

THE CASE THAT FELL TO EARTH *SINCLAIR v. BROUGHAM* (1914)

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*Whom the Mad would destroy, they first make Gods.*¹

1. INTRODUCTION. THE LOVE OF MONEY IS THE ROOT OF ALL EVIL?²

Some are born great, some achieve greatness, and some have greatness thrust upon them.³ As with people, so with cases. *Sinclair v. Brougham*⁴ was probably born to greatness; something of a *cause célèbre* of its time,⁵ it reached a division of the House of Lords of exceptional ability, who produced forthright speeches of elegance and style, characterised by legal precision tempered with an equitable eye to a just outcome. In many ways, therefore, it was a virtuoso performance which deserved its plaudits and the pre-eminence which it enjoyed for more than eighty years.⁶

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¹ Reworking the more traditional rendering, this is Bernard Levin, of Mao Zedong, *The Times*, September 21, 1987.

² 1 Timothy 6.10.

³ Shakespeare, *Twelfth Night* II:5.

⁴ [1914] A.C. 398; [1914-1915] All E.R. Rep. 622 (H.L.); see Lord Wright of Durley, "*Sinclair v. Brougham*" in *Legal Essays and Addresses* (C.U.P., Cambridge, 1939) 1 [hereafter Wright, *Sinclair*; reprinting (1938) 6 C.L.J. 305]; Stoljar, "Re-Examining *Sinclair v. Brougham*" (1959) 22 M.L.R. 21 [hereafter Stoljar].

⁵ There were full reports of the arguments and speeches in *The Times* (see *The Times*, December 9, 10, 11, 13 and 16, 1913 and February 13, 1914). See also the notes (brief and unsigned in the contemporary style) at (1914) 48 I.L.T. 294; (1914) 30 L.Q.R. 263 and 385.

⁶ For example, Stevens has written that it was part of a "clear" trend in private law adjudication in the House of Lords at the time: "[a]fter a shaky beginning, the House of Lords moved into a golden period in private law" (Stevens, *Law and Politics. The House of Lords as a Judicial Body, 1800-1976* (Wildenfeld and Nicolson, London, 1979) 20. Again, Lord Wright wrote that it "has been generally regarded as an authority of first-rate importance" (Wright, *Sinclair*, 1); for Hanbury, it was "the great case of *Sinclair v. Brougham*" (Hanbury "The Recovery of Money" in *Essays in Equity* (Clarendon Press, Oxford, 1934) 1 [hereafter Hanbury; reprinting (1924) 40 L.Q.R. 31] 12); and Stoljar wrote that "*Sinclair v. Brougham* has always, and rightly, been thought as of fundamental importance" (Stoljar, 21). In Ireland, Barton J. was of a similar opinion; the "celebrated" speeches are "the most remarkable illustration . . . of the meticulous care with which that House approaches the task of reconciling what is called 'abstract justice' with the strict rule of law" *In re Cummins: Barton v. Bank of Ireland* [1939] I.R. 60 (H.C.) 71.

History teaches us that, however they have achieved greatness, the mighty can fall, and often do, for reasons as Shakespearean as hubris or as mundane as the vagaries of fashion. Again, as with people, so with cases. *Sinclair v. Brougham*, from its great height, had far to fall, and, over the last decade or so, it has fallen far. From a perspective which sees the decline as merited, the influence of the case, though profound, was at best coquettish, at worst malign. On this view, then, it has been not so much a leading case as a misleading⁷ or even a bad one. Bad cases, Dworkin says, have no staying power; they don't fit, and the law – eventually – works itself pure.⁸ Even if there are problems with this analysis,⁹ discussed in this volume by Allen Hutchinson,¹⁰ nevertheless, in many ways it is an excellent description of the rise and fall of *Sinclair v. Brougham*. Decided in 1914, early in the twentieth century but displaying a distinctly nineteenth century cast of mind, its comeuppance eventually arrived in the shape of the decision of the House of Lords in the *Westdeutsche*,¹¹ decided in 1996, late in the twentieth century but heralding for the twenty-first a fresh start and a firmer footing for the law.¹²

There are many similarities between the England of Queen Victoria and that of Margaret Thatcher. In Victorian England, what we now call classical economics were then newly in vogue and application; Thatcher's England saw the apotheosis of neo-classical economics. As a consequence, both periods saw the growth of financial markets and investment products, sophisticated by contemporary standards: investing in a building society in the former era was as sophisticated a financial transaction as investing in interest rate swaps would be in the latter.¹³ Unsurprisingly, the similarity of economic background gave rise to similarity of economic legal problems: in each case, some of these flag-ship modes of investment would founder on the rock of legal incapacity: in

⁷ With apologies to A.P. Herbert, *Uncommon Law. Being Sixty Six Misleading Cases* (Methuen, London, 1935, reissued, 1909, 1977).

⁸ Dworkin, *Taking Rights Seriously* (Duckworth, 1977); *Laws Empire* (Fontana, 1986); *A Matter of Principle* (O.U.P., 1986).

⁹ See, e.g., Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (Duckworth, 1984); for a more sympathetic treatment, see Guest, *Ronald Dworkin* (2nd ed., Edinburgh U.P., 1997).

¹⁰ Hutchinson, "The Importance of Leading Cases. A Critical Analysis" above, 000. See also Hutchinson, "The Last Emperor?" in Hunt (ed.), *Reading Dworkin Critically* (Berg N.Y. and Oxford, 1992) 45.

¹¹ *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.* [1996] A.C. 669; [1996] 2 All E.R. 961 (H.L.).

¹² It might be said that, in this area of the law at least, there has been, as in history, a short twentieth century; see Hobsbawm, *The Age of Extremes. The Short Twentieth Century 1914-1991* (Abacus, London, 1995) 5-11.

¹³ "The impetus leading to the formation of these societies was not so much the desire of the 'industrious class' to obtain funds by 'periodical subscriptions' (as stated in the preamble of the Building Societies Act, 1936), but the desire on the part of capitalists to invest at a higher rate of interest than the usury laws then allowed". Stoljar, 21-22, n.5 referring to Lord Cranworth L.C. in *Fleming v. Self* (1854) 3 De G.M.&G. 997; 43 E.R. 390.

Sinclair v. Brougham, a building society operated as an *ultra vires* bank; in *Westdeutsche*, a local authority had entered into *ultra vires* interest rate swaps.

Sinclair v. Brougham and *Westdeutsche* have it in common, therefore, that they arise out of, and seek solutions for, sophisticated financial transactions which went wrong. Operating successfully, such sophisticated financial instruments can generate untold wealth; George Soros famously made a fortune on the European currency markets at a time of great volatility in 1992¹⁴ When things go wrong, there is great scope for financial destruction; Nick Leeson famously lost a fortune on the Far Eastern derivatives markets and bankrupted Barings Bank in the process in 1995.¹⁵ There are many who would see in these cautionary tales some support for the biblical injunction¹⁶ that the love of money is the root of all evil. Unlike Leeson and Barings, however, the transactions underlying *Sinclair v. Brougham* and *Westdeutsche* went wrong, not because of financial incompetence, but because of the legal incapacity of a major player in each transaction. The problem was of the law's making, and, on this view, it was incumbent upon the law to find an appropriate solution. *Sinclair v. Brougham* was its first attempt, denying a legal and personal remedy to the depositors in the *ultra vires* bank, but giving them a partial equitable proprietary one. In truth, this was not a particularly good solution; indeed, in some quarters, it came to be demonised as the root – if not of all evil – then at least of much legal error. *Westdeutsche*, on the other hand, seems to have made a much better fist of things, affording a legal and personal remedy to the local authority but denying an equitable proprietary one, and in the process correcting many of the errors perpetuated by *Sinclair v. Brougham* though not without arousing controversies in its turn.

The controversies of *Sinclair v. Brougham* are the theme of this paper, and the approach is purely formal.¹⁷ to demonstrate the decline of a once-great case by considering the course of the litigation in the case (section 2) the un-

¹⁴Betting against sterling, he made US\$1billion when the pound collapsed on September 16, 1992. See, e.g., "Turning Dollars Into Change" *Time Magazine*, September 1, 1997.

¹⁵Trading derivatives on the Singapore International Monetary Exchange, Nick Leeson lost more than US\$1billion of Barings' money. See, e.g., "Going for Broke" Cover Story, *Time Magazine*, March 13, 1995. Less than three months earlier, Orange County, California, having suffered a US\$1.5 billion loss in a US\$20 billion derivatives investment pool, had filed for bankruptcy protection in the largest municipal collapse in U.S. history. See, e.g., "The California Wipe-out" *Time Magazine*, December 19, 1994.

¹⁶On the legal fate of another, more famous, "biblical injunction [that] you should love your neighbour" ([1932] A.C. 562, 580 *per* Lord Atkin) see Hedley "M'Alister (or Donoghue) (*Pauper*) v. Stevenson (1932)" below, 000.

¹⁷Though, I hope, nor formalist. Although I am more convinced by the theories which have replaced it than by those embodied in the case itself, the decline of *Sinclair v. Brougham*, like its original rise, was by no means inevitable.

¹⁸Though see, generally, Birks and Rose, (eds.), *Lessons of the Swaps Litigation* (Mansfield/LLP, London, 2000).

successful personal claim (section 3) and the successful proprietary one (section 4), and assessing the greatness to which the case was born but from which it has been decisively evicted (section 5), all the while considering the corrective impact of the *Westdeutsche* case but leaving for another day¹⁸ (and perhaps for the leading cases of the twenty-first century) the resolution of many of the replacement *Westdeutsche* controversies.

2. THE *SINCLAIR V. BROUGHAM* LITIGATION. DIARY OF A MADMAN?¹⁹

It all began innocuously enough with the formation, in 1851, of a building society, the Birkbeck Permanent Benefit Building Society. As its business expanded, it increased its deposits and began also to operate what soon became "an extensive banking business".²⁰ Hence, from 1871, it began to call itself the Birkbeck Bank, and by 1910 the bank was "much the larger part of the enterprise".²¹ However, for a building society to carry on the business of a bank was contrary to the provisions of the Building Societies Act, 1836, and its borrowing from its depositors was therefore *ultra vires*.²² That became apparent in 1911 when the Society was wound up.²³ The outside creditors,²⁴ and those shareholders whose shares were to have matured, were paid off. What remained was enough to pay either the permanent shareholders or the depositors, but not both; and the liquidator sought directions.

The depositors argued that their deposits were money had and received by the society to their use or represented money which they had always owned and never properly formed part of the society's assets and could be traced into the hands of the society's liquidator; the intended effect of these arguments was to constitute the depositors as creditors who would then be paid off ahead of the shareholders. On the other hand, the shareholders argued that the deposits were *ultra vires* and invalid and could therefore give rise to no obligation on

¹⁹With apologies to Gogol, *Diary of a Madman* (trans. Wilks, Penguin, 1972) and de Maupassant, *The Diary of a Madman, and Other Tales of Horror* (trans. Kellett, Pan Books, 1976).

²⁰[1914] A.C. 398, 439; [1914-1915] All E.R. Rep. 622, 641 *per* Lord Parker.

²¹[1914] A.C. 398, 411; [1914-1915] All E.R. Rep. 622, 627 *per* Viscount Haldane LC.

²²[1914] A.C. 398, 411; [1914-1915] All E.R. Rep. 622, 627 *per* Viscount Haldane LC; [1914] A.C. 398, 418; [1914-1915] All E.R. Rep. 622, 636 *per* Lord Dunedin; [1914] A.C. 398, 439; [1914-1915] All E.R. Rep. 622, 641 *per* Lord Parker; [1914] A.C. 398, 451; [1914-1915] All E.R. Rep. 622, 648 *per* Lord Sumner.

²³"In 1911, however, there was a run on the bank which drove it into liquidation" (Stoljar, 21); "Heavy losses were incurred and the society went into liquidation" (Wright, *Sinclair*, 4); see [1912] 2 Ch. 183, 187.

²⁴These outside creditors were "inconsiderable in number and value" ([1914] A.C. 398, 427; [1914-1915] All E.R. Rep. 622, 635 *per* Lord Dunedin) and, as such "they were rightly paid, under the circumstances of the actual case, and had they not been, they would stand, after the expenses of the liquidation, at first in the ranking" ([1914] A.C. 398, 437; [1914-1915] All E.R. Rep. 622, 640 *per* Lord Dunedin).

the part of the Society to repay them. At first instance and in the Court of Appeal,²⁵ the remaining shareholders prevailed over the depositors,²⁶ but the House of Lords divided the spoils between them, ordering that the liquidator should apportion the entirety of the remaining assets between depositors and remaining shareholders in proportion to the amounts originally paid by them.²⁷ They reached this conclusion, not on the basis of the depositors' legal personal claim, the money had and received argument, which was dismissed, but on the basis of the depositors' equitable proprietary claim, the tracing argument.

The outcome in *Sinclair v. Brougham* seems fair. The means by which it was reached seemed unimpeachable at the time; but, after *Westdeutsche*, very little, if anything, of the reasoning in the speeches, now remains. That case also began innocuously enough, with local authorities seeking to take advantage of the financial markets, and in particular of interest rate swaps, to generate extra income at a time when other sources of funding were capped. In *Hazell v. Hammersmith and Fulham L.B.C.*²⁸ the House of Lords held that interest rate swaps transactions were *ultra vires* local authorities. In *Westdeutsche*, at first instance,²⁹ Hobhouse J. held that a net payor on such an *ultra vires* swap – in this case, a bank – was entitled to restitution of the net payment. He reached this conclusion on the basis of a legal personal claim, notwithstanding *Sinclair v. Brougham*. The Court of Appeal affirmed.³⁰ The defendant local authority did not appeal this matter to the House of Lords, but their Lordships plainly considered this to be right, and overruled *Sinclair v. Brougham* on this point. Such a personal action carried an award of only simple interest; but the bank

²⁵ *Re Birkbeck Permanent Benefit Building Society* [1912] 2 Ch. 183 (Neville J., and C.A.).

²⁶ At first instance, Neville J. ordered that the assets be applied: first, in payment of costs; second, in paying outside creditors; third, in paying off the shareholders; and fourth, what remained, proportionately, to depositors. The Court of Appeal, by a majority, affirmed. "This order ha[d] the effect, so far as the . . . shareholders are concerned, of paying them in full" ([1914] A.C. 398, 428; [1914-1915] All E.R. Rep. 622, 636 *per* Lord Dunedin). As Lord Wright pointed out, this "was clearly illogical . . . Logically the shareholders if entitled to priority would have been entitled to divide up *all* the remaining assets of the society" (Wright, *Sinclair*, 5; emphasis added). He is followed in this by Oakley who also thought it "difficult to follow the logic of this order" (Oakley "The Prerequisites of an Equitable Tracing Claim" (1975) 28 *C.L.P.* 64, 75 n.47). However, Neville J. had followed the earlier decision of *Re Guardian Permanent Benefit Building Society* (1883) 23 Ch.D. 440 (C.A.) [varied in part, *sub nom. Murray v. Scott* (1883-1884) 9 App. Cas. 519 (H.L.) but not in any particular which would affect Neville J.'s order] and he must have been influenced by the concern that that would later motivate the House of Lords that, to have held entirely in favour of the shareholders and entirely against the depositors, though logical, would have been unjust.

