS AND RECOMMENDATIONS FOR THE FUTURE OF CORPORATE CAPACITY

17.2.1. There is No Need to Abolish the Ultra Vires Doctrine

The wheel has turned full circle. It was not inevitable that ultra vires should be applied to the registered company;[109] nor is it now essential that it should be eliminated. The move towards abolition is understandable, but not necessary. Certainly, the evolution of the societal and legal context in which the doctrine of ultra vires operates weakened the usefulness of the doctrine. However, more recently, other developments have successfully countered the problems which so worried critics. The voidness of transactions which exceed a company's capacity is not a harmful or unjust principle. The principal arguments for abolition turn on the injustice which was previously done by the doctrine. The outsider now enjoys statutory protection but, far more importantly, the revolutionary growth in the availability of common law and equitable remedies guarantees that those unjust outcomes are an historical relic.

17.2.2. Limited Capacity Might be Retained

Though unlimited capacity is the popular route, the diametrically opposed solution may have much to recommend it: keep the ultra vires doctrine as a rule of capacity for all companies. While the benefits of the rule can be exaggerated,[110] there is no longer any pressing need to remove it.[111] As a policy choice, the retention of limited capacity is perfectly justifiable on the basis that limited liability puts the public at risk and that companies are fundamentally different to natural legal persons. While its introduction in the first place was questionable, today the policy arguments and those related to the nature of the corporation in its favour remain, whereas the arguments against it, based on the unfairness evident in the authorities, are

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[109] See above at Chapter 3: "The Initial Application of the Doctrine of Ultra Vires to the Registered Company".

[110] See above at 15.1.3: "Policy and the Ultra Vires Doctrine".

[111] See above at 15.2.1.2: "The unjust effects issue".

redundant. The doctrine has reached a new level of maturity by rejecting the corporate benefit test.[112] Determining the precise scope of the capacity to be conferred by an objects clause is now once again in the control of the company itself, rather than the product of unpredictable judicial interpretation employing extrinsic benefit tests and overriding the intentions of the company's promoters.

17.2.3. Complete Abolition is Not on the Cards

Complete abolition of restrictions on corporate capacity is one possible vision for the future. It has the benefits of simplicity and efficiency. Other rules of company law would fill the gap and meet the need to protect shareholders and creditors from the wasteful dissipation of corporate assets. However, the proposals of the Company Law Review Group are less straightforward. Whereas private limited companies will no longer specify objects and will possess full capacity, public companies and other forms of corporation will continue to be subject to an unreformed ultra vires doctrine. This decision reflects the Review Group's perceptions that the Second Companies Directive's requirement that public companies state objects implies limited capacity and that objects have some utility in public companies. There is no question of full capacity for all registered companies being introduced.

17.2.4. The Problem with a Multiplicity of Capacity Regimes

Casting a critical eye on the reforms proposed in Ireland, they are not the ideal solution. Carving exception from exception is not the path to clarity. The ultra vires doctrine will continue to apply to some corporate forms but not others. The proposals introduce a somewhat artificial distinction between the private company and the public company, which are essentially the same species of corporation. It is undesirable that such a fundamental attribute of the corporation as its contractual capacity should vary in a manner which cannot be explained by underlying legal principle. Furthermore, the Irish proposals are unique in that they allow private companies to choose to retain objects, which then have full external effect. True, the statutory protections of the outsider apply, but the authorities show the gaps in their

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[112] See above at 7.2: "Rolled Steel: the Nail in the Coffin for Corporate Benefit".

application.[113] In all the other jurisdictions where companies have the option of retaining objects, this choice cannot prejudice outsiders.[114]

17.2.5. The Ultra Vires Doctrine will Not Disappear

The continued vitality of the ultra vires doctrine in the future is not solely a product of the Company Law Review Group's decision to retain limited capacity for certain registered companies. Even if all registered companies were granted full capacity, residual categories of corporation would still retain limited capacity. For them, ultra vires will limp on, unreformed. The proposed regime leaves untouched the confusion which currently surrounds the law on capacity in all those cases where limited capacity will still exist. These rules will remain unclear unless either a future decision, ideally of the Supreme Court, or the Oireachtas steps in to restate the law. Legislative improvements to the ultra vires doctrine are highly desirable for all the circumstances where it remains in vigour.[115]

