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RESTITUTION FROM PUBLIC AUTHORITIES IN IRELAND

PhD Thesis

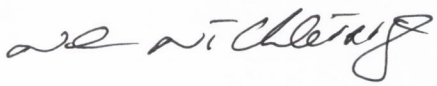
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SUMMARY

This thesis examines the law of restitution from public authorities in Ireland. It operates on two levels. First, it is the first large scale research project on the law of restitution in Ireland. It also analyses the law of restitution in Ireland and considers how Ireland has integrated traditional principles of restitution that have been developed in other common law jurisdictions. Second, it examines the law of restitution as it applies to public authorities in Ireland. It considers the relationship between the law of restitution and principles of public law, and considers how principles of public law have shaped traditional restitutionary doctrines when these doctrines are invoked in claims for restitution from the state.

Research Methods

The primary focus of this thesis is upon sources of Irish law. Because this is the first large-scale research project on the law of restitution in Ireland, considerable emphasis is placed on Irish cases that can be characterised as cases of restitution for unjust enrichment. Within this category of cases, greater emphasis is placed on cases where restitution is sought from state bodies. In addition to recent cases that expressly recognise the law of restitution and the principle against unjust enrichment, it considers early Irish cases that may be analysed in restitutionary terms. It also considers legislative instruments that are seen to affect recovery from public authorities, with a particular emphasis on provisions of tax legislation that are relevant to claims for restitution of unlawfully exacted taxes.

This project also adopts a comparative approach, comparing the jurisprudence of the Irish courts with that of other common law jurisdictions: England, Canada, and Australia. The primary point of contrast for Irish law in this thesis will be English law, as the Irish courts have already drawn heavily upon principles of English law in developing the law of restitution. Consideration of Canadian and Australian authorities will be relied upon where the courts in all four jurisdictions have defined principles in a very similar manner, or to provide a useful point of contrast where the law is unsettled. In light of the fact that the development of the law of restitution has been driven by academic writing, thesis will draw heavily on academic commentary from England, Ireland, Canada, and Australia.

In addition to case-law, legislation, and academic commentary, this thesis also considers the impact of Irish constitutional law on restitution from the state. It argues that the unlawful levying of taxes or other charges constitutes an unlawful interference with the property rights of the taxpayers affected, so that restitution from public authorities engages constitutional property rights. It also considers property rights protected by the European Convention of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union. The impact of the Irish Constitution on restitution claims from public authorities will be contrasted with English

attempts to incorporate principles of (ECHR) jurisprudence within the law on restitution from public authorities. This thesis also considers all issues relevant to restitution from the state in light of principles of EU law. These principles have proven to be particularly relevant when defining the parameters of the law of restitution from public authorities in English law, and are directly applicable in Irish law.

Major Findings of the Thesis

First, this thesis demonstrates that Irish law adheres to general restitutionary doctrines as they have been developed in England, Canada, and Australia, and that the historical development of the law of restitution in Ireland bears a close relationship with that of other common law jurisdictions, particularly that of English law. However, although Irish law recognises traditional restitutionary causes of action—such as mistake, duress, and duress *colore officii*—and defences—such as the change of position defence—many features of these causes of action in Irish law are distinct to Ireland.

Second, this thesis also proves that, in claims for restitution from the state, the Irish courts are motivated by concerns similar to those motivating courts in other jurisdictions, and that these general considerations are supplemented by provisions of the Irish Constitution. It also demonstrates that restitution from public authorities is underpinned by substantive rights and principles of international law, such as the right to property under Article 1 of the First Protocol to the European Convention on Human Rights and principles of EU law, such as the principle against unjust enrichment and the right to an effective remedy.

Third, this thesis considers the case a public law regime for restitution of overpaid tax and concludes that the case for a public law regime has not been made out. Claims for restitution against the state may be encompassed within traditional principles of the law of restitution and principles of public law simply shape the parameters of these doctrines where relied upon by, or against, the state. Authorities from each of the jurisdictions surveyed in this thesis demonstrate how consent-oriented unjust factors may be successfully relied upon to obtain restitution from the state. In particular, all four jurisdictions have ensured that such causes of action could respond to claims from the state by limiting restrictions traditionally associated with such causes of action. Furthermore, this thesis outlines the many conceptual and practical difficulties that attend the public law regimes for restitution that have been canvassed in other jurisdictions, such as Canada and England.

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Chapter 1: Introduction

This thesis concerns restitution from public authorities in Ireland. It operates on two levels. First, it is the first large scale research project on the law of restitution in Ireland.[1] It considers how Ireland has integrated traditional principles of restitution that have been developed in other common law jurisdictions. It also analyses the roots from which the Irish law of restitution has grown, charts the current position of the Irish law of restitution, and suggests the path that Irish law should follow in future.

Second, this thesis examines the law of restitution as it applies to public authorities in Ireland. For the purposes of this study, a public authority is one that meets three prerequisites. First, it must be a body that derives its authority from statute or from an exercise of executive power. Second, there must be a coercive element to the transaction in that the public authority has powers of enforcement available to it other than issuing proceedings for recovery of a debt. Third, the public authority must act in a public capacity in demanding or receiving the payment. In other words, this thesis does not purport to consider commercial transactions entered into by public authorities. Although this thesis will argue that the public nature of a defendant should affect every element of a restitutionary claim made against it, our conception of what constitutes a public authority is of particular importance in considering the principle developed by Lord Goff in *Woolwich Equitable Building Society v IRC*,[2] where he held that unlawfully exacted taxes are recoverable as of right.

In this context, this thesis considers the relationship between the law of restitution and principles of public law, and considers how principles of public law have shaped traditional restitutionary doctrines when these doctrines are invoked in claims for restitution from the state. It argues that traditional restitutionary principles, causes of action, and defences apply to claims for restitution from the state and demonstrates that, where these general principles are invoked against the state, they are moulded and redefined by principles of public law. Furthermore, the shared experience of the jurisdictions surveyed in this thesis demonstrates that cases on restitution from public authorities have furthered our understanding of restitutionary doctrines in a general sense and help to clarify the boundaries between public

[1] Much of the research builds upon the contributions of others, referred to at appropriate points throughout the thesis.