²⁷ After the decision in the Court of Appeal, the liquidator had made payments accordingly; after the decision of the House of Lords, it was clear that they were overpayments, and in a subsequent action, Neville J. held that he was entitled to recover them as mistaken payments: *Re Birkbeck Permanent Building Society* [1915] 1 Ch. 91.

²⁸ [1992] 2 A.C. 1 (H.L.).

²⁹ [1994] 4 All E.R. 890 (Hobhouse J., and C.A.).

³⁰ [1994] 4 All E.R. 890 (Hobhouse J., and C.A.); [1994] 1 W.L.R. 938 (C.A.).

wanted compound interest, which would have been available had there been an equitable claim. So it sought to rely on the successful equitable claim in *Sinclair v. Brougham*. This hare had been started in the Court of Appeal,³¹ was given added legs in the House of Lords by the enthusiasm of Viscount Haldane L.C. in particular,³² and the argument prevailed at first instance and in the Court of Appeal in *Westdeutsche*. However, the local authority did appeal this matter to the House of Lords, and succeeded in having *Sinclair v. Brougham* overruled on this point as well.

It is clear, therefore, that *Sinclair v. Brougham* made two entries in the diary of legal madness: denying a legal personal claim, and awarding an equitable proprietary one instead. They – and their quite proper repudiation in *Westdeutsche* – are treated in the next two sections.

3. THE PERSONAL CLAIM. THE ONCE AND FUTURE KING

The depositors claimed that they had paid the society on foot both of a mistaken belief in the society's capacity to accept deposits as a bank and for a consideration which had wholly failed, so that their deposits amounted to money had and received by the society to their use, and the society was thus under a duty to repay the sums deposited. They relied upon a tradition which conceived of the action for money had and received as a means of achieving restitution and preventing unjust enrichment. It drew its inspiration from the judgment of Lord Mansfield in *Moses v. Macferlan*³³ who took an open-textured and flexible approach to the action,³⁴ and the tradition constructed upon it saw the implied contract as no more than a fiction which should have faded away with the mid-nineteenth century reforms of the procedure³⁵ to which it had given rise, to be replaced with an obligation imposed by law to make restitution, just as the obligation to compensate for tortious behaviour is imposed by law.

Such arguments were not necessarily doomed to failure.³⁶ Indeed, just be-

³¹The Court of Appeal, in having recourse to equity, "started a line of reasoning which was to become most troublesome" (Stoljar, 23) and would attain "new levels of complexity" (*ibid.*, 27) in the House of Lords.

³²[1914] A.C. 398; 404 *arguendo* (the arguments of counsel, at Viscount Haldane's interjection do not appear in the report at [1914-1915] All E.R. Rep. 522).

³³(1760) 2 Burr. 1005; 97 E.R. 676.

³⁴(1760) 2 Burr. 1005, 1008-1010; 97 E.R. 676, 678-679; see also n.128 below.

³⁵*e.g.* the Common Law Procedure Act, 1852; the Judicature Act, 1873.

³⁶"Brice, the nineteenth-century English authority, in his treatise on *Ultra Vires*, acknowledged that no action could be brought to enforce an *ultra vires* agreement, but then went on to state as a general proposition of English law that benefits received by the corporation under such agreements must be restored" Maddaugh and McCamus, *The Law of Restitution* (Canada Law Book Inc., Ontario, 1991) [hereafter Maddaugh and McCamus] 327, citing Brice *Ultra Vires* (3rd ed., Stevens & Haynes, London, 1895) 641 *et seq.* Thus, for example, in *Re Phoenix Life Assurance*

fore the House of Lords came to decide *Sinclair v. Brougham*, in *In re Irish Provident Assurance Co.*,³⁷ the Court of Appeal in Ireland held that an insurance company which had carried on an *ultra vires* life assurance business could, in principle, recover back *ultra vires* payments, subject to making counter-restitution of premia received, which was a complete defence on the facts. But this view of the law was never going to command the assent of Lord Sumner. As Hamilton L.J. in the Court of Appeal the previous year, he had dismissed this view of the action for money had and received: "whatever had been the case 146 years ago [when *Moses v. Macferlan* was decided], 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'."³⁸ And in the House of Lords in *Sinclair v. Brougham*, he returned to this theme:

I cannot but think that Lord Mansfield's language has been completely misunderstood. . . . I think it is evident that Lord Mansfield did not conceive himself to be deciding that this action was on in which the courts of common law administered 'an equity' in the sense in which it was understood in the Courts of Chancery. . . . 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.³⁹

Rejecting the open-textured view of the action for money had and received should not of itself have necessarily been fatal to the depositors' claim. Yet the House of Lords unanimously held that it could not be maintained. On their Lordships' view, the common law of obligations had only two branches – tort and contract – within which an obligation to repay of the sort relied upon by the depositors against the society had to be accommodated. Such an obligation, described as *quasi-contractual*, could only be imposed on the society by

(1862) 2 J.&H. 441; 70 E.R. 1131 and *Flood v. Irish Provident Assurance* (1912) 46 I.L.T.R. 214; [1912] 2 Ch. 597n (C.A., Ir.) it was held that *premia* paid to an insurance company on *ultra vires* policies were recoverable for total failure of consideration. See also *Confederation Life Association v. Howard* (1894) 25 O.R. 197 where money paid on *ultra vires* debentures was recovered as money had and received.

³⁷ [1913] 1 I.R. 352 (C.A., Ir.); see O'Dell, "Incapacity" in Birks and Rose, (eds.), *Lessons of the Swaps Litigation* (Mansfield/L.L.P., London, 2000) 113 [hereafter O'Dell "Incapacity"] 146-150.

³⁸ *Baylis v. Bishop of London* [1913] 1 Ch. 127 (C.A.) 140; *cp.* his comments just a short time later sitting in the Court of Appeal in *R. Leslie v. Sheill* [1914] 3 K.B. 607 (C.A.) 613; though *cf.* some less critical views on his part as Hamilton J. in *Evanson v. Crooks* (1911) 106 L.T. 264, 269.

³⁹ [1914] A.C. 398, 454-456; [1914-1915] All E.R. Rep. 622, 649-650 *per* Lord Sumner; as a consequence, Scrutton L.J. described the history of the action for money had and received as a "history of well-meaning sloppiness of thought" *Holt v. Markham* [1923] 1 K.B. 504 (C.A.) 513.

means of a contract implied by the law; and since the society could not in fact make such a contract, one could not be imposed by the law. The point is summed up best in a sentence in the speech of Lord Parker of Waddington: "The implied promise on which the action for money had and received is based would be precisely that promise which the company or association could not lawfully make".⁴⁰ Other speeches were more expansive. Viscount Haldane L.C., with whom Lord Atkinson concurred, put it thus:

... so far as proceedings *in personam* are concerned the law of England really recognises (unlike the Roman law) only actions of two classes, those founded on contract and those founded on tort. When it speaks of actions arising *quasi ex contractu* it refers merely to a class of action in theory based on a contract which is imputed to the defendant by a fiction of law. The fiction can really only be set up with effect if such a contract would be valid if it really existed. ... Consideration of the authorities has led me to the conclusion that the action [for money had and received] was in principle one which rested on a promise to pay, either actual or imputed by law. ... I think that it must be taken to have been given only ... where the law could consistently impute to the defendant at least the fiction of a promise.⁴¹

Lord Dunedin's reasoning on this point was similar:

The English common law has various actions which ... are divided into actions in respect of contract and of tort. ... the English law, having no *quasi contract*, got over the difficulty in such cases as the action for money had and received by the fiction of a contract. ... That there can be no resulting proper contractual obligation [in the case of an *ultra vires* contract] is clear ... It is here that the difficulty comes in extending the action for money had and received to such a case. ... how is it possible to say that there is a fictional contract which is binding in circumstances in which a real contract is not binding? ... I have come to the conclusion that the action for money had and received cannot be stretched to meet the situation.⁴²

But the most strident and striking rhetoric rejecting the common law actions was that of Lord Sumner:

⁴⁰[1914] A.C. 398, 440; [1914-1915] All E.R. Rep. 622, 642 *per* Lord Parker.

⁴¹[1914] A.C. 398, 415-417; [1914-1915] All E.R. Rep. 622, 629-630 *per* Viscount Haldane L.C. Heuston praised this speech as "an authoritative survey of the scope of the doctrine of restitution or quasi-contract". Heuston, *Lives of the Lord Chancellors* (Clarendon Press, Oxford, 1964) 239.

⁴²[1914] A.C. 398, 432-434; [1914-1915] All E.R. Rep. 622, 638-639 *per* Lord Dunedin.

All these causes of action are common species of the genus *assumpsit*. All now rest, and long have rested, upon a notional or imputed promise to repay. The law cannot *de jure* impute promises to repay, whether for money had and received or otherwise, which, if made *de facto*, it would inexorably avoid.⁴³

The persuasive power of an opinion is an important factor in establishing a judgment as leading,⁴⁴ and this passage has an epigrammatic⁴⁵ quality rendering it instantly memorable and quotable. I remember being struck by this passage as a student, and it has never failed to grab my attention whenever I have encountered it since. I do not believe myself to be alone in this: many of my own students quote it as easily as they remind me that promissory estoppel acts as a shield and not a sword;⁴⁶ it has been followed in the House of Lords,⁴⁷ and it was chosen as representative of the reasoning of the House on this point by Hobhouse J. at first instance⁴⁸ and by Lord Goff in the House of Lords⁴⁹ in *Westdeutsche*.⁵⁰ This passage is by no means the whole of the reason for the importance of *Sinclair v. Brougham*, but it must surely have played a not insignificant part.

The speeches are working on many levels: the rejection of a flexible approach to unjust enrichment, the denial of restitution as a third head of obligations separate from contract and tort, the insistence on restitutionary obligations being imposed by means of an implied contract, and the reification of the implied contract fiction in the conclusion that if a valid contract could not have existed in fact, one could not be implied in law. Even though each conclusion does not flow inexorably from the one before – the rejection of a flexible approach to unjust enrichment does not necessarily entail the denial of restitution

⁴³[1914] A.C. 398, 652; [1914-1915] All E.R. Rep. 622, 648 *per* Lord Sumner.

⁴⁴See, e.g., Twining, *Rethinking Evidence* (Blackwell, London, 1990) 219, especially his discussion of Lord Denning (232-238). Lord Denning's staccato style is legendary and used to good effect in the two cases by which he is represented in this volume: see Breen, "Dusting Down Equity's Armour. *High Trees* (1947) in Perspective" below, 000 and Capper, "The *Mareva* Injunction – From Birth to Adulthood. *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.* (1975)" below, 000. Again, that Gavan Duffy J.'s language is memorable no doubt helped to establish *Grealish v. Murphy* [1946] I.R. 35 (H.C.) as a leading case on unconscionability at Irish law (see Clark "An Everyday Story of Country Folk (Not!). *Grealish v. Murphy* (1946)" below, 000).

⁴⁵Wright, *Sinclair*, 24.

⁴⁶*Combe v. Combe* [1951] 2 K.B. 215 (C.A.) 224; [1951] 1 All E.R. 767, 772 *per* Birkett L.J. adopting the "vivid" description given by counsel for the husband; on which see Breen "Dusting Down Equity's Armour. *High Trees* (1947) in Perspective" below, 000, text with n.39.

⁴⁷*Boissevain v. Weil* [1950] A.C. 327 (H.L.) 341; [1950] 1 All E.R. 728, 734-735 *per* Lord Radcliffe.

⁴⁸[1994] 4 All E.R. 980, 919.

⁴⁹[1996] A.C. 669, 687; [1996] 2 All E.R. 960, 971, describing it as "a much-quoted passage".

⁵⁰See also *United Australia v. Barclays Bank* [1941] A.C. 1 (H.L.) 45; [1940] 4 All E.R. 20, 47 *per* Lord Porter; *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour* [1943] A.C. 32 (H.L.) 64; [1942] 4 All E.R. 122, 137 *per* Lord Wright (on which see text after n.68 below);

as a third head of obligations, any more than subscribing to an implied contract explanation for the obligation to make restitution does not necessarily entail the conclusion that that a contract cannot be implied if it could not have existed in fact – they have come to be regarded as a package deal: buy one, get the others free. And their heady mix proved extraordinarily potent: there were many buyers at the time and subsequently. Thus, its rejection of *Moses v. Macferlan* and its strong version of the implied contract theory were sometimes enthusiastically embraced, as in *Holt v. Markham*,⁵¹ and, in more temperate language, in *Morgan v. Ashcroft*.⁵² Hanbury, for example, wrote that to “allow an action for money had and received here would be unhistorical and nonsensical”.⁵³

Sinclair v. Brougham seemed, therefore, to have put paid to the possibility of restitutionary remedies for *ultra vires* contracts, and many subsequent cases simply set up a dichotomy between enforceability and non-enforceability of the *ultra vires* transaction, without asking whether there are any legal alternatives to enforceability. Remedies consequent upon non-enforceability are simply not considered. Indeed, this has led, on at least one occasion, to the *non sequitur* that because the contract is unenforceable, there must be no remedy. In the Irish case of *Re Cummins*⁵⁴ Johnston J. held that 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”.⁵⁵

But these conclusions did not go unchallenged. Lord Wright led the counter-charge against this aspect of *Sinclair v. Brougham*,⁵⁶ defending the concept of unjust enrichment,⁵⁷ arguing for restitution as a third head of obligations,⁵⁸

⁵¹[1923] 1 KB 504 (C.A.) 513 *per* Scrutton L.J. And, in an excellent example of the certification of the implied contract, it became common to include claims based upon so called quasi contracts within those paragraphs of Order 11 R.S.C. covering contracts: *Bowling v. Cox* [1926] A.C. 751 (P.C.); see Briggs, “Jurisdiction under Traditional Rules” in Rose (ed.), *Restitution and the Conflict of Laws* (Mansfield Press, Oxford, 1995) 49.

⁵²[1938] 1 K.B. 49 (C.A.) 62 *per* Lord Green M.R.; *cp. Re Cleadon Trust* [1939] Ch. 286 (C.A.) 299-300 *per* Lord Green M.R., 315 *per* Scott L.J., 319 *per* Clauson L.J.; *Re Diplock*; *Diplock v. Wintle* [1948] Ch. 465 (C.A.) 480; [1948] 2 All E.R. 318, 326 *per* Lord Greene M.R. Similarly, in cases such as *Hirsch v. Zinc Corp* (1917) 24 C.L.R. 34 (H.C.A.), *Smith v. William Charlick* (1924) 34 C.L.R. 38 (H.C.A.) and *Turner v. Bladin* (1951) C.L.R. 463 (H.C.A.), the implied “contract theory was dutifully adopted by the High Court of Australia” (Erbacher, *Restitution Law: Text, Cases and Materials* (Cavendish, London & Sydney, 1998) 7); see also Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney, 1995) [hereafter Mason and Carter] 20, para. 118.

⁵³Hanbury, 12.

⁵⁴*In Re Cummins*: *Barton v. Bank of Ireland* [1939] I.R. 60 (H.C.).

⁵⁵[1939] I.R. 60, 70.