17.2.6. The Need for Legislative Clarification and Modification

Whether limited capacity is retained for all companies, or for some, statutory intervention is highly desirable to introduce clarity and eliminate doubt. Even if the Review Group's approach is adopted, the law governing those organisations which still possess limited capacity must be restated along the lines of the *Rolled Steel* formulation. The legislator should also issue instructions for a new form of simple objects clause. This includes creating guidelines for interpretation to reassure company promoters and eliminate the need for the technical devices which have developed within objects clauses. The legislature may also choose whether to expressly permit corporate gifts.

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[113] See above at 8.3.1: "Section 8(1) of the Companies Act, 1963".

[114] See above at 16.2.4.2: "The element of choice".

[115] See above at 16.2.2: "Statutory Clarification and Modification".

17.2.7. The Choice concerning Gratuitous Dispositions

The legislature should consider expressly authorising the making of gifts by those companies which retain limited capacity, by enacting a similar provision to that enacted in Singapore.[116] The provision could be framed so as to exclude fraud or gifts to connected persons, or limited when a company faces insolvency. Commercial companies should have the capacity to make charitable donations for purely altruistic purposes, subject to the many rules of company law which protect shareholders and creditors from dishonesty, oppression and the waste of company capital. It would be a policy question whether to restrict this power to charitable and not political donations. This policy choice is urged for all cases where ultra vires will remain in the future: the giving of gifts which do not benefit the company should appropriately be regarded as a question of the fiduciary duty of directors, which may be ratified by members if it reflects their wishes. A prohibition imposed by the courts is not consonant with the wishes of shareholders and there is no justification for substitution of the court's sanction for that of members themselves. This is especially so given the existence of a fiduciary duty to creditors in insolvent companies, which ensures that gifts will not be authorised where they prejudice creditors.

17.2.8. Corporate Benefit Must be Definitively Rejected

The modern analysis propounded in *Rolled Steel* is the only satisfactory basis for the doctrine of ultra vires in the future. It is imperative that any doubt that this is law in Ireland be emphatically dispelled. The traces of the corporate benefit test must be removed. Corporate benefit is properly relevant only to the exercise of directors' duties. The extent of a company's capacity should emerge clearly from the words of its objects clause. It must be clear that the capacity of a company depends solely on what is contained in its objects clause, without imposing external and changing tests to read down that capacity which is conveyed on the face of the text. Neither the memorandum itself nor the legal rules governing its interpretation should be

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[116] T.C. Choong, "From Ultra Vires to Agency: A Comment on the Recent Modifications to the Ultra Vires Doctrine" (1986) 28 Mal. L. R. 17, 19.

allowed to cloud the communication of a company's permitted activities. Objects and the ultra vires doctrine serve some purpose only when the capacity of a company is clearly discernable by laymen from contents of the memorandum of association itself.

17.2.9. The Usefulness of Objects

All companies might usefully retain a statement of objects. Objects clauses permit those dealing with a company to become fully aware of the kind of business it proposes to engage in. These objects should be clear and communicative. The format of objects clauses should be comprehensively revised and simplified to meet this end. Shareholders should be able to ascertain the permissible business activities of companies, both public and private. The burdensome imperative for outsiders to investigate the capacity of their trading partners is mitigated if statements of objects are clear, and if the cost of being mistaken is reduced or eliminated. Objects clauses could form the basis of either limited capacity or internal restrictions.

17.2.10. Objects as a Means of Internal Control

By eliminating the objects clause for the majority of private companies, the current proposals remove from the hands of shareholders a means of restricting and controlling the activities of management. An opportunity to empower shareholders is missed. At a minimum, objects should form the basis of internal discipline exercised by shareholders over the acts of officers. Rather than an ultra vires rule which imposes external judicial control, as in the past, the pursuit of specified objects should be a duty which shareholders can impose on management. If it were no longer a matter of capacity, shareholders could approve directors' conduct which fell outside the objects, should they so desire. This is an attractive medium between the ultra vires doctrine, which results in a void and unratifiable act, and full capacity, which does not permit shareholders to directly control the areas in which the company does business. Furthermore, given the imperative that public companies retain objects, the choices for these companies are either limited capacity or objects as an internal constraint. Public companies will not be able to escape any object-based constraint entirely.