[2] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL). This issue is discussed further in Chapter 6 at 198-202.

and private law. It is hoped that this analysis of restitution from public authorities in Ireland will serve the same goals in Irish law, by furthering our understanding of restitutionary doctrines and exploring the application of private law principles to state actions.

I. Chapter Outlines

Part I

The law of restitution in Ireland is underdeveloped. Therefore, before this thesis could focus upon restitution from public authorities, it was first necessary to consider the constituent elements of the law of restitution as they have been developed in Ireland. Thus, Part I of this thesis analyses the foundations of the law of restitution in Irish law, and considers restitution from the state in particular. Chapter 2 constitutes an introduction to the law of restitution. It considers the historical development of the law of restitution in Ireland and Ireland's adoption of the principle against unjust enrichment. It adopts a comparative analysis, using cases from Canada, Australia, and England to establish a framework within which Irish cases on restitution can be evaluated. It outlines the general prerequisites that a plaintiff must satisfy to maintain a claim for restitution, and will demonstrate that the Irish law of restitution implicitly adheres to many of the principles that have been explicitly expounded in other jurisdictions. However, the Irish courts' failure to engage in critical or reflective analysis when adopting principles of restitution means that some of these principles have been developed in an incoherent manner.

Chapter 2 considers the relationship between the law of restitution and principles of public law that underpin restitution from the state. General principles of the law of restitution are applicable to public bodies,[3] although other principles and policies mandate that public bodies be treated differently from private individuals. Some of these principles are established principles within the law of restitution that draw on public policy considerations. Chapter 2 argues that many of these general principles are supplemented by provisions of the Irish Constitution. Chapter 2 also considers how substantive rights, such as the right to

[3] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [133] (Lord Walker); *Pacific National Investments Ltd v Victoria (City)* [2004] SCC 75, 245 DLR (4th) 211 [58]. *Magical Waters Fountains Ltd v Sarnia* (City) 74 OR (2d) 682, 73 DLR (4th) 734 [41] (Gautreau J). The decision was reversed on appeal but this specific issue was affirmed: *Magical Waters Fountains Ltd v Sarnia (City)* (1992) 91 DLR (4th) 760 [10]-[11].

property, whether derived from the Irish Constitution or from international human rights documents, can affect claims for restitution. It argues that restitution of unlawfully exacted taxes can be reconceptualised in terms of property rights, and that such rights reinforce the public law imperative that the state should not remain enriched by the receipt of unlawfully exacted taxes.

Although the Irish courts have accepted that a plaintiff must establish that the defendant has been enriched at the expense of the plaintiff, they have never considered what it means to say that the defendant has been 'enriched', or that the enrichment has been obtained 'at the expense of the plaintiff'. Therefore, before it will be possible to consider specific restitutionary causes of action that are applicable against the state, it will be necessary to consider these preliminary elements of a claim in restitution.

Chapter 3 describes the concept of 'enrichment'. It examines the tests for enrichment that have been developed by commentators and by the English, Canadian, and Australian courts. It will argue that, although the Irish courts have devoted little attention to the concept of 'enrichment', a closer study of the Irish authorities demonstrates that the Irish courts have implicitly applied many of the principles that underpin the approach of the courts in other jurisdictions, and are therefore likely to adopt many of the tests developed in those jurisdictions as a means of establishing enrichment. However, it also acknowledges that the Irish courts' failure to analyse the basis on which they are applying different tests for enrichment means that the Irish law on enrichment is unprincipled and incoherent.

Chapter 3 also considers the role of an award of interest in cases of restitution from the state. It considers provisions of statutory taxation codes that provide for the payment of interest on overpaid taxes, as well common law rights to interest that arise on the basis of restitutionary principles. It discusses the decision of the House of Lords in *Sempra Metals v IRC*,[4] in which the House of Lords recognised a general common law right to compound interest where sought as a means of reversing unjust enrichment, and argues that a similar approach should be adopted by the Irish courts, as there is an important public interest in ensuring that the state is not enriched by unlawful receipts.

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[4] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561.

Chapter 4 examines the role that 'at the expense of the plaintiff' plays in the law of restitution. The Irish courts have devoted little attention to this requirement. Chapter 4 discusses the relationship between unjust enrichment and restitution, and considers whether the Irish law of restitution recognises a direct quadration between the two concepts. It also analyses issues that the phrase 'at the expense of the plaintiff' has raised in other jurisdictions. It considers whether the term 'at the expense of the plaintiff' entails that the gain received by the defendant must correspond with a loss sustained by the plaintiff, whether a 'correspondence principle' is recognised in Irish law, and whether such a requirement is desirable as a matter of principle, particularly in the context of restitution from public authorities. Finally, in some cases, the state will not receive a payment directly from the person who seeks restitution of the payment. Chapter 4 considers whether restitution is available in respect of receipts received by the defendant indirectly from the plaintiff. It discusses cases of indirect enrichment and argues that the ultimate taxpayer should be entitled to recover directly from the state in such circumstances.

Part II

The second Part of this thesis considers specific causes of action that may be relied upon by individuals seeking restitution from the state. Chapter 5 examines traditional consent-oriented causes of action, such as mistake and compulsion, and their application in Canada, Australia, England, and Ireland. It argues that such traditional grounds of restitution are capable of responding to restitution claims against the state. It also demonstrates that a phenomenon common to the four jurisdictions considered in this thesis is a judicial tendency to ensure that such causes of action *can* respond to claims from the state by limiting restrictions traditionally associated with such causes of action, and describes the differences in the manner in which each jurisdiction has modified those traditional unjust factors.

Chapter 5 considers mistake claims and compulsion claims that may be made against the state. It discusses traditional restrictions on the mistake cause of action, such as the rule that monies paid pursuant to a mistake of law are irrecoverable. The status of this mistake of law rule is unclear in Ireland, although it has been abolished in England, Canada and Australia. Chapter 5 draws on cases from these jurisdictions to demonstrate the case for the abolition of the rule. It also considers the conceptual problems that have presented themselves upon the abolition of the mistake of law rule in the jurisdictions considered. It also considers

the general principle of compulsion, which encompasses two established bases for recovery: duress *colore officii* and the wider principle of duress. There are few decided cases on compulsion in Irish law, although many cases on restitution of overpaid tax recognise the compelled nature of many payments made to the state.[5] Chapter 5 draws on the principled analysis of duress-based claims developed in English, Australian, and Canadian law, to provide a framework within which it is possible to consider compulsion claims in Irish law.