⁵⁶In Wright, *Sinclair*; which Lord Atkin subsequently described as “a valuable contribution to the discussion” *United Australia v. Barclays Bank* [1941] A.C. 1 (H.L.) 26; [1940] 4 All E.R. 20, 35.

⁵⁷Lord Wright of Durley “The Study of Law” in *Legal Essays and Addresses* (C.U.P., Cambridge, 1939) 387 [hereafter Wright, “Study”] 404: “not implied contract but unjust enrichment”. Similarly, a “careful study of the English reported cases at law or in equity will, I think, show that the

and deprecating the misuse of the language of *quasi-contract*⁵⁹ and of the implied contract fiction⁶⁰ as

... such unfortunate and misleading terminology. The room of the fiction is better than its company. Not only is it undesirable that English law should be defaced by superfluous solecisms and illogical phrases, but the ghost of this fiction has, I fear, actually delayed and hindered in England the systematic and scientific study of this important branch of law. I should like to see it forgotten for good and all here and now. But it is certainly doomed. Another generation of lawyers will have forgotten it, or if they ever remember it, will wonder why people troubled to discuss it except as a matter of obsolete history.⁶¹

He cited authorities from 1699⁶² to 1908⁶³ in which the obligation to make restitution was seen simply as one imposed by law and not by means of an implied contract, and he continued, rather disingenuously, that he did not be-

basis of the doctrine of unjust enrichment is, as has been so often here stated, that the defendant has received some property of the plaintiff or received some benefit from the plaintiff, for which it is just (as shown in the precedents) that he should make restitution" (Wright, *Sinclair*, 26).

⁵⁸"[U]njust enrichment has no relation as a juristic conception with contract at all. . . . the dichotomy [of contract and tort] does not correspond to any juristic classification. . . . even if the term 'contract implied by law' is retained as meaning quasi-contract, and if the equitable rights and remedies are ignored, still 'contracts implied by law' signify a third head apart from contract and tort. The specific character of restitution as a legal category may be disguised but cannot be destroyed by confusing and inappropriate terminology" (Wright, *Sinclair*, 15-16). "I cannot understand why it is not more generally recognised that *quasi-contract* or restitution involves a definite system of rules, just like the rules of contract or tort" (*ibid.*, 26; see also Lord Wright of Durley, "The Common Law in its Old Home" in *Legal Essays and Addresses* (C.U.P., Cambridge, 1939) 327 [hereafter Wright, "Old Home"]; 345-346; Wright, "Study", 403.)

⁵⁹The term *quasi-contract* "is not very apt, but it does no harm if it is understood to be a label, and to refer to the peculiarity of the action, though there is no promise in fact, the defendant is ordered by the court to pay the money just as much as if he had promised to pay it" (Wright, "Old Home", 356; see also *ibid.*, 384); that is, the substance is the prevention of unjust enrichment (*ibid.*, 358).

⁶⁰"The old common lawyers [who utilised the fiction] 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 realise the true nature of the concept" (Wright, *Sinclair*, 20). Again, "the old common lawyers did not always take their fictions seriously. They used them for their practical value" (Wright, *Sinclair*, 30). Hence, "a fiction was adopted in the past merely as a device to justify a court in less enlightened days when it was applying a novel doctrine and was doing so on the analogy of, and by way of extending, a familiar rule. Hence the crop of absurd and outrageous fictions, now mostly forgotten, which it is almost indecent to exhume, fictions which can never have deceived anybody." (Wright, "Old Home", 384-385; see also (1949) 65 L.Q.R. 295). See now, generally, Baker "The History of *Quasi-Contract* in English Law" in Cornish, Nolan, O'Sullivan & Virgo (eds.), *Restitution. Past, Present and Future* (Hart Publishing, Oxford, 1998) 37, 40-42.

⁶¹Wright, *Sinclair*, 33.

⁶²*Starke v. Cheeseman* (1699) 1 Ld. Raym. 538; 91 E.R. 1259 (Holt C.J.).

⁶³*Nash v. Inman* [1908] 2 K.B. 1 (C.A.).

lieve "that the House of Lords in *Sinclair v. Brougham* had any intention of overruling these authorities";⁶⁴ and he sought to limit the fallout from the speeches in *Sinclair v. Brougham*:

it is the decision which is the precedent. Here no decision was based on the Lords' views about legal history or about the old forms of action. It was already settled that in such a case as that before them the legal claim did not lie.⁶⁵ . . . Decisions, I repeat, are decisions. Views on legal history are not legal decisions. They may form the basis of decisions, though they did not in *Sinclair v Brougham*.⁶⁶

In *Fibrosa v. Fairbairn*,⁶⁷ he went even further:

. . . serious legal writers have seemed to say that the[] words of Lord Sumner in *Sinclair v. Brougham* closed the door to any theory of unjust enrichment in English law. I do not understand why or how. It would indeed be a *reductio ad absurdum* of the doctrine of precedents. In the fact the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect, instrument to prevent unjust enrichment, . . .⁶⁸

There is a large measure of wishful thinking in all of this. Lord Wright's essay

⁶⁴Wright, *Sinclair*, 22, see also *ibid.*, 24: "the House of Lords cannot have intended to overrule the established authorities . . .". He also referred to the later House of Lords decision of *Jones v. Waring & Gillow* [1926] A.C. 670 (H.L.) as not setting the restitutionary obligation imposed in that case on an implied contract; ironically, he relies in particular on Lord Sumner's speech in that case (see [1926] A.C. 670, 696) and he even manages to extract some solace from *Baylis v. Bishop of London* [1913] 1 Ch. 127 (C.A.) 140 *per* Hamilton L.J. despite the comments from that case set out text with n. 38 above. As Tunney points out in "The Search For Justice. *Mabo* (1992)" below, 000, text after n. 9, the devil can cite scripture for his purpose, and there is something of that in Lord Wright's selective citation of Lord Sumner's views in *Baylis*, *Jones* and the later *Hirji Mulji v. Cheong Yue Steamship Co.* [1926] A.C. 497 (P.C.) 510 and even *Sinclair v. Brougham* itself (!) (Wright, *Sinclair*, 25, citing [1914] A.C. 398, 458; [1914-1915] All E.R. Rep. 622, 651).

⁶⁵Wright, *Sinclair*, 19; that the legal personal claim did not lie had been settled in *Re National Permanent Building Society ex p Williamson* (1869) 5 Ch. App. 309; *Cunliffe Brooks & Co. v. Blackburn and District Benefit Building Society* (1884) 9 App. Cas. 857; *Baroness Wenlock v. River Dee Co.* (1885) 10 App. Cas. 354 (H.L.) discussed by Lord Parker in *Sinclair v. Brougham* at [1914] A.C. 398, 440; [1914-1915] All E.R. Rep. 622, 642 and referred to by Lord Wright earlier in the essay: *Sinclair*, 16. However, in the consequent remedy fashioned in *Cunliffe Brooks v. Blackburn*, it was overruled in *Sinclair v. Brougham*, and this entire line of authority, holding against the present claim, is no longer good law after *Westdentsche*.

⁶⁶Wright, *Sinclair*, 32.

⁶⁷*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour* [1943] A.C. 32 (H.L.); [1942] 4 All E.R. 122.

⁶⁸[1943] A.C. 32, 64; [1942] 4 All E.R. 122, 137.

on the case had drawn from Holdsworth's pen⁶⁹ a strong defence of *Sinclair v. Brougham* in all its rigour, and, from his reference to "serious legal writers", Lord Wright must have had Holdsworth's defence in mind in that passage from *Fibrosa*. In fact, Lord Sumner's words do fairly bear the interpretation rejected by Lord Wright but defended by Holdsworth. Whether the law ought to maintain that position is an entirely different matter. It is now clear that it has decided not to. First, in England, there are some examples of restitution of benefits transferred pursuant to an *ultra vires* contract notwithstanding *Sinclair v. Brougham*.⁷⁰ More than that, an alternative view of the history of the implied contract has judicially prospered,⁷¹ the fiction had been rejected in favour of a

⁶⁹ See Holdsworth "Unjustifiable Enrichment" in Goodhart and Hanbury (eds.) *Essays in Law and History* (Clarendon Press, Oxford, 1946), 238 [reprinting (1939) 55 L.Q.R. 37; see also (1932) J.S.P.T.L. 41; (1937) 53 L.Q.R. 302, 304]. The editors of the collection of Holdsworth's papers point out in their Preface that "this article . . . is in the nature of reply to Lord Wright's paper on *Sinclair v. Brougham* . . ." (Editors' Preface, xiii). And Lord Wright seems to have been taken aback by it. In his Preface to his *Legal Essays and Addresses* (C.U.P., Cambridge, 1939) he confessed that he had not "appreciate[d] what criticism and opposition my humble extra-judicial expression of opinion would provoke" (xii). He went on that "in the United States, as I understand, it is generally accepted that *quasi-contract*, or restitution as the Restatement calls it, is a separate category in the law. . . . Why, I wonder, is the view so strongly held in England that in the Common Law there are not three but only two categories of civil liability, contract and tort? That view has recently received its most complete expression in a recent article in the *Law Quarterly Review*, but, with all the respect that I feel for that great lawyer, I cannot in this matter agree with his arguments" (xiv).

⁷⁰ See, generally, Street, *The Doctrine of Ultra Vires* (Sweet & Maxwell, London 1930) [hereafter Street] 376-389: "... restitution is a wholly distinct relief. It is, if possible, granted in all cases of true *ultra vires* to all parties affected by the finding of nullity" (376). Hence, "[p]arties to an *ultra vires* transaction will so far as possible be restored to their original position" (377, citing, *inter alia*, *In re Irish Provident Assurance Co.* [1913] 1 I.R. 352 (C.A. Ir.); on which see n.37, above). Thus for example, in *Craven Ellis v. Canons* [1936] 2 K.B. 403; [1936] 2 All E.R. 1066 (C.A.) a Managing Director whose appointment was *ultra vires* nevertheless got a *quantum meruit*; in *Linz v. Electric Wire Co. of Palestine*, Lord Simonds for the Privy Council did not "question the general proposition that, where an *ultra vires* issue of shares has been made, the subscribers are entitled to recover their money" in action for money had and received for total failure of consideration ([1948] A.C. 371 (P.C.) 377); in *Bell Houses Ltd. v. City Wall Properties* [1966] 1 Q.B. 207, 226; [1965] 3 All E.R. 427, 436 Mocatta J. at first instance affirmed the availability of both the *quantum meruit* and the action for money had and received; in *Simmonds v. Heffer* [1983] B.C.L.C. 298 an *ultra vires* political donation was recovered. And a peculiar species of subrogation – of which the leading Irish example is *In Re Lough Neagh Ship Company; Ex parte Workman* [1895] 1 I.R. 533 (C.A., Ir.) – has also been pressed into service; see Street, 379-383; Goff and Jones *The Law of Restitution* (5th ed., Sweet & Maxwell, London, 1998) [hereafter Goff and Jones] 153-169; Mitchell, *The Law of Subrogation* (O.U.P., Oxford, 1994) 154-161.

⁷¹ See, especially, the speech of Lord Atkin in *United Australia v. Barclays Bank* (rejecting "fantastic resemblances of contracts" ([1941] A.C. 1 (H.L.) 29; [1940] 4 All E.R. 20, 37); the speech of Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour* [1943] A.C. 32 (H.L.); [1942] 4 All E.R. 122; and the judgments of the High Court of Australia in *Pavey & Matthews v. Paul* (1986) 162 C.L.R. 221 (H.C.A.) on which, for this point, see Ibbetson, "Implied Contracts and Restitution: History in the High Court of Australia" (1988) 8 O.J.L.S. 312.

largely descriptive principle against unjust enrichment, and restitution has become established as a third head of obligations alongside contract and tort.⁷² As Keane J. put in the *Bricklayers' Hall* case:⁷³

It is clear that, under our law, a person can in certain circumstances be obliged to effect restitution of money or other property to another where it would be unjust for him to retain the property. Moreover, as Henchy J. noted in *East Cork Foods v. O'Dwyer Steel*,⁷⁴ this principle no longer rests on the fiction of an implied promise to return the property which, in the days when the forms of action still ruled English law, led to its tortuous rationalisation as being "quasi-contractual" in nature.

The modern authorities in this and other common law jurisdictions, of which *Murphy v. Attorney General*⁷⁵ is a leading Irish example have demonstrated that unjust enrichment exists as a distinctive legal concept, separate and distinct from contract and tort, which in the words of Deane J. in the High Court of Australia in *Pavey & Matthews v. Paul*⁷⁶

... explains why the law recognises, in a variety of distinct categories of cases, an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary process of legal reasoning, of the question of whether the law should, in justice, recognise the obligation in a new and developing category of case.⁷⁷

... 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 ... describing the enrichment [as unjust]: possible instances are money paid under duress or as a result of a mistake of fact or law or accompanied by a total failure of consideration.⁷⁸

Such a development undercuts all of the main planks of the denial of the per-

⁷²I have attempted elsewhere to describe this process: see O'Dell, "The Principle Against Unjust Enrichment," (1993) 15 *D.U.L.J.* (n.s.) 50; "Birks and Stones and the Structure of the Law of Restitution" (1998) 20 *D.U.L.J.* (n.s.) 101 [hereafter O'Dell "Bricks and Stones ..."].

⁷³*Dublin Corporation v. Building and Allied Trades Union* [1996] 1 I.R. 468; [1996] 2 I.L.R.M. 547 (S.C.); on which see O'Dell [1996] *Restitution Law Review* §134; "Restitution and *Res Judicata* in the Irish Supreme Court" (1997) 113 *L.Q.R.* 245; and O'Dell "Bricks and Stones ...".

⁷⁴[1978] I.R. 103 (S.C.): the implied contract fiction was no more than "a pleader's stratagem ... 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" ([1978] I.R. 103, 110 *per* Henchy J.).

⁷⁵[1982] I.R. 241 (S.C.), on which see, generally, Scannell "The Taxation of Married Women. *Murphy v. A.G.* (1982)" below, 000.

⁷⁶(1986) 162 C.L.R. 221 (H.C.A.).

⁷⁷(1986) 162 C.L.R. 221, 256-257 *per* Deane J.

⁷⁸[1996] 1 I.R. 468, 483-484; [1996] 2 I.L.R.M. 547, 557-558.

sonal action at law in *Sinclair v. Brougham*. In retrospect, its overruling by the House of Lords in *Westdeutsche* has an aura of inevitability about it,⁷⁹ not least because there were Canadian and Irish harbingers.

Canadian courts "have demonstrated a remarkable capacity for finding excuses for failing to follow"⁸⁰ *Sinclair v. Brougham*: it was almost immediately doubted,⁸¹ and it was soon held that "the principle that a corporation which has received benefit from an *ultra vires* contract must account for the benefit received . . . [is] long and firmly established . . . [and] applicable to any case in which by reason of an *ultra vires* engagement, a corporation has received benefit".⁸² This recovery is now explained on the basis of "the recent revival of the law related to restitution based on unjust enrichment".⁸³ Consequently, *Sinclair v. Brougham* does not seem to form part of the law in Canada.⁸⁴

As to the Irish harbinger, in the *P.M.P.A.* case,⁸⁵ Murphy J. pointed out that the significance of the development of a law of restitution predicated upon the principle against unjust enrichment and not the implied contract fiction "is that 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*".⁸⁶

Unsurprisingly, therefore, for Lord Browne-Wilkinson in *Westdeutsche*, the development of the law of restitution demonstrated that the reasoning in *Sinclair*

⁷⁹ *Westdeutsche Landesbank Girozentrale v. Islington L.B.C.* [1996] A.C. 669; [1996] 2 All E.R. 961 (H.L.).