17.2.11. The Statutory Protections of Outsiders are Flawed, but Inescapable

While the current statutory protections of the outsider are not satisfactory in practice or principle, it is not realistic to suppose that they might be removed. However, it is acceptable, if clumsy, to leave these provisions untouched. Even though the artificial statutory validity which the outsider acting in good faith can invoke for ultra vires acts is limited, the existence of comprehensive and principled remedies offered by the common law and equity ensures that ultra vires is no longer a source of injustice.

17.2.12. The Viable Alternatives for Corporate Capacity

The two best alternatives are to retain limited capacity for all registered companies, while clarifying the operation of the ultra vires doctrine by statute, or else to replace the ultra vires doctrine with a new internal obligation to respect stated objects. While the abolition of objects to achieve unlimited capacity has the appeal of simplicity, the Company Law Review Group's approach confirms that it is not appropriate for public companies, and the patchwork effect of the Group's recommendations undermines the simplicity argument for full capacity.

17.2.13. … And a Word about Remedies

An examination of the dramatic changes which have occurred in the fields of unjust enrichment and constructive trusts indicate that these are exceptionally fruitful areas for further study. There is a profound need for more comprehensive analysis of current Irish law in these areas. It would also be welcome were these developments to be more widely known in the legal community. Furthermore, it seems likely that these developments might also have significant ramifications in many other legal areas, which might beneficially be explored.

17.3. Final Conclusion

By looking anew both at the ultra vires doctrine and beyond it, it is impossible not to see the doctrine in a new, and perhaps surprising, light. This is not a rousing defence of the principle limited capacity, but it does question the assumed case

against it. If the recommendations of the Company Law Review Group seem to have some sort of inevitability, it is important to point out that there is no compelling reason to abolish the ultra vires doctrine.

Revisiting the history of the corporation shows that it was far from inevitable in the first place that the ultra vires doctrine be extended to the new registered company in the nineteenth century. The justifications for taking this step in *Ashbury* were not fully persuasive at the time. Now they are even weaker, due to changes in the perception of the corporation, the development of a comprehensive structure of company regulation, and the undermining of the objects clause.

On the other hand, the ultra vires doctrine has overcome those internal weaknesses which gave rise to the movement for reform in the first place. The principal arguments against limited capacity have been quietly defeated. The doctrine now relates a company's capacity to the express terms of its objects clause, and is no longer a potential source of injustice. The development of the law of remedies in recent years is impressive and exciting. It has the effect of completely reversing the assumed injustice which is thought to exist in the context of void contracts, and no doubt does so in many other areas as well. It is essential that practitioners and legislators not overlook the radical importance of these developments.

The only concern about present operation of the ultra vires doctrine in Ireland is that it needs to be made absolutely clear that the *Rolled Steel* analysis is law: the exercise of all objects and powers stated in a memorandum is within a company's capacity. The purpose for which a power is exercised does not affect its capacity. Removing the last vestiges of a corporate benefit test may require legislation. The only lasting deficiency which results from the evolution of the ultra vires doctrine is the structure of the modern objects clause. Yet the answer should not be to abolish objects. They are potentially very useful, particularly to shareholders. They need instead to be reborn in a new, clear, informative form.

Legislation is necessary to enable objects to be reformulated and to clarify, and perhaps to modify, the application of the ultra vires doctrine in all those cases where it will continue to apply. The Company Law Review Group's recommendations are unsatisfactory, because they create a patchwork of capacity regimes, and do nothing

to clarify the rules governing bodies with limited capacity. Furthermore, they deprive shareholders of an opportunity to control the activities in which directors involve the company. For these reasons, the retention of objects, either as internal regulations, or even as the basis of limited capacity, is preferable to the current recommendations. In any case, applying the same clear, coherent approach across the board is more conducive to the clarity and simplicity which is universally desired.

In the end, we are left with a policy choice on the fundamental question of whether registered companies should be deemed to have full capacity, like the chartered corporation, or limited capacity, like the statutory form. It is time to face that choice, with a new awareness of what is, and is not, at stake.

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