Chapter 6 considers specific grounds of restitution that, rather than focusing on the vitiation of the plaintiff's consent, are motivated by public policy considerations. The most important of these causes of action is the principle developed by Lord Goff in *Woolwich Equitable Building Society v IRC*,[6] where he held that unlawfully exacted taxes are recoverable as of right. The *Woolwich* principle has been adopted as a matter of Irish law, but has not been expressly adopted by the Canadian or the Australian courts. It is also a relatively recent addition to the legal landscape. Chapter 6 traces the development of the *Woolwich* principle in English law, discusses its adoption into Irish law, and considers the uncertainty that surrounds various elements of the *Woolwich* cause of action. It argues that Ireland's adoption of the *Woolwich* principle is weakened by the Irish courts' failure to distinguish clearly between the three grounds of recovery considered by the House of Lords in *Woolwich*.

Chapter 6 also considers the absence of basis approaches canvassed by Lord Browne-Wilkinson in *Woolwich* and by Birks. It argues that, although the Irish courts have not yet explicitly considered absence of consideration or absence of basis as grounds for restitution, the language in recent Irish decisions is reminiscent of an absence of basis approach. Chapter 6 also considers recent suggestions that there should be a separate, public law regime for the recovery of overpaid taxes. It examines public law regimes that have been suggested in England and in Canada, and considers whether recent Irish cases suggest the development of a similar regime in Irish law. Chapter 6 discusses whether the case has been made for the adoption of a public law regime for the recovery of ultra vires payments and examines the principled and practical difficulties that the adoption of such a regime might pose.

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[5] *Dolan v Neligan* [1967] IR 247 (HC) 252; *Rogers v Louth County Council* [1981] IR 265 (SC) 271; *Murphy v Attorney General* [1982] IR 241 (SC) 317.
[5] *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC) 187; *Dolan v Neligan* [1967] IR 247 (HC) 252.
[6] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL).

Part III

Part III of this thesis will consider the defences that are available to restitutionary claims. This issue is of considerable importance, as the development of appropriate defences to restitutionary claims has been instrumental in liberalising restitutionary causes of action.[7] Defences to claims for restitution can be divided into two categories. The first category consists of general defences that also apply to restitutionary claims and tend to be founded on general considerations of public policy. The second category concerns defences that are specific to the law of restitution.

Chapter 7 considers the first category of defences and demonstrates that such defences are available in response to restitutionary claims. It considers the doctrines of *res judicata* and laches, both of which have been invoked in Irish law as a defence to claims for restitution. Chapter 7 also discusses statutory limitation periods in claims for overpaid tax. It considers which general provisions of the Statute of Limitations 1957 apply to claims for restitution, as well as outlining specific limitation periods that apply to claims for overpaid tax. It considers common law, EU law, and constitutional law limitations upon the state's power to impose restrictive limitation periods in respect of claims for unlawfully exacted tax.

Chapter 8 considers defences that have been specifically developed to respond to claims for restitution. It demonstrates that public law principles, such as principles of constitutional or EU law, have an important role to play in the development of defences to claims for overpaid tax.

Parts I to III of Chapter 8 consider traditional defences to restitutionary claims that deny an element of the restitutionary cause of action. Part I considers the change of position defence, and the closely related defences of 'counter restitution impossible' and 'honest receipt.' It analyses whether the permissive approach that the courts have adopted where change of position is relied upon by the state constitutes a disproportionate interference with the right to property, and whether the traditional approach to causation may be modified to take account of property rights concerns.

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[7] *Lipkin Gorman v Karpnale* [1991] 2 AC 548 (HL) 581; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 385.

Part II considers common law forms of the passing on defence in Canadian, Australian, and English cases, and will demonstrate that these defences have been rightly rejected as inconsistent with a principled analysis of the law of restitution. It also evaluates statutory forms of the passing on defence and compares section 20(5) of Ireland's Value Added Tax Act 1972 with section 80(3) of England's Value Added Tax Act 1994. It considers the restrictions that the Court of Justice of the European Union (CJEU) has imposed upon statutory forms of the passing on defences, where such defences are relied upon to resist restitution of taxes levied in breach of EU law.

Part III of Chapter 8 considers the principle that voluntary payments may not be recoverable by way of restitution. It demonstrates that, although defences premised upon the voluntary nature of the plaintiff's payment have been recognised as a matter of law, the state will rarely be able to rely on such defences to resist a claim of restitution of overpaid tax in light of the coercive nature of taxation. Part IV considers policy motivated defences to claims for restitution, such as the settled law defence and the defence of honest receipt. It analyses the reception that these defences have received in England and in Australia and considers whether such defences should be adopted as a matter of Irish law.

Part IV

The final Part of this thesis examines the remedies available in claims for restitution of overpaid tax in Ireland. Chapter 9 argues that the Irish courts have awarded a wide variety of remedies, both personal and proprietary, in response to claims for restitution of overpaid tax, but their approach in awarding these remedies has been incoherent. It demonstrates that the Irish courts have permitted personal remedies, such as an account in equity, in addition to traditional claims for an account at law. It considers whether such an approach is justified as a matter of principle, and whether it is supported as a matter of law. It also discusses whether restitutionary damages are available in respect of claims for overpaid tax where the cause of action relied upon is a breach of statutory duty.

Chapter 9 also demonstrates that the Irish courts have frequently granted proprietary remedies in response to claims for restitution in general,[8] and to claims for restitution of overpaid tax in particular.[9] It argues that the manner in which the Irish courts have awarded proprietary relief in restitution claims obscures the proper conceptual bases of proprietary awards and, in the specific context of restitution from the state, has failed to indicate why proprietary restitutionary remedies will be available. Chapter 9 also considers subrogation and rescission. These are 'hybrid' remedies that may be either personal or proprietary in their effects, and may operate to reverse unjust enrichment.