⁸⁰ Maddaugh and McCamus, 28 and generally, Chap. 14. This case "had no effect on American Law" (Wade, *Restitution, Cases and Materials* (2nd ed., Foundation Press, N.Y., 1966) 852).

⁸¹ *Trades Hall Co. v. Eric Tobacco* (1916) 29 D.L.R. 779, 794 per Cameron J.A.; *Gnaedinger v. Turtleford Grain Growers* (1922) 63 D.L.R. 498; *Re General Finance Corp. (Yarmouth)* [1941] 1 D.L.R. 754; *Machrays Department Store v. Zionist Labour* (1965) 53 D.L.R. (2d.) 657.

⁸² *Halton County v. Trafalgar Township* [1927] 4 D.L.R. 134, 142 per Grant J. Similarly, a borrower under an *ultra vires* contract must return the money so borrowed to prevent unjust enrichment: *Caledonia Community Credit Union Ltd. v. Haldimand Feed Mill* (1974) 45 D.L.R. (3d) 676 (H.C., Ontario) 679 per Van Camp J. See also *La Caisse Populaire Notre Dame Limitée v. Moyer* (1967) 61 D.L.R. (2d) 118, Tucker J., (Sask. Q.B.); *Breckenridge Speedway v. The Queen in right of Alberta* (1970) 9 D.L.R. (3d) 142 (S.C.C.); *Provincial Treasurer of Alberta v. Long* (1975) 45 D.L.R. (3d) 695; cp. *Re K.L. Tractors* (1961) 106 C.L.R. 318 (H.C.A.).

⁸³ *First City Development Corp. v. Regional Municipality of Durham* (1989) 67 O.R. (2d.) 655, 689 per Craig J.

⁸⁴ *Parkland Mortgage Corporation Ltd. v. Therevan Developments* (1981) 130 D.L.R. (3d.) 682, 696 per Feehan J. However, Maddaugh and McCamus are more circumspect, merely commenting that it has been confined to its own particular facts; see Maddaugh and McCamus, 324 *et seq.*

⁸⁵ *In re P.M.P.A. Garage (Longmile) Ltd. (No. 2)* [1992] 1 I.R. 332; [1992] I.L.R.M. 349 (H.C.); on which see O'Dell "Estoppel and *Ultra Vires* Contracts" (1992) 14 *D.U.L.J. (n.s.)* 123, and O'Dell "Incapacity", 140-141. Hence, Murphy J. could avoid the "monstrous injustice" which would flow from the "audacious" and "unattractive" proposition ([1992] 1 I.R. 332, 336; [1992] I.L.R.M. 349, 351) that there could be no remedy; thereby correcting the error in *Re Cummins*, above, n.55.

⁸⁶ [1992] 1 I.R. 332, 336; [1992] I.L.R.M. 349, 352.

v. Brougham was no longer sound and ought to be overruled, so that the depositors should have been entitled to restitution of their deposits on the grounds of failure of consideration.⁸⁷ Lord Slynn agreed that *Sinclair v. Brougham* should be departed from,⁸⁸ and Lord Lloyd agreed that it was wrongly decided.⁸⁹ Lord Woolf expressed no opinion on the point. Only Lord Goff demurred, thinking *Sinclair v. Brougham* "basically irrelevant to the decision of the present appeal",⁹⁰ for two reasons. First, he identified "the problem which arose in *Sinclair v. Brougham*"⁹¹ as the exclusion of a personal remedy in restitution "on the grounds of public policy"⁹² and held that it did not arise in the present case as it was not concerned with a borrowing contract.⁹³ Second, he regarded the decision in *Sinclair v. Brougham* as confined to "*ultra vires* borrowing contracts, and as not intended to create a principle of general application".⁹⁴ Consequently, he was not for overruling *Sinclair v. Brougham*.

There is a respectable pedigree for Lord Goff's first point that the personal remedy in restitution was excluded in *Sinclair v. Brougham* on the grounds of public policy. There is support in the speeches in the case itself. Viscount Haldane L.C. was of the opinion that to "hold that a remedy will lie *in personam* of a statutory society, which by hypothesis cannot in the case in question have become a debtor, or entered into any contract for repayment, is to strike at the root of the doctrine of *ultra vires* as established in the jurisprudence of this country".⁹⁵ Lord Sumner and Lord Parker of Waddington were of the same opinion.⁹⁶ Indeed, Hobhouse J. at first instance and Leggatt L.J. in the Court of Appeal in *Westdeutsche*⁹⁷ were prepared to support the result in *Sinclair v.*

⁸⁷[1996] A.C. 669, 710; [1996] 2 All E.R. 961, 993.

⁸⁸[1996] A.C. 669, 718; [1996] 2 All E.R. 961, 1000.

⁸⁹[1996] A.C. 669, 738; [1996] 2 All E.R. 961, 1018.

⁹⁰[1996] A.C. 669, 686; [1996] 2 All E.R. 961, 970.

⁹¹[1996] A.C. 669, 688; [1996] 2 All E.R. 961, 972.

⁹²*ibid.*; see generally Arrowsmith, "Ineffective Transactions, Unjust Enrichment and Problems of Policy" (1989) 9 *L.S.* 307.

⁹³*ibid.*

⁹⁴*ibid.*

⁹⁵[1914] A.C. 398, 414; [1914-1915] All E.R. Rep. 622, 628 *per* Viscount Haldane L.C. Similarly, "the law of England cannot now, consistently with the interpretation which the courts have placed on the statutes which determine the capacity of statutory societies, impute the fiction of such a promise where it would have been *ultra vires* to give it" ([1914] A.C. 398, 417; [1914-1915] All E.R. Rep. 622, 630 *per* Viscount Haldane L.C.).

⁹⁶"To hold otherwise would be indirectly to sanction an *ultra vires* borrowing" ([1914] A.C. 398, 452; [1914-1915] All E.R. Rep. 622, 648 *per* Lord Sumner). "It is not . . . open to the House to hold that in such a case the lender has an action against the company or association for money had and received. To do so would in effect validate the transaction so far as it embodied a contract to repay the money lent" ([1914] A.C. 398, 440; [1914-1915] All E.R. Rep. 622, 642 *per* Lord Parker). This line of reasoning seems to have commenced with the judgment of Cozens-Hardy M.R. in *Re Guardian Permanent Benefit Building Society* (1882) 23 Ch.D. 440; see Stoljar, 28 n. 35.

⁹⁷[1994] 4 All E.R. 890, 918 *per* Hobhouse J.; [1994] 4 All E.R. 890, 968; [1994] 1 W.L.R. 938, 952 *per* Leggatt L.J.; see also Birks, *An Introduction to the Law of Restitution* (rev. ed., Clarendon

Brougham on that ground. But the policy underlying the *ultra vires* rule must be carefully excavated. It is not monolithic, but instead has two aspects, each designed to increase the funds available for disbursement to company shareholders or local authority ratepayers: there is the retention policy at issue in *Sinclair v. Brougham* which allows the retention of *ultra vires* receipts by the company or local authority acting *ultra vires*, and there is a parallel restitution policy which allows restitution of *ultra vires* expenditure by the company or local authority acting *ultra vires*; in both cases, the effect of that policy is to swell the coffers of the *ultra vires* company or local authority.⁹⁸

The retention policy has its critics. Goff and Jones observe that, at times, "the courts have tended too readily to deny a restitutionary claim on this ground".⁹⁹ Even in *Sinclair v. Brougham* itself, Lord Dunedin thought that the *ultra vires* doctrine could not allow an *ultra vires* borrower to retain the borrowing: to do so would be "to run the doctrine mad. It was a doctrine which was introduced in order to let societies keep their own money, not to appropriate other people's".¹⁰⁰ The rigour of other rules for the maintenance of capital has been much mitigated;¹⁰¹ and if the law is not strict on capital maintenance even where the capital is validly obtained, there can be little if any justification for its retention where it is invalidly obtained.

By contrast, there is no such objection to a restitution policy which allows societies to recover their own money paid away *ultra vires* – indeed, in *Brougham v. Dwyer*,¹⁰² the liquidator of the Birkbeck Building Society succeeded in just such an action – and every reason in principle to support it.

Moreover, it seems that the retention policy is being supplanted by a restitution policy even in the case of *ultra vires* receipts: it was canvassed briefly by Birks in his discussion of Hobhouse J.'s judgment in *Westdeutsche*¹⁰³ and taken up by Waller L.J. in *Guinness Mahon v. Kensington L.B.C.* who suggested that there was therefore "no injustice in the council [the receiving incapax] being

Press, Oxford, 1989) 396: restitution would have "flatly contradicted the *ultra vires* rule". *Cp. Kasumu v. Baba-Egbe* [1956] A.C. 539 (P.C.) 551; [1956] 3 All E.R. 266, 271 *per* Lord Radcliffe.

⁹⁸ See O'Donoghue "Incapacity", 162-167.

⁹⁹ Goff and Jones, 68 criticising *Sinclair v. Brougham* on this ground, but defending *R. Leslie v. Sheill* [1914] 3 K.B. 607 (C.A.); *cf.* Burrows, *An Introduction to the Law of Restitution* (Butterworths, London, 1993) convincingly refuting the reliance by the House of Lords on such policy in the former case (458-460) and seeing a consequently "overwhelming" case to overrule the latter (452).

¹⁰⁰ [1914] A.C. 398, 438; [1914-1915] All E.R. Rep 622, 641.

¹⁰¹ For example, the rule in *Trevor v. Whitworth* (1887) 12 A.C. 409 (H.L.) has been progressively relaxed (see the Companies Act, 1990, Part XI, and, in England, the Companies Act 1985, chapter VII). On the modern justifications, if any, for such rules, see Armour, "Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law" (2000) 63 *M.L.R.* 355.

¹⁰² (1913) 108 L.T. 504 (Lush J.); see also *In Re Coltman: Coltman v. Coltman* (1881) 19 Ch.D. 64; *cp. In re Irish Provident Assurance* [1913] 1 I.R. 352 (C.A., Ir.).

¹⁰³ Birks "No Consideration. Restitution After Void Contracts" (1993) 23 *U.W.A.L.R.* 195, 206

bound to repay".¹⁰⁴ As a co-author of a commentary upon *Guinness Mahon*,¹⁰⁵ Birks has returned the compliment: for him, the proper basis for restitution after an *ultra vires* swap is now "to be found by asking whether the policy behind the nullity dictates that there must be restitution",¹⁰⁶ and he finds various passages in *Guinness Mahon* – and in the subsequent decision of the House of Lords in *Kleinwort Benson v. Lincoln City Council*¹⁰⁷ – which imply that there has to be restitution in order to uphold the policy behind the *ultra vires* rule.¹⁰⁸ These passages are significant because they appear in cases in which it is the defendant which seeks to retain what has been received *ultra vires*, circumstances in which the retention policy would previously have denied restitution. 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. Hence, the tide of policy seems now to be running strongly in favour of restitution not only of payments made *ultra vires* the payor but also of payments received *ultra vires* the payee. In both cases, by allowing restitution to unwind any performance of the *ultra vires* contract, the void nature of the contract is emphasised and the policy of the *ultra vires* rule is supported and not subverted. Consequently, the ground has been cut out from under Lord Goff's first point in defence of *Sinclair v. Brougham*.

His second, intimately bound up with his first,¹⁰⁹ was that it is confined to the narrow context of precluding the indirect enforcement of *ultra vires* borrowing contracts. It, too, has a respectable pedigree, and support in the speeches in *Sinclair v. Brougham*. For example, Lord Parker of Waddington, was of the opinion that if "the *ultra vires* contract . . . was not a contract of borrowing . . . the implied promise on which the action for money had and received depends would form no part of, but would be merely collateral to, the *ultra vires* contract".¹¹⁰ In truth, this offers two routes by which to escape the shackles of

¹⁰⁴ [1998] 2 All E.R. 272 (C.A.) 287-288; [1998] 3 W.L.R. 829, 843-844, relying on Leggatt L.J. in *Westdeutsche* ([1994] 4 All E.R. 890, 967; [1994] 1 W.L.R. 938, 951).

¹⁰⁵ Birks and Swadling "Restitution" [1998] All E.R. Rev. 390, 393-395 and see also Birks, "Private Law" in Birks and Rose (eds.), *Lessons of the Swans Litigation* (Mansfield/L.L.P., London, 2000) 1, 17-18 making the same point.

¹⁰⁶ *ibid.*, 394.

¹⁰⁷ [1999] 2 A.C. 349 (H.L.) 382; [1998] 4 All E.R. 513, 543 *per* Lord Goff; [1999] 2 A.C. 349, 415; [1998] 4 All E.R. 513, 567.

¹⁰⁸ [1998] All E.R. Rev. 390, 394 *per* Lord Hope.

¹⁰⁹ For example, the comments of Viscount Haldane L.C., Lord Sumner and Lord Parker in nn.95 and 96 above and those of Hobhouse J. and Leggatt L.J. in n.97 above might as easily be cited here.

¹¹⁰ [1914] A.C. 398, 440; [1914-1915] All E.R. Rep. 622, 642; on which see Wright, *Sinclair*, 14-15. See also *Westdeutsche* [1994] 4 All E.R. 890, 919 *per* Hobhouse J. However, though confined, the policy can still catch the unwary, as seems to have occurred in *South Tyneside B.C. v. Svenska International* [1995] 1 All E.R. 454 (Q.B.) Clarke J. held that where a net payor on a void swap was entitled to restitution, the net payee could not rely on payments in advance as constituting a change of position because to do so "would in effect be relying upon the supposed validity of a void transaction" [1995] 1 All E.R. 454, 565). However, the decline of this

Sinclair v. Brougham's denial of restitution: a plaintiff can argue that the contract in the instant case is not a borrowing one, or that the policy against indirect enforcement is inapplicable. The judgment of Murphy J. in the *P.M.P.A.* case¹¹¹ provides an excellent example of the first route: in *Sinclair v. Brougham* "their Lordships had to consider problems which by coincidence bear an extraordinary resemblance to the facts of the present case with the crucial distinction that in *Sinclair v. Brougham* it was the borrowing which was *ultra vires* whereas in the instant case it is the lending which was incompetent".¹¹² As to the second route – that the policy against indirect enforcement of *ultra vires* borrowing is inapplicable – it is no more than a consideration in the specific context of *ultra vires* borrowing of the general question already discussed of whether the policy underlying the *ultra vires* rule is better served by retention or restitution. The judgment of Lardner J. in the High Court in *In re Frederick Inns*¹¹³ seems to provide an example: in the case of a company making an *ultra vires* payment to the Revenue Commissioners in attempted settlement of a debt of related companies, Lardner J. held that an action for money had and received lay against the Revenue on the ground of their unjust enrichment, and that "the considerations relating to the *ultra vires* nature of the transaction of deposit-taking which existed in *Sinclair v. Brougham* . . . do not exist in the present case".¹¹⁴ Before *Westdeutsche*, it was an increasingly common strategy.¹¹⁵ However, in truth, it is an unnecessary one. Restitution of an outstanding balance is very different from repayment according to the detailed repayment schedule and other terms of a contract. More generally, even if the value of the defendant's enrichment and the contract price correspond,¹¹⁶ then restitution

policy (discussed text with nn.115-118 below) must call this reason for rejecting the defence into question: if restitution of benefits transferred does not amount to enforcing a borrowing contract, then *a fortiori* neither does a change of position defence.