II. Research Methodology

Comparative Approach

The primary focus of this thesis is upon sources of Irish law. Because this is the first large-scale research project on the law of restitution in Ireland, considerable emphasis is placed on Irish cases that can be characterised as cases of restitution for unjust enrichment. Within this category of cases, greater emphasis is placed on cases where restitution is sought from state bodies. In addition, this project adopts a comparative approach, comparing the jurisprudence of the Irish courts with that of other common law jurisdictions: England, Canada, and Australia. There are two reasons why this approach has been adopted.

First, the law of restitution is an area of Irish law that has been under-developed to date. There are many areas of the law of restitution that have never been explicitly considered by the Irish courts. For example, the Irish courts have never considered the juridical basis of the principle against unjust enrichment, the relationship between the principle against unjust enrichment and the law of restitution, or the manner in which enrichment is to be established as a matter of Irish law. Any Irish cases that have adopted English principles of the law of restitution have done so without analysing if there are alternative approaches to those adopted by the court, or why one judicial approach should be preferred over another. Therefore,

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[8] *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 469 (SC) 483; *Kelly v Cahill* [2001] 1 IR 56 (HC) 62. See also Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2011) 172-173; Birks, *Unjust Enrichment* (2nd edn, OUP, Oxford, 2005) 26 and 186-189.

[9] *Murphy v Attorney General* [1982] IR 241; *O'Rourke v Revenue Commissioners* (Supreme Court, 15 May 1996); *In re Frederick Inns* [1991] ILRM 582 (HC).

comparative analysis is necessary to develop a principled framework within which to fit Irish cases on the law of restitution, and to demonstrate how the law of restitution might or should develop in future.

Second, the law of restitution is an area of law that is particularly suited to comparative analysis, as it has been an area in which there has already been much cross-pollination between jurisdictions. One such instance of this cross-fertilisation is the abolition of the mistake of law rule. When the High Court of Australia held that the mistake of law rule did not form part of Australian law in *David Securities Pty Ltd v Commonwealth Bank of Australia*,[10] it referred the reasoning of the Canadian Supreme Court in *Air Canada v British Columbia*,[11] in which the rule was rejected as a matter of Canadian law. In turn, when the House of Lords came to abolish the rule in *Kleinwort Benson v Lincoln City Council*, it drew on the experience in both Canada and Australia in reaching its conclusions.[12] Any Irish cases that have considered principles of restitution have drawn heavily upon the principles developed in these jurisdictions. In *Dublin Corporation v Building and Allied Trade Union*, the Supreme Court was influenced by the jurisprudence of the High Court of Australia when setting out the principles relevant to restitution for unjust enrichment in Irish law.[13] Similarly, in *Murphy v Attorney General*,[14] Henchy J adopted the test for duress *colore officii* set out by Windeyer J in *Mason v New South Wales*.[15]

However, the focus upon other jurisdictions will vary from Chapter to Chapter. In most Chapters, the primary point of contrast for Irish law will be English law. There are several reasons for this approach. First, as in other areas of law,[16] the Irish courts have drawn heavily upon principles of English law in developing the law of restitution. Keane J's adoption of the *Woolwich* principle in *O'Rourke v Revenue Commissioners* is a clear example of this trend,[17] as is the Irish courts' adoption of remedies such as constructive and resulting

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[10] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 374.
[11] *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC).
[12] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 372-373.
[13] *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 483 *et seq.*
[14] *Murphy v Attorney General* [1982] IR 241 (SC) 316.
[15] *Mason v New South Wales* (1959) 102 CLR 108 (HCA).
[16] Many if not all areas of private law in Ireland draw heavily on English case law and this phenomenon is evident from the most cursory perusal of any leading text book on any area of Irish law. It is particularly true of the law of contract (*McDermott, Contract Law* (Butterworths, Dublin 2001)), tort law (McMahon and Binchy, *Law of Torts* (3rd edn Butterworths, Dublin 2000)) and equity (Delany, *Equity and the Law of Trusts in Ireland* (5th edn Thomson Roundhall, Dublin 2011)).
[17] *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (SC). See Chapter 6 at 192-196.

trusts.[18] Therefore, considerable attention have been directed to the law of restitution from public authorities in England, as compared with the law in Canada or in Australia, because experience has shown[19] that English law is likely to heavily influence the development of restitutionary jurisprudence in Ireland. This influence also extends to legislative enactments and there are close parallels between many of the Irish and English statutes considered in this thesis.[20]

The second reason for the central focus on English law is that Irish and English law are governed by similar external considerations. Both are Contracting Parties to the European Convention on Human Rights (ECHR), and both are Member States of the European Union. Therefore, principles of EU and ECHR law apply equally in both jurisdictions. EU law has had a significant impact on the development of the law of restitution from public authorities in England, affecting areas such as the right to compound interest,[21] the permissible forms of statutory limitation periods,[22] and limitations upon statutory forms of the passing on defence.[23] These considerations make England a natural point of contrast for any comparative analysis of the Irish law of restitution, and of restitution of overpaid tax in particular.

Therefore, consideration of Canadian and Australian authorities will be confined to certain areas. First, these jurisdictions will be relied upon where the courts in all four jurisdictions have defined principles in a very similar manner. For example, Chapter 2 discusses how similar public law considerations underpin the courts' approach to restitution of overpaid tax in all four jurisdictions. Similarly, Chapter 5, when making the case for the abolition of the mistake of law rule in Ireland, describes how the three other jurisdictions have abolished the rule for broadly similar reasons. Canadian and Australian authorities will also provide a useful point of contrast where the law is unsettled, or where each jurisdiction takes a very different approach. In light of the unsettled nature of the tests for enrichment in each jurisdiction, Chapter 3 considers Canadian and Australian tests for enrichment. Similarly, Canada is the only jurisdiction that has adopted a public law ground of restitution,

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[18] See Chapter 9 at 373-378.
[19] *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC); *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC); *Harris v Quigley* [2005] IESC 79, [2006] 1 IR 165.
[20] Compare the Statute of Limitations 1957 (Ireland) with the Limitation Act 1980 (England) or the passing on defences enshrined in section 20(5) of the Value Added Tax Act 1972 (Ireland) with the equivalent defence in section 80(3) of the Value Added Tax Act 1994 (England).
[21] Considered in Chapter 3 at 109-110.
[22] Considered in Chapter 7 at 270-271.
[23] Considered in Chapter 8 at 337-339.

and so Chapter 6 focuses upon Canadian law when considering if Ireland should adopt a public law approach to restitution of overpaid tax. However, where Australian or Canadian law adds little to the discussion of a particular issue, or where Irish law is affected by considerations that have no relevance to Australia and Canada,[24] focus is confined to English and Irish law.

Sources of Law

This thesis considers case-law on restitution from public authorities in Ireland, England, Canada, and Australia. As noted above, English case law is of particular significance in this jurisdiction. However, many recent Irish cases on restitution from the state simply engage in an unthinking and uncritical application of principles derived from English cases without considering whether Irish cases might be relevant to restitutionary analysis. Therefore, this thesis considers early Irish cases that may be analysed in restitutionary terms. It also considers legislative instruments that are seen to affect recovery from public authorities. Many provisions of tax legislation are relevant to claims for restitution of unlawfully exacted taxes, and any consideration of restitution claims against the state would be incomplete if it did not take these provisions into account.

In addition to legislation and case-law, this thesis also considers the impact of Irish constitutional law on restitution from the state. Ireland's constitution provides strong protection for private property rights. This thesis will argue that the unlawful levying of taxes or other charges constitutes an unlawful interference with the property rights of the taxpayers affected, so that restitution from public authorities engages constitutional property rights. Furthermore, property rights in Ireland do not derive their exclusive protection from the Irish Constitution. They are also protected by the ECHR and the Charter of Fundamental Rights of the European Union.[25] The impact of the Constitution on restitution from public authorities will be contrasted with English attempts to incorporate principles of ECHR jurisprudence within the law on restitution from the state.

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[24] For example, where Irish law is likely to be heavily influenced by principles of EU law.

[25] In England the relationship between the law of restitution and Article 1 of the First Protocol to the ECHR has been considered in *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306, [2009] Ch 69; *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816; *R (SRM Global Master Fund LP) v Treasury Commissioner* [2009] EWCA Civ 788, [2009] UKHRR 1219.

Finally, in light of the increasing relevance of European Union law in this area, it is necessary to consider all issues relevant to restitution from the state in light of principles of EU law—particularly the principles of equivalence and effectiveness. These principles have proven to be particularly relevant when defining the parameters of the law of restitution from public authorities in English law, and are directly applicable in Irish law.

Academic Commentary

This thesis will draw heavily on academic commentary, and will do so for several reasons. First, more than any other area of law, the development of the law of restitution has been driven by academic writing. It is significant that, when the House of Lords first formally recognised restitution for unjust enrichment, the leading text on the law of restitution was in its third edition.[26] The courts have drawn heavily on the writings of many commentators in developing a principled structure of the law of restitution. All four of the jurisdictions surveyed in this thesis have been firmly guided by the writings of Professor Birks, and Lord Goff and Professor Jones. In addition, each jurisdiction, with the exception of Ireland, has looked to the writings of commentators within that jurisdiction for guidance in developing restitutionary principles. As a result, development of the law of restitution in England, Canada, and Australia, has been both principled and self-reflective. This unusual, if not unique, relationship between commentary and doctrine has been furthered by the fact that many judges who have been instrumental in developing the law of restitution have also written extensively on the subject.[27] This thesis will therefore highlight the importance of academic writing in the law of restitution in the hope that this focus will demonstrate the existence and utility of this rich resource that can be relied upon by the Irish courts in developing principles of the law of restitution.

However, academic commentary is more useful in certain areas of restitution than in others. There are some areas of the law of restitution where commentators are almost exclusively responsible for the current state of the law. Two such areas are canvassed in this thesis. First, academic writings have played an important role in developing tests for enrichment in the law of restitution, drawing seemingly unrelated cases on restitution into the coherent and principled tests for establishing enrichment that are applied by the courts

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[26] *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 (HL). See Goff and Jones, *The Law of Restitution* (3rd edn Sweet and Maxwell, London 1986).

[27] See, for example, Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 339, 399-400; Beatson, 'The Nature of Waiver of Tort' in Beatson (ed) *The Use and Abuse of Unjust Enrichment* (Oxford 1991) 232.

today.[28] Second, the development of the principle in *Woolwich Equitable Building Society v Inland Revenue Commissioners* [29] was preceded by an extended period in which commentators made the case for the recovery of unlawfully exacted taxes as of right.[30] The considerations raised by those commentators are clearly evident in the speeches of the House of Lords in *Woolwich* and in the leading speech of Lord Goff in particular, who had also written extensively on the subject.

Academic commentaries also take on increased significance for Irish law where there has been considerable divergence in how different jurisdictions have developed a particular aspect of law. Naturally, there are many nuanced differences between all of the jurisdictions canvassed in this thesis,[31] and the Irish courts have not made a principled decision as to which of the different approaches should be followed as a matter of Irish law. In such cases, academic commentaries will highlight principled concerns and practical difficulties that underpin the approaches adopted in different jurisdictions and may, as a result, enable the Irish courts to make informed decisions as to the future path that the law of restitution should follow in Ireland.

Thus, comparative materials and academic commentaries provide invaluable tools in undertaking the task of this thesis. These materials help to illuminate principles of Irish law that would otherwise remain obscured and provide a backdrop against which those principles, once identified can be analysed. It is with this methodological approach in mind that we turn to the development of the law of restitution in Ireland.

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[28] See, for example, Burrows, 'Free Acceptance and the Law of Restitution' (1988) 104 LQR 576; Birks, "In Defence of Free Acceptance" in Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press, Oxford 1991); Virgo, *The Principles of the Law of Restitution* (2nd edn OUP, Oxford 2006) Chapter 4; McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (2003) 48 McGill Law Journal 419, 424; McInnes, 'Incontrovertible Benefits in the Supreme Court of Canada' (1994) 23 Canadian Business Law Journal 122, 123.These and other commentaries are considered in Chapter 3.