¹¹¹ [1992] 1 I.R. 332; [1992] I.L.R.M. 349 (H.C.).

¹¹² [1992] 1 I.R. 332, 336; [1992] I.L.R.M. 349, 352; see also [1992] 1 I.R. 332, 339; [1992] I.L.R.M. 349, 354; indeed, he had noticed this at an earlier stage in the proceedings when he determined the *ultra vires* point: see *In re P.M.P.A. Garage (Longmile) Ltd. (No.1)* [1992] 1 I.R. 315 (H.C.) 331; [1992] I.L.R.M. 337, 349 *per* Murphy J. The same distinction is drawn in *La Caisse Populaire Notre Dame Limitée v. Moyen* (1967) 61 D.L.R. (2d.) 118, 147-151 *per* Tucker J.

¹¹³ [1991] I.L.R.M. 582 (H.C.).

¹¹⁴ [1991] I.L.R.M. 582, 593. In an extraordinarily selective citation from *Sinclair v. Brougham*, Lardner J. simply set out Viscount Haldane L.C.'s quotation of *Moses v. Macferlan* ([1914] A.C. 398, 415; [1913-1914] All E.R. Rep. 622, 629) without referring to its fate in the Lord Chancellor's speech or to the views on the action for money had and received set forth in all of the speeches. However, Lardner J. had also held that the Revenue held the *ultra vires* payment on constructive trust ([1991] I.L.R.M. 582, 591-592); on appeal, this was the only mechanism of recovery discussed: [1994] 1 I.L.R.M. 387 (S.C.).

¹¹⁵ See, e.g. *Dynevor v. The Proprietors, Centre Point Building Units Plan No 4327* (Qld C.A., unreported, 12 May 1995) [1996] *Restitution Law Review* § 20.

¹¹⁶ As they often will, but not invariably: if the benefit is a service, its value may be different from any contract price.

in the amount of the benefit transferred under an invalid contract may look like enforcing the contract, but emphatically it is not, it is giving a remedy in restitution.¹¹⁷ Since the contract is not being enforced, there is no conflict with the *ultra vires* doctrine. Indeed, in the House of Lords in *Westdeutsche*, Lord Goff himself "incline[d] to the opinion that a personal claim in restitution would not indirectly enforce the *ultra vires* contract . . .".¹¹⁸ The ground therefore seems also to have been cut out from under the second of Lord Goff's reasons for not overruling *Sinclair v. Brougham*.

Neither of Lord Goff's reasons to support *Sinclair v. Brougham* holds. Nothing beside remains. Its overruling in *Westdeutsche* is therefore to be welcomed as placing the law, at last, upon a sounder footing. On this point at least, a once-great case has therefore quite properly fallen. Though hubris may be a realistic aspersion to cast upon the speeches in *Sinclair v. Brougham*, the displacement of the implied contract theory by the principle against unjust enrichment, described in the long extract from the *Bricklayers' Hall* case set out above,¹¹⁹ is much more likely to be a result of the changing winds of academic and judicial fashion and a judicial adoption of the principle against unjust enrichment as

¹¹⁷ There is another context in which such concerns have been articulated. In the context of an *ultra vires* contract performed, or partly so, on one side, while *Sinclair v. Brougham* obscured the availability of restitution of the benefits transferred in that purported performance, the question was raised whether the party who had performed could prevent the other from taking the *ultra vires* point and so in effect enforce the contract to have a remedy for that performance (see, e.g., Furmston, "Who Can Plead That a Contract is *Ultra Vires*?" (1961) 24 M.L.R. 715). This view had some attraction (see, e.g., *Cabaret Holdings v. Meeanee Sports and Rodeo Club* [1982] 1 N.Z.L.R. 673 (H.C. N.Z.) 675 per Somers J.; *In re P.M.P.A. Garage (Longmile) Ltd.* (No. 2) [1992] 1 I.R. 332, 341-343; [1992] I.L.R.M. 349, 356-357 per Murphy J.) but was ultimately rejected as inconsistent with the *ultra vires* doctrine (see, e.g. *Kathleen Investments v. Australian Atomic Energy Commission* (1976-1977) 139 C.L.R. 117 (H.C.A.) 148-149 per Stephen J.; *cp. Commonwealth Homes and Investment Co. v. Smith* (1937) 59 C.L.R. 443 (H.C.A.) 460 per Dixon J.). This was the position taken by Mocatta J. at first instance in *Bell Houses Ltd. v. City Wall Properties* [1966] 1 Q.B. 207, 224-226; [1965] 3 All E.R. 427, 435-436; on appeal, Salmon L.J. was attracted to the distinction, but found it unnecessary to "to consider the interesting, important and difficult question which would arise were the contract *ultra vires*, namely, whether, the plaintiff company having fully performed its part under the contract and the defendants having obtained all the benefit of the contract, the defendants could successfully take the point that the contract was *ultra vires* the plaintiff company and so avoid payment. It seems strange that third parties could take advantage of a doctrine, manifestly for the protection of shareholders, in order to deprive the company of money which in justice should be paid to it by the third parties" ([1966] 2 Q.B. 656, 693-694; [1966] 2 All E.R. 674, 687). Consistently with the *ultra vires* doctrine, there is no contract, and, on Salmon L.J.'s example, the defendant could plead it, but a remedy in restitution would prevent the injustice he identified. Had it been appreciated that restitution does not amount to the enforcement of the contract, it would not have been necessary to flirt with the heresy of enforcing an *ultra vires* contract to provide an appropriate remedy in the context of a performed or partly-performed *ultra vires* contract.

¹¹⁸ [1996] A.C. 669, 688; [1996] 2 All E.R. 961, 972; *cp. Street*, 376: "... restitution is a wholly distinct relief" (emphasis added).

¹¹⁹ Text with nn.73-78.

the flavour of the month theory. More profoundly, it may be that the principle against unjust enrichment is an idea whose time has come.

There may be nothing so powerful as an idea whose time has come. It must, first, however, displace the idea whose time has passed. Thus has the principle against unjust enrichment displaced the implied contract theory. But once the time for the idea has come, it must defend itself against other ideas or in turn be vanquished. Thus must the principle against unjust enrichment defended itself against various charges: that it does not organise the subject of restitution, because unjust enrichment ideas are broadly dispersed throughout the realm of private law, or because the law of restitution does not have an organising principle, or because, if it does, it is something other than the principle against unjust enrichment, or because, if the principle does organise the subject, it does not do so in an exclusive way but shares that function with other principles.¹²⁰ As Lord Wright found support for the principle against unjust enrichment in the speeches in *Sinclair v. Brougham*, so also – and with perhaps greater justification – may some support for another competing idea be found in them.

Stoljar has suggested that in the action for money had and received, the plaintiff recovers “on what is in effect a proprietary basis”¹²¹ by asserting that the money in defendant’s hands belongs to him (*i.e.*, the plaintiff) and that the defendant came to it without the plaintiff’s consent.¹²² Lord Haldane may have taken a similar approach in *Sinclair v. Brougham* when he said that the “common law looked simply to the question whether the property had passed”.¹²³ Certainly, this is how it is represented by Lord Wright: “Lord Haldane puts the remedy of law as being based on the fact that no property in the money had passed”.¹²⁴ The property explanation is attractive, but modern writers¹²⁵ do not ground their theories upon *Sinclair v. Brougham*. Lord Wright, having discerned in *Sinclair v. Brougham* a theory other than the implied contract fiction, nevertheless, rejected it as an insufficiently comprehensive explanation of the decided cases in favour of the principle against unjust enrichment,¹²⁶ and the

¹²⁰ These alternative theories are considered and rejected in the articles cited in n.72 above.

¹²¹ Stoljar, *The Law of Quasi-Contract* (2nd ed., Law Book Co., Sydney, 1989) 18; see also, 20.

¹²² *ibid.*, 6.

¹²³ [1914] A.C. 398, 420; [1914] A.C. 398, 000; [1914-1915] All E.R. Rep. 622, 631.

¹²⁴ Wright, *Sinclair*, 11; and he finds further support for this in the speech of Lord Dunedin (*ibid.*, 12).

¹²⁵ It has been taken up not only by Stoljar, but in various ways by Watts, “A Property Principle and a Services Principle” [1995] *R.L.R.* 49; McBride and McGrath, “The Nature of Restitution” (1995) 15 *O.J.L.S.* 33; and, to a lesser extent Dietrich, *Restitution. A New Perspective* (Federation Press, Sydney, 1998).

¹²⁶ Wright, *Sinclair*, 12-13; see also 24: “However, I feel a difficulty in limiting the concept to ideas of property. The cases of services rendered or debts discharged certainly afford frequent examples of unjust enrichment. I think it is safer to state the claim for unjust enrichment in such cases as depending on an obligation imposed by law in all the circumstances of the case in order to satisfy the requirements of justice, that is, to avoid what is unconscionable or unconscientious . . .”.

modern versions of the theory do not entirely meet these objections. However, even if a modern versions of the property explanation were to displace the principle against unjust enrichment, *Sinclair v. Brougham* is not necessary for this displacement.¹²⁷

Under Lord Mansfield, who professed himself a great friend of the action for money had and received,¹²⁸ it prospered mightily. If it was not king of all it surveyed, it was certainly a prince among actions. If, by circumscribing the action, *Sinclair v. Brougham* did not quite commit regicide, it certainly consummated a successful coup. And if *P.M.P.A.* and *Westdeutsche* did nothing else, they have helped to restore the law of restitution, incorporating the action for money had and received, to its rightful place among the heads of obligations at common law.

4. THE PROPRIETARY CLAIM. BAD CASES MAKE HARD LAW?

Not only did the denial of the personal claim in *Sinclair v. Brougham* set the law on the wrong path, but it also had the potential to work an injustice on the facts. If the case had rested with the depositors' loss on the personal claim, then the permanent shareholders would have got everything. This would have resulted in a five-fold windfall for them.¹²⁹ For the House of Lords, this was unthinkable. When the common law finds itself in times of trouble, principles of equity come to it, speaking words of wisdom, (frequently). Unsurprisingly, therefore, their Lordships appealed to equity to mitigate the harshness of their decision on the common law point. Thus, Lord Sumner thought that "the present case must be decided upon equitable principles upon which there is no direct authority";¹³⁰ while for Lord Dunedin, it was not "necessary that the claim should be one capable of being made good by action at common law. It will suffice if there is an equitable remedy. Precisely the same difficulty was felt and met in the Roman law. . . . Is English Equity to retire defeated from the task which other systems of Equity have conquered?"¹³¹ Rousing rhetoric; stirring

¹²⁷ Even more. Lord Haldane's speech may not be a secure basis for the property theory of the action for money had and received, because Lord Haldane was not in the passage cited at n.123 dealing with the depositors' personal claim at law, but with their tracing claim.

¹²⁸ *Weston v. Downes* (1778) 1 Doug. 23, 24; 99 E.R. 19, 20.

¹²⁹ "The appalling result in this very case would be that the society shareholders having got the proceeds of the depositors' money in the form of investment, . . . [would be] enriched to the extent of 500 per cent". [1914] A.C. 398, 436; [1914-1915] All E.R. Rep. 622, 640 *per* Lord Dunedin.

¹³⁰ [1914] A.C. 398, 458; [1914-1915] All E.R. Rep. 622, 651 *per* Lord Sumner.

¹³¹ [1914] A.C. 398, 434; [1914-1915] All E.R. Rep. 622, 639 *per* Lord Dunedin. On the Roman learning discussed by Lord Dunedin, and intended by him as a guide to the solution of the problem in Scots law, see Rodger "Recovering Payments under Void Contracts in Scots Law" in Jones and Swadling (eds.), *The Search For Principle. Essays in Honour of Lord Goff of Chieveley* (O.U.P., Oxford, 1999) 1, 5-7, 10-14.

stuff. Unfortunately, it is difficult to discern precisely what the equitable remedy was.¹³² Lord Sumner called it "the 'tracing' equity",¹³³ and the word "tracing" appears in the other speeches,¹³⁴ but this seems to have been the occasion upon which this child of equity was christened.¹³⁵ Like all infants, it suffered somewhat from its lack of maturity.¹³⁶ Indeed, it is only in recent years that it has become clear that the tracing exercise is in two stages: a plaintiff must first identify his property or its exchange product in the defendant's hands, and then, second, make a claim to it.¹³⁷ It is commonplace in this context to distinguish between tracing at law and tracing in equity.¹³⁸ However, this ought to be understood as applicable not to the identification stage of the tracing exercise but to the claiming stage; there is no justification for having two sets of identification rules,¹³⁹ either the plaintiff's property or its exchange product is to be found in the defendant's hands or it is not; once it has been identified, the

¹³² Nevertheless, it has been applied not only generally in subsequent tracing cases, but also in the context of *ultra vires* contracts; see, e.g. *In re P.M.P.A. Garage (Longmile) Ltd. (No. 2)* [1992] 1 I.R. 332; [1992] I.L.R.M. 349 (H.C.); *Tauranga Borough v. Tauranga Electric Power Board* [1944] N.Z.L.R. 155 (N.Z. C.A.).

¹³³ [1914] A.C. 398, 460; [1914-1915] All E.R. Rep. 622, 652 per Lord Sumner.

¹³⁴ [1914] A.C. 398, 412, 418; [1914-1915] All E.R. Rep. 622, 6627, 630 per Viscount Haldane L.C.; [1914] A.C. 398, 437; [1914-1915] All E.R. Rep. 622, 640 per Lord Dunedin; [1914] A.C. 398, 441; [1914-1915] All E.R. Rep. 622, 642 per Lord Parker.

¹³⁵ Winfield, "Equity and Quasi-Contract" in *Select Legal Essays* (Sweet & Maxwell, London, 1952) 226 [reprinting (1948) 64 L.Q.R. 46] commented (235) that a curious feature of the "tracing order" was that "although it is well represented in Equity, there is an almost total lack of reference to it *eo nomine* in the treatises and textbooks on equity, which its baptismal name is some phrase like 'following trust property'. In the law reports its christening as a 'tracing order' seems to be as modern as the decision of the House of Lords in *Sinclair v. Brougham*".

¹³⁶ For Hanbury, it represented a "somewhat rough-and-ready principle" (Hanbury, 13); while for Lord Wright, though it worked substantial justice (Wright, "Home", 358), it was also "a sort of rough justice, in the form of a tracing order" (Wright, *Sinclair*, 2), even "a rough sort of tracing order" (*ibid.*, 5).