[29] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL).

[30] See Birks, 'Restitution from Public Authorities' (1980) Current Legal Problems 191, 194; Collins, 'Restitution from Government Officials' (1984) 29 McGill Law Journal 407, 412; Pannam, 'The Recovery of Unconstitutional Taxes in Australia and the United States', (1964) 42 Texas Law Review 777, 788. See, however, Burrows, 'Public Authorities, Ultra Vires and Restitution', in Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press, Oxford 1991) 40; Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' in Finn (ed) *Essays on Restitution* (Law Book Co, Sydney 1990) 194-195. This issue is considered in greater detail in Chapter 2 and in Chapter 6.

[31] In particular, many features of Canadian law differ greatly from the law in England or in Australia. The Canadian courts have held that restitution of overpaid tax is governed by a public law ground of restitution, rather than by traditional unjust factors. This issue is discussed in Chapter 6 at 234-241. Other points of contrast in which Canada differs is the civilian absence of basis approach adopted in that jurisdiction (discussed in Chapter 2) and the Canadian requirement of correspondence between the plaintiff's loss and the defendant's gain (discussed in Chapter 4).

Chapter 2: An Introduction to the Law of Restitution in Ireland and the Principles Underpinning Restitution from Public Authorities.

This thesis is primarily concerned with restitution from public authorities in Ireland. However, before it is possible to consider the principles specific to restitution from public authorities, it is first necessary to understand how the principle against unjust enrichment and the law of restitution have developed in Irish law. Part I of this Chapter is a general introduction to the law of restitution in Ireland and elsewhere. It conducts a comparative overview of the law of restitution and the principle against unjust enrichment in Canada, Australia and England. This comparative analysis establishes a framework within which Irish cases that touch upon the law of restitution can be evaluated. Part I demonstrates that the Irish law of restitution, although poorly developed, has assimilated many of the principles explicitly expounded in other common law jurisdictions.

Part II explains why restitution from public authorities is different from restitution from private individuals. It considers how principles general to the law of restitution—as well as principles deriving from the EU law, human rights law and the Irish constitution—require that public authorities are treated differently in certain restitution claims. Principles relevant to claims to restitution from public authorities, and the policy considerations that underpin them, are broadly similar in England, Canada, and Australia. Furthermore, many of these principles have been adopted as a matter of Irish law. Part II argues that these principles are also supported by express provisions of Irish constitutional law.

I. General Introduction to the Law of Restitution

The law of restitution describes a set of remedies[1] that

[1] Virgo, *Principles of the Law of Restitution* (2nd edn OUP, Oxford 2006) 3.

> involves removing from the defendant some accretion to his wealth which, in the eyes of the law, he should not be entitled to retain or making the defendant pay for some non-money benefit on the basis that it be wrong to allow him to retain it for nothing.[2]

Restitution is not concerned with compensating the plaintiff for losses, but instead looks to the defendant's gain,[3] as it seeks to return enrichments unjustly obtained. In *Sempra Metals Ltd v Inland Revenue Commissioners*, Lord Hope held that 'the remedy of restitution differs from that of damages. It is the gain that needs to be measured, not the loss to the claimant. The gain needs to be reversed if the claimant is to make good his remedy'.[4]

The law of restitution is generally considered to be founded on a philosophy of corrective justice.[5] In *Kingstreet,* Bastarache J described this function as follows:

> When a transfer of value between two parties is normatively defective, restitution functions to correct that transfer by restoring parties to their pre-transfer positions.[6]

The corrective justice principle normally applies in relationships between two individuals. In contrast, the relationship between the individual and the state is also heavily influenced by

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[2] *Criminal Assets Bureau v JWPL* [2007] IEHC 177 [3.2].

[3] *Ibid* [3.1]. See also *Haugesund Kommune & Anor v Depfa ACS Bank & Anor* [2010] EWHC 227 (Comm) [18]; *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [47]; *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 71; Birks, 'Misnomer' in Cornish, Nolan, O'Sullivan and Virgo (eds) *Restitution: Past, Present and Future* (Hart, Oxford 1998) 10.

[4] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 [28]. Hereafter *Sempra.* See also *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2010] EWCA Civ 103, [2010] STC 1251 [179]. However, Sedley LJ has suggested that the law of restitution is also concerned with the equitable distribution of losses or 'a means of distributing loss among parties whose rights are not met by some stronger doctrine of law': *Niru Battery Manufacturing Co v Milestone Trading Ltd (No1)* [2003] EWCA Civ 1446 [192]. See also *Boake Allen Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25, [2006] STC 606 [98].

[5] *Peel (Regional Municipality) v Canada* [1992] 3 SCR 762, (1993) 98 DLR (4th) 140 (SCC) [61]. See also McInnes, 'The Measure of Restitution' (2002) 52 University of Toronto Law Journal 163, 186-188; Grantham and Rickett, 'Disgorgement for Unjust Enrichment?' (2003) 62 CLJ 159, 159-160; Burrows, 'Contract, Tort and Restitution—A Satisfactory Division or Not?' (1983) 99 LQR 217, 256; Virgo, *Principles of the Law of Restitution* (n1) 5; Barker, 'Understanding the Unjust Enrichment Principle in Private Law' in Neyers, McInnes, and Pitel (eds), *Understanding Unjust Enrichment* (Hart, Oregon 2004) 97-10. See also Weinrib, 'Correctively Unjust Enrichment' in Chambers, Mitchell, and Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, Oxford 2009); Smith, 'Restitution: The Heart of Corrective Justice' (2001) 79 Texas Law Review 2115. However, this view is not universally accepted: McInnes, 'Resisting Temptations to "Justice"' in Chambers, Mitchell, and Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, Oxford 2009) 112; Klimchuk, 'Unjust Enrichment and Corrective Justice' in Neyers, McInnes, and Pitel (eds), *Understanding Unjust Enrichment* (Hart, Oregon 2004); Klimchuk, 'The Normative Foundations of Unjust Enrichment' in Chambers, Mitchell, and Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, Oxford 2009); Dagan, *The Law and Ethics of Restitution* (CUP, Cambridge 2004).

[6] *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [32].

principles of distributive justice.[7] Thus, corrective justice cannot provide the sole and exclusive basis for restitution from public authorities. In turn, this conclusion raises the question as to whether corrective justice principles can provide a complete philosophical basis for the law of restitution in general.[8] However, a further possibility is that, *if* the law of restitution is wholly and exclusively founded on a principle of corrective justice, this would lend weight to arguments that restitution from public authorities is a unique species of restitution that is unrelated to restitution for unjust enrichment, as suggested by Bastarache J in *Kingstreet Investments*.[9] The ramifications of the *Kingstreet* decision are discussed in Chapter 6.

Currently the law recognises two categories of restitution: restitution for unjust enrichment and restitution for wrongs.[10] Restitution for unjust enrichment is a principle of strict liability; it 'applies to cases where the person who received the benefit may have done no wrong'.[11] In contrast, restitution for wrongs is a remedial, restitutionary response that does not respond to unjust enrichment, but instead is founded on the defendant's wrong.[12] Section A considers the development of the principle against unjust enrichment in Canada, Australia, England, and Ireland. Having traced the development of the principle against unjust enrichment, Section B considers its parameters and its role in the law of restitution.

A. Development of the Principle against Unjust Enrichment

The law of restitution for unjust enrichment is founded on the principle against unjust enrichment. It traces its origins to the case of *Moses v McFerlan*, where Lord Mansfield held:

> If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ("*quasi ex contractu*," as the Roman law expresses it)... In

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[7] For a consideration of this issue in Irish law, see *O'Reilly v Limerick Corporation* [1989] ILRM 181 (HC) 193-194; *Sinnott v Minister for Education* [2001] 2 IR 545 (SC) 699-702 (Hardiman J); *TD v Minister for Education* [2001] 4 IR 259, 305 (Denham J) and 359-361 (Hardiman J).

[8] See also, Virgo, *Principles of the Law of Restitution* (n 1) 6.

[9] *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [32]-[35]. This issue is discussed further in Chapter 6 at 234-241.

[10] These categories are discussed further below.

[11] *Criminal Assets Bureau v JWPL* [2007] IEHC 177 [3.1]. See also *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) 560; *Banque Financiere de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 227 (Lord Steyn) and 243 (Lord Hutton) (Hereafter '*BFC*'); McInnes, 'Resisting Temptations to "Justice"' (n 5) 103.

[12] See further, Section B of this Chapter, Chapter 4 at 115-117, and Chapter 9 at 365-369. See also, Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2011) 9-12.

> one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.[13]

This decision was approved in Ireland in *Rochfort v Earl of Belvidere.*[14] However, the courts remained hostile to the principle against unjust enrichment. Judges were wary of the 'vague brocards of "unjust benefit," or "restitution," or "quasi-contract"',[15] and were reluctant to administer what they considered to be 'that vague jurisprudence which is sometimes attractively styled "justice as between man and man."'[16] The law of restitution, insofar as any law existed at the time, consisted of disparate causes of action founded on the common law *indebitatus assumpsit* writ. As noted by McLachlin J, in *Peel (Regional Municipality) v Canada*:

> Of these common counts, four have come to form the basis of the vast majority of common law actions in quasi-contract: (i) money had and received to the plaintiff's use, where money is paid directly to the defendant; (ii) money paid to the defendant's use, where money is paid, not to the defendant but to a third party for the defendant's benefit; (iii) *quantum meruit*; and (iv) *quantum valebat*, where services or goods, respectively, are bestowed by the plaintiff upon the defendant.[17]

Insofar as these restitutionary claims were considered to hang on a unifying principle, they were considered to be founded on an implied contract theory.[18] This theory drew on Lord Mansfield's observation in *Moses v Macferlan* that the obligation of the defendant to return the enrichment to the defendant arose 'as it were upon a contract ("*quasi ex contractu*," as the Roman law expresses it)'.[19] In *Sinclair v Brougham,* Viscount Haldane held that, when the law 'speaks of actions arising *quasi ex contractu* it refers merely to a class of action in

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[13] *Moses v Macferlan* (1760) 2 Burrow 1005, 1009 and 1012.
[14] *Rochfort v Earl of Belvidere* (1770) Wall L 45.
[15] *Attorney General v Ryan's Car Hire Ltd* [1965] IR 642 (SC) 664.
[16] See also *Holt v Markham* [1923] 1 KB 504 (CA) 513.
[17] *Peel (Regional Municipality) v Canada* [1992] 3 SCR 762, (1993) 98 DLR (4th) 140 (SCC) [28] quoting from Maddaugh and McCamus, *The Law of Restitution* (Canada Law Book, Aurora 1990) 5. The *indebitatus assumpsit* and its associated counts were abolished by the Common Law Procedure Act 1852 and the Judicature Acts, 1873 and 1875.On the historical development of the law of restitution, see generally, Baker, 'The History of Quasi-Contract in English Law' in Cornish, Nolan, O'Sullivan and Virgo (eds) *Restitution: Past, Present and Future* (Hart, Oxford 1998); Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, Oxford 2001) Chapter 14.
[18] The development of the implied contract theory is discussed in *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 (HCA) 356 (Mason CJ); *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (HCA) 232 (Brennan J).
[19] *Moses v Macferlan* (1760) 2 Burrow 1005, 1009 and 1012.

theory based on a contract which is imputed to the defendant by a fiction of law.'[20] However, the implied contract theory was unsatisfactory for several reasons. First, the theory was ill-founded as a matter of precedent. In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, Lord Wright noted that Lord Mansfield in *Moses v Macferlan* did not endorse the implied contract theory:

> Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort. This statement of Lord Mansfield has been the basis of the modern law of quasi-contract, notwithstanding the criticisms which have been launched against it.[21]

Second, the implied contract theory, and the 'quasi-contractual' label given to restitutionary relief, was 'hopelessly misinforming'.[22] Basing restitutionary relief on an implied agreement to repay was fictitious,[23] and failed to provide a principled or rational explanation why the law recognised an obligation to repay in certain cases. As Henchy J noted in *East Cork Foods Limited v O'Dwyer Steel Company Limited*, the implied contract theory was nothing more than a 'pleader's stratagem':

> So long as the forms of action governed the course of litigation, it was necessary for the Courts to go along with this transparent fiction. Nowadays, however, when the forms of action have long since been buried, the concept of implied contract is an unreal and outdated rationale for the action for money had and received.[24]

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[20] *Sinclair v Brougham* [1914] 1 AC 398 (HL) 415. See also *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL) 28 (Lord Atkin):

> The law, in order to do justice, imputed to the wrongdoer a promise which alone as forms of action then existed could give the injured person a reasonable remedy.