¹³⁷ Smith, *The Law of Tracing* (O.U.P., Oxford, 1997) chapter 1. See *Boscawen v. Bajwa* [1996] 1 W.L.R. 328 (C.A.) 334; [1995] 4 All E.R. 769, 776 per Millett L.J.; *Trustees of the Property of F.C. Jones & Co. v. Jones* [1997] Ch. 159 (C.A.) 169-170 per Millett L.J.; *Foskett v. McKeown* [2000] 2 W.L.R. 1299 (H.L.) 1305 per Lord Browne-Wilkinson, 1308 per Lord Steyn, 1322-1324 per Lord Millett (Lord Hoffmann concurring). Indeed, there would seem to be some measure of support for this separation of the tracing exercise into identification and claiming in the speech of Viscount Haldane L.C. in *Sinclair v. Brougham*: "So long as the money . . . can be traced into what has been procured with it, the principal can . . . claim that his money is invested in a specific thing" ([1914] A.C. 398, 419; [1914-1915] All E.R. Rep. 622, 631; emphasis added; discussed by Smith, 12).

¹³⁸ This distinction is drawn in the speeches in *Sinclair v. Brougham*: see [1914] A.C. 398, 420; [1914-1915] All E.R. Rep. 622, 632 per Viscount Haldane L.C.; [1914] A.C. 398, 436-437; [1914-1915] All E.R. Rep. 622, 640 per Lord Dunedin.

¹³⁹ Smith, 120-130, 277-279, 342-347; Birks "The Need of a Unitary Law of Tracing" in Cranston (ed.), *Making Commercial Law: Essays in Honour of Roy Goode* (O.U.P., Oxford, 1997) 239; *Trustees of the Property of F.C. Jones & Co. v. Jones* [1997] Ch. 159, 169-170 per Millett L.J.; *Foskett v. McKeown* [2000] 2 W.L.R. 1299, 1308-1309 per Lord Steyn, 134 per Lord Millett (Lord Hoffmann concurring); cf. 1305 per Lord Browne-Wilkinson reserving the question.

plaintiff's claim can then be made either at law or in equity. Not only do these separations bring order to a notoriously chaotic field of law, but they supply a useful tool with which to analyse the speeches in *Sinclair v. Brougham* on this point.

The House of Lords ordered that the depositors and remaining shareholders should share in the proceeds *pari passu*, and then congratulated themselves on a job well done. It has been left to subsequent generations to work out whether such a conclusion is justifiable. It is not enough simply to assert that the depositors and shareholders were able to trace their money into the society's funds; it is necessary to show both that such money was identifiable in the society's hands and that it could be claimed by the depositors and shareholders.

In the course of argument,¹⁴⁰ Viscount Haldane L.C. suggested that the principle in *Re Hallett's Estate*¹⁴¹ would help in this regard. In that case, Hallett, a solicitor, died insolvent. Upon his death, it was discovered that by selling bonds, he had misappropriated funds first from his marriage settlement and then from a client, and lodged the proceeds to his bank account. Fry J. at first instance took the view that Hallett had misapplied trust funds in both cases, and that the client and the trustee could, in principle, identify the proceeds of their bonds in the bank account and claim accordingly. However, he applied the rule in *Clayton's Case*,¹⁴² and concluded that the trustees' claim was completely defeated by subsequent withdrawals, and the client's claim was partially so.

The Court of Appeal affirmed that Hallett's misappropriation of the client's bonds was a misapplication of trust funds, and that the client could, in principle, claim in the bank account the identifiable proceeds of her misapplied bonds. Jessel M.R. laid down some basic principles of identification and claiming. First, if the misappropriated trust funds are applied to a purchase, the beneficial owner "is entitled at his election either to take the property, or to have a charge on the property for the amount of the trust money".¹⁴³ Second, if the misappropriated trust funds are mixed with the trustee's own funds for the purchase, the beneficial owner is "entitled to a charge on the property purchased, for the amount of the trust money laid out in the purchase; and that charge is quite independent of the facts of the amount laid out by the trustee".¹⁴⁴ Furthermore, he confirmed that these rules applied not only where the trustee purchased land or goods with the misappropriated funds, but also where

¹⁴⁰ See above, n.32.

¹⁴¹ (1880) 13 Ch.D. 696; [1874-1880] All E.R. Rep. 793 (C.A.).

¹⁴² *Devaynes v. Noble*; *Clayton's Case* (1816) 1 Mer. 529; 35 E.R. 767. The rule presumes that in the absence of contrary intention or countervailing circumstances, the first debt in time is discharged by the first incoming credits, and so on, and *vice versa*. See, generally, McConville "Tracing and the Rule in *Clayton's Case*" (1963) 79 L.Q.R. 388.

¹⁴³ (1880) 13 Ch.D. 696, 709; [1874-1880] All E.R. Rep. 793, 796 per Jessel M.R.

¹⁴⁴ *ibid.*

he lodged them in his bank account,¹⁴⁵ and applied not only to express trustees, such as the trustees of the marriage settlement, but also to other fiduciaries, such as the client.¹⁴⁶

In a separate judgment on the applicability of the rule in *Clayton's Case*, Jessel M.R. held that "where a man does an act which may be rightfully performed, he cannot say that the act was intentionally and in fact done wrongly".¹⁴⁷ Applying this to Hallett's lodgement of trust money to his bank account from which he subsequently made drawings, it was to Jessel M.R. "perfectly plain that he cannot be heard to say that he [i.e., Hallett] took away the trust money when he had a right to take away his own money".¹⁴⁸ The rule in *Clayton's Case*, though a very convenient one, applied "unless there is evidence either of agreement to the contrary, or of circumstances from which a contrary intention must be presumed and then, of course, that which is a mere presumption of law gives way to those other considerations"¹⁴⁹ as in this case. Since the account at all times had sufficient credit to meet the claim both of the trustees and of the client, the trustees' appeal was allowed.

Quite what all this has to with identifying in the society's hands money which could be claimed by the depositors and shareholders in *Sinclair v. Brougham* is unclear. *Re Hallett's Estate* states two rules to be applied when an errant trustee misapplies trust funds to aid in the identification of the beneficiary's funds, and uses a presumption against a wrongdoer to decline to apply the rule in *Clayton's Case* in the same identification process. On the other hand, in *Sinclair v. Brougham*, trust funds may have been mixed but they were not misapplied; there was no wrongdoer; and *Clayton's Case* would have been unusable on the facts.¹⁵⁰

¹⁴⁵ (1880) 13 Ch.D. 696, 771; [1874-1880] All E.R. Rep. 793, 797; *Pennell v. Deffell* (1853) DeG.M.&G. 372; 43 E.R. 551 approved; *ex p Dale* (1879) 11 Ch.D. 772 doubted; see also (1880) 13 Ch.D. 696, 721-722; [1874-1880] All E.R. Rep. 793, 802-803 per Baggallay L.J. concurring.

¹⁴⁶ (1880) 13 Ch.D. 696, 720, 709-710; [1874-1880] All E.R. Rep. 793, 796, 802 per Jessel M.R.; see also (1880) 13 Ch.D. 696, 721; [1874-1880] All E.R. Rep. 793, 802 per Baggallay L.J. concurring.

¹⁴⁷ (1880) 13 Ch.D. 696, 727; [1874-1880] All E.R. Rep. 793, 805. Again, "[w]henever an act can be done rightfully the man who has done it is not allowed to say, as against the persons entitled to the property or the right, that he has done it wrongfully. That is the universal law" (*ibid.*).

¹⁴⁸ *ibid.* See also *Shanahan's Stamp Auctions v. Farrelly* [1962] I.R. 386 (H.C.) 425-429, 443 per Budd J.; *In re Irish Shipping* [1986] I.L.R.M. 518 (H.C.) 521, 523 per Carroll J.

¹⁴⁹ (1880) 13 Ch.D. 696, 728; [1874-1880] All E.R. Rep. 793, 806 per Jessel M.R.; see also (1880) 13 Ch.D. 696, 738-739; [1874-1880] All E.R. Rep. 793, 811 per Baggallay L.J. concurring. See also *In re Chute's Estate* [1914] 1 I.R. 180, 185 per Ross J.; *Re Hughes* [1970] I.R. 237, 243 per Kenny J.; *In re Money Markets International* High Court, unreported, July 20, 1999, Laffoy J. at 13.

¹⁵⁰ *Barlow Clowes International v. Vaughan* [1992] 4 All E.R. 22 (C.A.); see also *Re Securitibank Ltd.* [1978] 1 N.Z.L.R. 97 (H.C. N.Z.); McConville, "Tracing and the Rule in *Clayton's Case*" (1963) 79 L.Q.R. 388, 406-407. For Viscount Haldane C.L., the enthusiast for *Mallett* in the House of Lords in *Sinclair v. Brougham*, "the really relevant part of the judgment in *Hallett's*

Sinclair v. Brougham boils down simply to a case in which two funds were mixed through no fault of either of the contributors.¹⁵¹ Where property has been mixed through no fault of the contributors to the mixture, the general rules seem to be that each party "can assert that her contribution exists in any part of the mixture, *subject to* the right of other contributors to do likewise"¹⁵² and reductions in the mixture are borne in proportion to the original contribution.¹⁵³ Assuming that these principles apply not only to mixtures but also to bank accounts¹⁵⁴ and applying them to the facts of *Sinclair v. Brougham*, it is plain that the depositors and shareholders could each identify the proceeds of their money in the society.

On the question of whether they could then claim the money so identified, Viscount Haldane L.C. was of the view that if property in the money had not passed at law, the owners of the money could claim at law.¹⁵⁵ But money being currency,¹⁵⁶ property passes easily – as it does when it is lodged into a bank account and is therefore replaced with a debt owed by the banker to the customer – and the basis of this claim at law disappears.¹⁵⁷ Where there was a claim at law, equity "exercised a concurrent jurisdiction based upon trust";¹⁵⁸

Case is that which stress how the difficulty of following money into a debtor and creditor account like a banker's is got over in equity" [1914] A.C. 398, 422; [1914-1915] All E.R. Rep. 622, 633); that is, he regarded *Hallett* as relevant on the identification stage of the process, whereas the analysis above demonstrates otherwise.

¹⁵¹ [1914] A.C. 398, 000; [1914-1915] All E.R. Rep. 622, 641 *per* Lord Dunedin; *cp. Re Diplock; Diplock v. Wintle* [1948] Ch. 465, 532; [1948] 2 All E.R. 318, 353 *per* Lord Greene M.R.

¹⁵² Smith, 73; emphasis in original.

¹⁵³ *ibid.* *Hallett* is relevant to neither principle. But Smith posits a third – that "when a contributor withdraws from a mixture, his contribution is followed into his withdrawal; in other words, what he takes out is counted first against his contribution" (Smith, 76) – of which he instances *Hallett* (see above, n.147) as an example. But, as has already been said, the facts of *Sinclair v. Brougham* do not come within the terms of this principle.

¹⁵⁴ This is a large and controversial assumption, but it is the correct position in principle: see Smith, 183-215.

¹⁵⁵ "The common law . . . looks simply to the question whether the property had passed, and if it had not, for instance, where no relationship of debtor and creditor had intervened, the money could be followed, notwithstanding its normal character as currency, provided that it could be earmarked or traced into assets acquired with it" [1914] A.C. 398, 420; [1914-1915] All E.R. Rep. 622, 631-632 *per* Viscount Haldane L.C. If by this he meant, as it seems he did, that the plaintiff could make a proprietary claim to the money paid, it is at best an overstatement: "Specific relief, as distinct from damages (the normal remedy at common law), was confined to a very limited range of claims . . ." (*Re Diplock; Diplock v. Wintle* [1948] Ch. 465, 519; [1948] 2 All E.R. 318, 346; see also Stoljar, 28-30, and more generally, Smith, 320-338.

¹⁵⁶ Where it is not currency, then it is treated like any other chattel. Furthermore, "if money in a bag is stolen, and can be identified in the form in which it was stolen, it can be recovered *in specie*" ([1914] A.C. 398, 418; [1914-1915] All E.R. Rep. 622, 631). This seemingly simple case of the stolen bag of coins in fact causes great difficulties of analysis: see n.192-193 below.

¹⁵⁷ "But while the common law gave the remedy I have stated, it gave no remedy when the money had been paid by the wrongdoer into his account with his banker, who simply owed him a debt, so that no money was or could be, in the contemplation of a court of law, earmarked" ([1914] A.C. 398, 420; [1914-1915] All E.R. Rep. 622, 632).

¹⁵⁸ *ibid.*

where there was no claim at law, equity

gave a further remedy. The Court of Chancery could and would declare, even against the general creditors of the wrongdoer, that there was what it called a charge on the banker's debt to the person whose money had been paid in to the latter's account in favour of the person whose money it really was. And as Jessel M.R. pointed out in *Re Hallett's Estate*, this equity was not confined to cases of trust in the strict sense, but applied at all events, to every case where there was a fiduciary relationship. . . . I see no reason why the remedy explained by Jessel M.R. in *Re Hallett's Estate* of declaring a charge on the investment in a debt due from bankers on balance, or on any mass of money or securities with which the plaintiff's money had been mixed, should not apply in the case of a transaction that is *ultra vires*. The property was never converted into a debt, in equity at all events, and there has been throughout a resulting trust, not of an active character, but sufficient, in my opinion, to bring the transaction within the general principle.¹⁵⁹

However, the funds to be distributed by the liquidator represented money which not only the depositors but also the society (and thus its shareholders) were entitled to follow; and, since the depositors could "only claim the depreciated assets which represent[ed] their money, and nothing more"¹⁶⁰ it followed that "the principle to be adopted in the distribution must be apportionment on the footing [that] depreciation and loss are to be borne *pro rata*".¹⁶¹ Lord Sumner "agree[d], without recapitulating reasons, that the principle upon which *Re Hallett's Estate* is founded justifies an order allowing the appellants [the depositors] to follow the assets"¹⁶² and make a claim, subject to the equal rights of the shareholders similarly to identify and claim.

It is difficult to make sense of these passages, but they seem to come to this. The depositors and shareholders had no claim at law. However, in *Hallett*, Jessel M.R. had held that once the client could identify the proceeds of the sale of her bonds in Hallett's bank account, since he stood in a fiduciary relation to her, she could claim such proceeds in the account. Similarly, here, since the society owed fiduciary duties to the depositors – who could identify the pro-

¹⁵⁹ [1914] A.C. 398, 420-421; [1914-1915] All E.R. Rep. 622, 632.

¹⁶⁰ [1914] A.C. 398, 424; [1914-1915] All E.R. Rep. 622, 633.

¹⁶¹ [1914] A.C. 398, 424; [1914-1915] All E.R. Rep. 622, 633-634. Heuston comments that in "the field of equity Haldane was particularly strong . . . [especially] in the uncertain area where the principle of common law and equity overlap . . . [and in this speech] he expounded with masterly learning the circumstances in which equity would permit a beneficiary to trace misapplied trust funds . . ." (Heuston, *Lives of the Lord Chancellors* (Clarendon Press, Oxford, 1964) 215-216); cf. below, n.209/

¹⁶² [1914] A.C. 398, 459; [1914-1915] All E.R. Rep. 622, 652.

ceeds of their money in the society – they could claim those proceeds. Hence, though it was not relevant on the identification leg of the tracing exercise, *Hallett* proved relevant on the claiming leg of the exercise.

So much is tolerably clear from these passages. However, they contain at least three difficulties. First, the *pro rata* distribution of the funds to the depositors and shareholders is made to sound like it was a consequence of the claiming rules at issue. On the reading presented here, it was just as much if not more so a consequence of the identification rules at issue. The fiduciary relationship asserted to subsist between the depositors and the society allowed the depositors to claim in equity the proportion of the funds which had already been identified; both the depositors and shareholders could identify proceeds of their money in the society, and since each can group can in such circumstances assert that its contribution exists in any part of the mixture, *subject to* the right of the other group to do likewise,¹⁶³ what the depositors could identify and therefore claim was limited by what the shareholders could similarly identify and claim. On this reading, it would have been necessary clearly to identify the basis of the shareholders' claim – though no doubt given the creativity which went into this aspect of the decision in *Sinclair v. Brougham*, one would easily have been found.

Second, Viscount Haldane L.C. seemed to hold that the society owed fiduciary duties to the depositors.¹⁶⁴ This proposition is startling, because the relationship of banker and customer is usually one of debtor and creditor, and not fiduciary in nature,¹⁶⁵ and there was nothing more on the facts of the relation-

¹⁶³ See text with n.152 above; *cp.* [1914] A.C. 398, 438; [1914-1915] All E.R. Rep. 622, 641 *per* Lord Dunedin; [1914] A.C. 398, 448-449; [1914-1915] All E.R. Rep. 622, 646 *per* Lord Parker.

¹⁶⁴ In allowing the parties to trace and claim, he based himself on *Re Hallett's Estate* which he held "applied to all events to ever case where there was a fiduciary relationship" [1914] A.C. 398, 421; [1914-1915] All E.R. Rep. 622, 632) and since he held that *Hallett* applied, it follows that he must have regarded the relationship between the parties as fiduciary, though he was careful to hold that the society did not breach its fiduciary duty [1914] A.C. 398, 422-423; [1914-1915] All E.R. Rep. 622, 633). Lord Atkinson concurred, and Lord Parker delivered a speech to similar effect (see *e.g.* [1914] A.C. 398, 441; [1914-1915] All E.R. Rep. 622, 643 (fiduciary relationship). Lord Sumner agreed that *Hallett* justified the tracing order [1914] A.C. 398, 459; [1914-1915] All E.R. Rep. 622, 652), which presumably amounts to a concurrence that a fiduciary relationship subsisted on the facts. Only Lord Dunedin disagreed: "[n]either party is here in any fiduciary position to the other" [1914] A.C. 398, 438; [1914-1915] All E.R. Rep. 622, 641).

¹⁶⁵ *Foley v. Hill* (1848) 2 H.L.C. 28; *Kinlen v. Ulster Bank* [1928] I.R. 171 (S.C.). See, *e.g.*, Oakley, "The Prerequisites of an Equitable Tracing Claim" (1975) 28 *C.L.P.* 64 [hereafter Oakley]: "The relationship between the depositors and the society was clearly that of creditor and debtor and, therefore, it is difficult to see how the depositors retained any legal or equitable proprietary interest in the money deposited – a creditor retains no proprietary interest in the money advanced" (76-77). Again, "it is by no means clear why the directors of the building society owed fiduciary duties to members, let alone to lenders of money borrowed *ultra vires*", that is, let alone to the depositors (Meaghar, Gummow and Lehane, *Equity: Doctrines and Remedies* (3rd ed., Butterworths, Sydney, 1992) 134, para. 505.

ship between the depositors and the society¹⁶⁶ to alter this conclusion.¹⁶⁷ Hence, it is, as Chambers notes:

difficult to understand why the directors were in a fiduciary relationship with the depositors, and, if so, why they were in breach of their duties when the depositors had consented to the investment of their money. It is also difficult to accept the classification of shareholders as innocent recipients and directors as fiduciaries in breach, when the . . . shareholders included all of the directors of the society.¹⁶⁸

The third difficulty arises from the fact that Viscount Haldane L.C. justified the depositors' equitable claim not only on the basis of the fiduciary relationship but also because the facts gave rise to "a resulting trust" – though it was "not of an active character". In *Westdeutsche*, the bank latched on to this, and claimed that the net payments on the *ultra vires* swaps were held by the local authority on resulting trust. Lord Goff concluded that there was no basis for imposing a resulting trust,¹⁶⁹ as did Lord Browne-Wilkinson, who described the inactive resulting trust posited by Viscount Haldane L.C. as an unconventional one of which there was no trace in any other authority¹⁷⁰ and for which there was no justification in principle.¹⁷¹ Whether or not their Lordships in *Westdeutsche* were correct in rejecting a resulting trust in principle,¹⁷² they were surely right

¹⁶⁶ Indeed, Donnelly, *The Law of Banks and Credit Institutions* (Round Hall Sweet & Maxwell, Dublin, 1999) 127-128 sees the principle in *Foley v. Hill* as applicable as between customer and credit institutions generally, and she includes building societies (chapter 3) within that category of credit institution.

¹⁶⁷ However, in *Re Diplock*, the Court of Appeal argued that in *Sinclair v. Brougham*, "a sufficient fiduciary relationship was found to exist between the depositors and the directors by reason of the fact that the purposes for which the depositors had handed their money to the directors were by law incapable of fulfilment" *Re Diplock, Diplock v. Wintle* [1948] Ch. 465, 540-541; [1948] 2 All E.R. 318, 357.

¹⁶⁸ Chambers, *Resulting Trusts* (O.U.P., Oxford, 1997) [hereafter Chambers] 156, citing [1914] A.C. 398, 422-423, 458 for the proposition that the depositors had consented to the investment, and [1912] 2 Ch. 183, 222-223 for the directors' status, as shareholders! See also Mason and Carter, 100, para. 328, n.228.

¹⁶⁹ [1996] A.C. 669, 690; [1996] 2 All E.R. 961, 974.

¹⁷⁰ [1996] A.C. 669, 712; [1996] 2 All E.R. 961, 994.

¹⁷¹ [1996] A.C. 669, 712-713; [1996] 2 All E.R. 961, 994-995. Lord Slynn agreed that "no resulting trust could arise" ([1996] A.C. 669, 718; [1996] 2 All E.R. 961, 1000); *cp.* Lord Lloyd ([1996] A.C. 669, 738; [1996] 2 All E.R. 961, 1018). Similarly, it "is hard to see how a resulting trust, even one of an inactive character, whatever that may be, can arise in a situation where a person intentionally places money on deposit with another, both parties intending that the property in the money should pass to the deposittee" (Oakley, 77; see also Stoljar, 32; and Chambers, 156-163, 167; cf. Worthington, *Proprietary Interests in Commercial Transactions* (O.U.P., Oxford, 1996) [hereafter Worthington] 148-161).

¹⁷² On the nature of the resulting trust after *Westdeutsche*, see O'Dell "Bricks and Stones . . .", 170-171 with references, to which should now be added Swadling, "The Law of Property" in Birks and Rose (eds.), *Lessons of the Swaps Litigation* (Mansfield/L.L.P., London, 2000) 242;

to hold that the reasoning in *Sinclair v. Brougham* provides no support for such a trust.

If neither a fiduciary relationship nor a resulting trust justified the depositors' claim, the question arises: what, if anything, does?¹⁷³ Another equitable proprietary interest was touched on by Viscount Haldane L.C. when he said that he could see "no reason why the remedy explained by Jessel M.R. in *Re Hallett's Estate* of declaring a charge . . . should not apply in the case of a transaction that is *ultra vires*".¹⁷⁴ Lord Parker¹⁷⁵ and Lord Sumner¹⁷⁶ spoke to the same effect.¹⁷⁷ In this identification of a charge¹⁷⁸ there is a credible equitable proprietary base for the depositors' claim. And, as a matter of Irish law, it is clear that a plaintiff who can identify and claim in equity "has a charge on the account to which the money or cheques have been lodged or on property on which the monies received have been spent".¹⁷⁹ Certainly, a charge was imposed in *Hallett*, and this aspect of it may finally provide the reason for Viscount Haldane L.C.'s championing of it in *Sinclair v. Brougham*; but if *Hallett* is secure as an authority justifying such a charge, the deeply problematic speech of Viscount Haldane L.C. is unnecessary for this purpose. In the end, therefore, although a charge might justify the depositors' equitable claim in *Sinclair v. Brougham*, that decision is not necessary to justify the availability of a charge in equity's armoury.

Much else has been taken from the speeches in *Sinclair v. Brougham* on the tracing issue. For example, it has been said that, as a consequence in "England, at least, it is apparently clearly established . . . that a subsisting fiduciary relationship is a necessary precondition of the equitable right to trace":¹⁸⁰ that is,

and Birks and Rose (eds.), *Restitution and Equity. Resulting Trusts and Equitable Compensation* (Mansfield/L.L.P., London, 2000).

¹⁷³ See also Virgo, *Principles of the Law of Restitution* (O.U.P., Oxford, 1999) 634 who speculates that a constructive trust might be appropriate on the facts; whether or not that it is correct in principle, it was not canvassed in the case.

¹⁷⁴ [1914] A.C. 398, 421; [1914-1915] All E.R. Rep. 622, 632; though this was more by way of prelude than of alternative to the resulting trust point.

¹⁷⁵ [1914] A.C. 398, 441-442; [1914-1915] All E.R. Rep. 622, 642-643.

¹⁷⁶ [1914] A.C. 398, 459-460; [1914-1915] All E.R. Rep. 622, 652.

¹⁷⁷ Hence, the House of Lords in *Sinclair v. Brougham* based "the remedy available in equity on a right of property recognised by equity as vested in the plaintiff throughout, not lost by payment into a banking account, nor by the mixture of moneys, nor by merger in a mass of assets. In all these cases the equitable remedy by way of declaration of charge is available" *Re Diplock, Diplock v. Wintle* [1948] Ch. 465, 540; [1948] 2 All E.R. 318, 357.

¹⁷⁸ Lord Wright called it a lien: "Equity in such cases gives a partial right, which has been called an equitable lien, on the total property to the extent that the total property represents the plaintiff's property" (Wright, *Sinclair*, 7). On whether it should more properly be called a lien, see Worthington, 175. On the accuracy of the concept, see Smith, 200-201; as to when it is appropriate and possible for a plaintiff to claim such a charge or lien, see Smith, 347-351, and, generally, *Foskett v. McKeown* [2000] 2 W.L.R. 1299 (H.L.).

¹⁷⁹ *In re Shannon Travel Ltd.* High Court, unreported, May 8, 1972, Kenny J., 8-9 of the transcript.

¹⁸⁰ Meagher, Gummow and Lehane, *Equity. Doctrines and Remedies* (3rd ed., Butterworths, Sydney, 1992) 134, para. 505, commenting that it is clearly established by "*Re Diplock* relying on

in *Sinclair v. Brougham* "Lord Parker and Viscount Haldane both predicate the existence of a right of property recognised by equity which depends on there having existed at some stage a fiduciary relationship of some kind . . .".¹⁸¹ The requirement of a subsisting fiduciary relationship is often easily satisfied,¹⁸² as it was at first instance in *Westdeutsche* by Hobhouse J.¹⁸³ and in the Court of Appeal.¹⁸⁴ But for so long as it persists, it will preclude an equitable claim in support of a purely legal interest, and if strictly interpreted could preclude an equitable claim in support of another species of equitable interest, such as one subsequently raised to reverse an unjust enrichment in a relationship which is not fiduciary. If however, the fiduciary limitation is not found in *Sinclair v. Brougham*, or if it is no longer to be followed on this point, then these limitations can fall away, though it is a separate question whether they should.

The fiduciary requirement seems to have had no friends since Lord Greene M.R.'s decision in *Re Diplock*.¹⁸⁵ Oakley argues that *Hallett* supported the right of the holder of any equitable proprietary interest to identify his property in its exchange product and claim it on the basis of an equitable proprietary interest,¹⁸⁶ and that properly interpreted, apart from Lord Dunedin,¹⁸⁷ the House of Lords in *Sinclair v. Brougham*¹⁸⁸ did likewise.¹⁸⁹ On this reading, having

the speech of Lord Parker in *Sinclair v. Brougham*". To like effect, see Delany, *Equity and the Law of Trusts in Ireland* (2nd ed., Round Hall Sweet & Maxwell, Dublin, 1999), 634-635, 643-647, and Goff and Jones, 103. The requirement seems to have been rejected in Canada and Australia (see Smith, 128), but the position in New Zealand is unclear (see Smith, 120, n.2, and 128, n.33).

¹⁸¹ *Re Diplock*; *Diplock v. Wintle* [1948] Ch. 465, 540; [1948] 2 All E.R. 318, 357; *cp.* the earlier defence of "the necessity of establishing as a starting point the existence of a fiduciary or a quasi-fiduciary relationship or of a continuing right of property recognised in equity" ([1948] Ch. 465, 520; [1948] 2 All E.R. 318, 346-347).

¹⁸² See, e.g., *Chase Manhattan Bank N.A. v. Israel British Bank (London) Ltd.*, [1981] Ch. 105 (Goulding J.); *Re Irish Shipping* [1986] I.L.R.M. 518 (H.C.); *Agip (Africa) Ltd. v. Jackson* [1990] Ch. 265 (Ch.) 280 *per* Millett J. (a point not taken on appeal: [1991] Ch. 547 (C.A.)).

¹⁸³ [1994] 4 All E.R. 890, 937: "the present case is indistinguishable from *Sinclair v. Brougham*. The fiduciary relationship comes into existence and the equity is created at the time that the payee receives the money".

¹⁸⁴ [1994] 4 All E.R. 890, 964; [1994] 1 W.L.R. 938, 949 *per* Dillon L.J.; [1994] 4 All E.R. 890, 969; [1994] 1 W.L.R. 938, 953 *per* Leggatt L.J. The objections to the finding of a fiduciary relationship in *Sinclair v. Brougham*, nn.165-168 above, apply with equal if not greater force here.

¹⁸⁵ See the careful analysis in Smith, 120-130 (demonstrating that the requirement is founded upon misunderstanding) and 340-347; see also Worthington, 184-185.

¹⁸⁶ Oakley, 72. In this respect, in *Hallett*, the fiduciary relationship was a *sufficient* basis for an equitable proprietary claim, but not a *necessary* one: see Smith, 124-125.

¹⁸⁷ Who simply looked to a "superfluity" ([1914] A.C. 398, 437; [1914-1915] All E.R. Rep. 622, 640) in the defendant's hands. This "unworkable principle" (Oakley, 80), as Oakley rightly points out, is "extraordinarily difficult to apply – what constitutes a superfluity for these purposes?" (Oakley, 79), and Lord Browne-Wilkinson was very wary of it in *Westdeutsche* ([1996] A.C. 669, 711; [1996] 2 All E.R. 961, 993).

¹⁸⁸ Oakley, 76-77; see also Oakley, "Proprietary Claims and Their Priority in Insolvency" [1995] C.L.J. 377; and Smith, 123-125.

¹⁸⁹ E.g. Viscount Haldane L.C. commented that the depositors' money "was never converted into

identified their money in the society, the depositors' equitable proprietary claim was based simply upon an equitable proprietary interest in the money, of which not one species (the fiduciary relationship) but three (that relationship, resulting trust, and charge) were identified,¹⁹⁰ and there is nothing in the speeches to confine the claim to only one species or source of equitable proprietary interest such as a fiduciary relationship.¹⁹¹ In *Westdeutsche*, Lord Browne-Wilkinson accepted that the owner of a stolen bag of coins lodged in a bank account could trace into the bank account, *i.e.*, identify the coins in their exchange product and claim accordingly, notwithstanding the necessary absence of a fiduciary relationship between plaintiff and thief.¹⁹² This has probably, and quite rightly, sounded the death-knell for the fiduciary requirement as a matter of English law.¹⁹³ Similarly, in Ireland Budd J. in the *Bricklayers' Hall* case in the High Court commented that "[i]t is questionable whether *Sinclair v. Brougham* is authority for the proposition that a fiduciary relationship is essential before property can be followed in equity".¹⁹⁴ This should similarly sound the death-knell for the fiduciary requirement as a matter of Irish law.

It is therefore difficult to abstract anything of value from *Sinclair v. Brougham* on the so-called "tracing" issue. Indeed, for Stoljar, it "cannot be really explained on the basis of the tracing doctrine. What was here called 'tracing' or 'following' property, was nothing more than a question-begging method to make the society return some of the lenders' money".¹⁹⁵ It comes as no surprise then that it did not survive *Westdeutsche* on this issue either: Lord Browne-Wilkinson held that "the decision as to rights *in rem* in *Sinclair v.*

a debt, in equity at all events" ([1914] A.C. 398, 421; [1914-1915] All E.R. Rep. 622, 632 and Lord Parker expressed his approach to be based upon the creation by equity of "rights of property, though not recognised as such by the common law" ([1914] A.C. 398, 422; [1914-1915] All E.R. Rep. 622, 643).

¹⁹⁰ A similar argument as to *Diplock* is also more than possible (Oakley, 80-82; [1995] *C.L.J.* 377, 383-384; Pearce, "A Tracing Paper" (1976) 40 *Conv. (n.s.)* 277) but it is probably rather more sound to argue instead that if the fiduciary limitation is not properly to be found in *Sinclair*, or if it is but *Sinclair* is no longer regarded as good law on the point, that limitation should wither away (notwithstanding *Diplock*: *cp.* Jones, "Ultra Vires Swaps: The Common Law and Equitable Fall-Out" [1996] *C.L.J.* 432, 435; *cf.* Lord Browne-Wilkinson in *Westdeutsche* [1996] A.C. 669, 714; [1996] 2 All E.R. 961, 996).

¹⁹¹ *Cp.* Smith, 125-126; Worthington, 184.

¹⁹² [1996] A.C. 669, 716; [1996] 2 All E.R. 961, 974.

¹⁹³ See Virgo, 649, and Smith, "Tracing" in Birks and Rose, (eds.), *Lessons of the Swaps Litigation* (Mansfield/L.L.P., London, 2000) 233, 234-235.

¹⁹⁴ High Court, unreported, March 6, 1996, at 41 of the transcript. The point did not arise on appeal: [1996] 1 I.R. 468; [1996] 2 I.L.R.M. 547 (S.C.). It might be objected that Budd J. was bound by the contrary authority of his father's judgment on the point in *Shanahan's Stamp Auctions v. Farrelly* [1962] I.R. 386 (H.C.). However, this may not necessarily be so. In *Shanahan's*, though he quoted them extensively, the elder Budd J. did not consider *Sinclair v. Brougham* and *Re Diplock* for what they themselves might have held but only for whether they supported his interpretation of *Re Hallett's Estate* (see, *e.g.* [1962] I.R. 386, 428, 438, 443).

¹⁹⁵ Stoljar, 32.

Brougham should . . . be overruled".¹⁹⁶ Lord Slynn agreed that *Sinclair v. Brougham* should be departed from,¹⁹⁷ and Lord Lloyd agreed that it was wrongly decided.¹⁹⁸ Given the infirmity of *Sinclair v. Brougham* on the whole tracing process, both as to identification and as to claiming, this must be right. Furthermore, to my late twentieth century eyes, raised on the distinction between ownership and obligation,¹⁹⁹ it is strange indeed that, where a personal action failed, a proprietary one should have succeeded! This outcome has been described as "somewhat irrational",²⁰⁰ not least because, in the case of an insolvency, it could result in an unfair priority over other creditors, and this was one of the concerns relied upon by Lord Browne-Wilkinson to justify overruling *Sinclair v. Brougham* on this point.²⁰¹

Lord Goff, however, was reluctant to adopt this suggestion, not least because "Lord Wright, who wrote in such strong terms indorsing the just result in *Sinclair v. Brougham*, would turn in his grave at any such suggestion".²⁰² For Lord Wright, "[t]he importance of the substantial and affirmative decision and of the actual discussion in the judgments lies in the exposition of the equity of restitution".²⁰³ Pointing to passages from the speeches of Lord Dunedin and Lord Parker²⁰⁴ in which the so-called "tracing" claim was justified to prevent the unjust enrichment of the shareholders at the expense of the depositors,²⁰⁵ he tries to spin *Sinclair v. Brougham* as supportive of unjust enrichment reasoning, if not at common law, at least in equity: "I regard the case as primarily significant as embodying the leading principles on which the Court acts in exercising its equitable jurisdiction to give relief in order to prevent unjust

¹⁹⁶ [1996] A.C. 669, 713; [1996] 2 All E.R. 961, 996.

¹⁹⁷ [1996] A.C. 669, 718; [1996] 2 All E.R. 961, 1000.

¹⁹⁸ [1996] A.C. 669, 738; [1996] 2 All E.R. 961, 1018.

¹⁹⁹ e.g. Goode, "Ownership and Obligation in Commercial Transactions" (1987) 103 *L.Q.R.* 433.

²⁰⁰ Maudsley, "Proprietary Remedies for the Recovery of Money" (1959) 75 *L.Q.R.* 234, 234-235.

²⁰¹ [1996] A.C. 669, 713-714; [1996] 2 All E.R. 961, 994-995; a similar point motivated Lord Goff's more limited rejection of the resulting trust: [1996] A.C. 669, 690; [1996] 2 All E.R. 961, 974.

²⁰² [1996] A.C. 669, 689; [1996] 2 All E.R. 961, 973.

²⁰³ Wright, *Sinclair*, 19; *cp. Fibrosa* [1943] A.C. 32, 64; [1942] 4 All E.R. 122, 137.

²⁰⁴ "Of the four speeches, I have found those of Lord Parker and Lord Dunedin most illuminating" (Wright, *Sinclair*, 6). Notice, he says that there were four speeches, of which two were illuminating, trying to create a spurious equality between these favoured views and the disfavoured views in the other two speeches. He glosses over the point that one of the other two speeches – that of Viscount Haldane L.C. – commanded the assent of Lord Atkinson, so that the disfavoured views were in fact not equal but in the majority.

²⁰⁵ "The shareholders are entitled to share among them the proper assets of the society. But they are not entitled to be made rich at the expense of the depositors by swelling the assets of the society by means of the proceeds of moneys to which they themselves never contributed" [1914] A.C. 398, 437-438; [1914-1915] All E.R. Rep. 622, 641 *per* Lord Dunedin. "The equity lay in this, that it would be unconscionable for the society to retain the amount by which its assets had been increased by, and in fact still represented, the borrowed money" [1914] A.C. 398, 444; [1914-1915] All E.R. Rep. 622, 644 *per* Lord Parker.

enrichment, or to achieve restitution . . .".²⁰⁶ There this just as much wishful thinking in this, however, as there is in Lord Wright's attempts to spin the common law. The common law has subsequently developed a coherent law of restitution based upon the principle against unjust enrichment, its unfinished business is the integration of equity,²⁰⁷ and it would better achieve that integration without the distorting effects of *Sinclair v. Brougham*.

Bad cases make hard law.²⁰⁸ *Sinclair v. Brougham* is doubly hard; first, hard in the sense that it is difficult to follow,²⁰⁹ and second, hard in the sense of unfair, not necessarily to the parties, but potentially to creditors in subsequent cases in which it is cited.²¹⁰ As Burrows and McKendrick observe, "the obscurity of the reasoning of their Lordships in *Sinclair v. Brougham* on the finding of a proprietary interest means that few will mourn its passing".²¹¹

6. CONCLUSION. *SINCLAIR V. BROUGHAM*: MAD, BAD AND DANGEROUS TO KNOW²¹²

Apart from getting things so comprehensively wrong, all that the litigation in *Sinclair v. Brougham* achieved was to dissipate in legal fees a large portion of the money otherwise available for disbursement to the depositors and the remaining shareholders.²¹³ the litigation only benefited the lawyers in the case itself, and baffled generations of lawyers since.

The contrast between their Lordships' insistence upon detailed precision (and misguided if not misunderstood detail at that) at law, and their tolerance

²⁰⁶ Wright, *Sinclair*, 1.

²⁰⁷ Beatson, "Unfinished Business. Integrating Equity" in *The Use and Abuse of Unjust Enrichment* (O.U.P., Oxford, 1991) 244.

²⁰⁸ *Sinclair v. Brougham* also demonstrates that hard cases make bad law. This is a maxim almost as much beloved of lawyers as those referred to in n.46 above. See Heuston, "Hard Cases Make Bad Law" (1978) *D.U.L.J.* 31; *cp. Sadler v. Evans* (1766) 4 Burr. 1984, 1990 98 E.R. 34, 37 *per* Lord Mansfield: "... the granting [of] this rule would be a bad precedent; though in a favourable case. Favourable cases make bad precedents.

²⁰⁹ "We should, however, be lacking in candour rather than showing respect if we refrained from saying that we find the opinions in *Sinclair v. Brougham* in many respects not only difficult to follow but difficult to reconcile with one another" (*Re Diplock, Diplock v. Wintle* [1948] 1 Ch. 465, 518; [1948] 2 All E.R. 318, 345). "Like others before me, I find Lord Haldane L.C.'s reasoning difficult, if not impossible, to follow" (*Westdeutsche* [1996] A.C. 669, 712; [1996] 2 All E.R. 961, 994).

²¹⁰ Of course, the proprietary remedy is limited to the identifiability of the claimed *res*. As Lord Sumner is reported to have observed in the course of argument (*The Times*, Dec. 11, 1913, 3a) if there is no personal claim, and the proprietary one is lost because the money is no longer identifiable, "the way to get rich quick to act *ultra vires*, and keep no accounts"!

²¹¹ Burrows and McKendrick, *Cases and Materials on the Law of Restitution* (O.U.P., Oxford, 1997) 676.

²¹² This is Lady Caroline Lamb's description in her *Journal* of Lord Byron.

²¹³ Costs came first out of the fund, even in the House of Lords: [1914] A.C. 398, 427; [1914-1915] All E.R. Rep. 622, 635 *per* Viscount Haldane L.C.

of (even revelling in) untrammelled discretion in equity is decidedly odd. It is all the more odd when it is realised that the precision was applied to the relatively puny legal personal claim, whilst the discretion was applied to the vastly potentially more powerful equitable proprietary claim. Indeed, the woolliness on the proprietary claim is a whirlwind still being reaped in subsequent attempts to generate unwarranted proprietary claims to gain priority over outside creditors on an insolvency. In neither *Sinclair* nor *Westdeutsche* was this reason in play – the outside creditors in *Sinclair v. Brougham* had already been paid off, and in *Westdeutsche*, the local authority, though strapped for cash, was not insolvent – in both cases the important point was that it was equitable, the fact that it was proprietary was somewhat beside the point. It is difficult to escape the conclusion that if they had got it right on the personal claim at law, the House of Lords would not have had to distort the proprietary claim in equity to achieve a just result.

Part of the problem on the equitable point seems to have been that Viscount Haldane L.C. wanted to talk about *Hallett*, and manufactured the opportunity to do so in *Sinclair v. Brougham*,²¹⁴ thereby managing to given it “something of a new mystique, as if it held untold possibilities”.²¹⁵ In fact, it added very little to the outcome, apart from supplying the source for the charge as one of the three equitable proprietary claims canvassed in the speeches.

For all its problems, however, if *Sinclair v. Brougham* hadn't happened, we'd probably have had to invent it. Its statement of a hard-line thesis generated as an antithesis the modern principle against unjust enrichment. Strange though it is to say, the modern law of restitution needed *Sinclair v. Brougham*. Without it, the law could have gone the way of discretion rather than principle and been all the less important for that. But this having occurred, its usefulness is now past. Holmes, according to Lord Wright, thought that cases have a shelf-life of about half a century.²¹⁶ This might explain why, from the perspective of the end of the twentieth century, there are more than twice as many leading cases in this volume from the second half of the century than from the first.²¹⁷ In this light, the eighty or so years of the *Sinclair v. Brougham* hegemony is a very good innings, and it is unsurprising that this once-great case should have fallen to earth.

²¹⁴In much the same way, Lord Browne-Wilkinson manufactured an opportunity to discuss constructive trusts in *Westdeutsche*, and having helped to still the controversies surrounding *Sinclair v. Brougham*, thereby constructed a whole new set: see O'Dell, “Bricks and Stones . . .”, 170-180.

²¹⁵Stoljar, 30.

²¹⁶“That great American lawyer, Mr Justice Holmes, said that every half-century the case-law is rewritten so that earlier cases may be put aside” (Wright, “Study”, 400); see also Wright, “Old Home”, 345 and Wright, “Study”, 382, 387.

²¹⁷There are 26 cases discussed in this volume; 8 were decided before 1950 (i.e. about 30%), 18 were decided after (i.e. about 70%).

The decline of *Sinclair v. Brougham* is an excellent example of the tradition of transformation which Hutchinson argues is at the heart of the common law.²¹⁸ But it can also be pressed into other jurisprudential service. For those who disagree with the reasoning in the speeches, the decline of *Sinclair v. Brougham* could be seen as an important example of the law working itself pure.²¹⁹ Whether one agrees with it or not, as a matter of observation, its decline provides an example of narrative which did not prove compelling.²²⁰ The story of that decline is one of the displacement of the implied contract fiction and the rise of the principle against unjust enrichment, which could be presented as an important paradigm²²¹ shift in the alignment of the common law of obligations.

The Chief Justice has written that *Sinclair v. Brougham* "must share with *Donoghue v. Stevenson* the distinction of being the most intensively raked over judicial decision of the [twentieth] century".²²² But whilst it can confidently be predicted that *Donoghue* will retain its iconic status in the twenty-first, *Sinclair v. Brougham* – as the case that fell to earth – quite properly will not.

²¹⁸ Hutchinson, "The Importance of Hearing Cases: A Critical Analysis", above, 000.

²¹⁹ Above, text with nn.8-10.

²²⁰ A central concern of branches of the law and ?????? movement. For various views on this issue, see, e.g., White, *The Legal Imagination* (University of Chicago Press, 1985); Brooks and Gewirtz (eds.), *Law's Stools, Narrative and Rhetoric in the Law* (Yale U.P., New Haven, Conn., 1996); Freeman and Lewis (eds.), *Law and Literature* (O.U.P., 1999); contra Posner, *Law and Literature* (rev. ed., Harvard U.P., Mass., 1998); Posner, "Relations between Law and Literature" (1999) XXXIV *Ir. Jur.* (n.s.) 18.

²²¹ Kuhn, *The Structure of Scientific Revolutions* (3rd ed., University of Chicago Press, 1996).

²²² Keane, *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths, Dublin, 1988) 282, para. 20.09.