[21] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 (HL) 62. Hereafter *Fibrosa*. See also *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (CA) 137 (Butler-Sloss LJ).

[22] Birks, 'Misnomer' (n 3) 1.

[23] Langbein has noted: 'To put the matter bluntly, the law of restitution in its earliest guise was a pack of lies. And so it remained into the early decades of the twentieth century': Langbein, 'The Later History of Restitution' in Cornish, Nolan, O'Sullivan and Virgo (eds) *Restitution: Past, Present and Future* (Hart, Oxford 1998) 57. See also, Baker, 'The History of Quasi-Contract in English Law' (n 17) 40-42.

[24] *East Cork Foods Limited v O'Dwyer Steel Company Limited* [1978] 1 IR 103 (SC) 110-111. See also *Coleman v Mullen* [2011] IEHC 179 [10].

Third, one consequence of the implied contract theory was that it limited the scope of restitutionary relief, as, 'facts that could not support actual contractual relief were believed to be similarly incapable of supporting quasi-contractual relief.'[25] The most notorious example of this was *Sinclair v Brougham,* in which the House of Lords refused to allow relief on the basis of a quasi-contract because such a contract, if entered into by the Birkbeck Permanent Benefit Building Society, would have been ultra vires the society.[26]

In light of these shortcomings, the implied contract theory has been judicially rejected as the basis for restitution in favour of the principle against unjust enrichment. In *Pavey & Matthews Pty Ltd v Paul,* the High Court of Australia acknowledged that a *quantum meruit* claim

> rests, not on implied contract, but on a claim to restitution or one based on unjust enrichment, arising from the respondent's acceptance of the benefits accruing to the respondent from the appellant's performance of the unenforceable oral contract.[27]

Similarly, in *East Cork Foods,* Henchy J held that

> it would be an affront to truth and reality to say that the basis of [the action for money had and received] is an implied promise to repay the money. The real reason why the Courts would uphold the claim is because it would be unjust and inequitable to allow the first defendant to keep the money. To refuse the claim would mean that the first defendant would be unjustly enriched.[28]

However, the recent Irish case of *Coleman v Mullen*[29] demonstrates a worrying tendency to revert to the language of implied contract theory. The plaintiff, Mrs Coleman, advanced a *quantum meruit* claim against the estate of the deceased, Mrs O'Keeffe, in respect of the various services that she had supplied to Mrs O'Keeffe during her lifetime. The plaintiff gave evidence that she would have provided the services even if the deceased had told her that she would make no provision for her in her will. Hogan J held that the plaintiff

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[25] McInnes, 'The Perfect Quadration Thesis' [1999] RLR 118, 118.
[26] *Sinclair v Brougham* [1914] 1 AC 398 (HL) 417 (Viscount Haldane), 433-434 (Lord Dunedin), 452 (Lord Sumner).
[27] *Pavey* (1987) 162 CLR 221 (HCA) 228 (Mason and Wilson JJ), 254 (Deane J). See also *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 (HCA) 473; *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2002) 208 CLR 516 [63] (Gummow J).
[28] *East Cork Foods* [1978] 1 IR 103 (SC) 110-111. See also *Re PMPA Garages (Longmile)* [1992] IR 332 (HC) 338-339.
[29] *Coleman v Mullen* [2011] IEHC 179.

was not entitled to recover in respect of the services that she provided. He reached this conclusion on the basis that the parties did not intend to enter into a legal relationship:

> There are, of course, instances of where the existence of a contract may nonetheless be found, even in family cases... Yet in this regard there would have to be clear evidence of an intention to create legal relations. I am perfectly satisfied, having heard the clear and frank evidence of Ms Coleman that, in the present case there was no such intention. ...
>
> If, therefore, there was no intention to create legal relations, should, then, the law impose such an obligation? I do not think that the courts can—or should—take this step. If the law is to be changed such as to enable voluntary carers of family and neighbours to make *quantum meruit* claims of this kind quite independently of any intention to create legal relationships, this would represent a potentially far-reaching legal change which could not be described as being some incremental and perfectly logical deduction from the existing corpus of case-law in this area. A change of this kind would be a matter for the Oireachtas. [30]

He concluded that 'in the absence of any intention to create legal relations, the plaintiff is not entitled to maintain her claim for *quantum meruit* against the estate of Ms O'Keeffe.'[31]

Hogan J recognised the fictitious nature of the implied contract theory. However, his analysis—by requiring that the plaintiff intended to create legal relations in order to recover on a *quantum meruit* basis—is unfortunate, as it suggests a return to the implied contract fiction. If a *quantum meruit* claim is supported by an unjust enrichment analysis, it is irrelevant whether the parties intended to enter into a legal relationship. Furthermore, imposing liability to repay in the absence of an intention to create legal relations is not the 'potentially far-reaching claim' that Hogan J considered it to be. The principle against unjust enrichment cannot operate where the relationship of the parties is governed by an existing contract, as the law of restitution will not subvert contractual allocations of risk.[32] Therefore, a *quantum meruit* claim to reverse unjust enrichment could not have existed if a contract existed between the parties.

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[30] *Ibid*, [17]-[18].
[31] *Ibid*, [20].
[32] *Pan Ocean Shipping Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161 (HL) 164.

However, Hogan J reached the right conclusions, albeit for the wrong reasons. Mrs Coleman's claim would have failed if an unjust enrichment analysis had been properly applied. Mrs Coleman had admitted that, even if Mrs O'Keeffe had told her that she would not receive anything in her will, Mrs Coleman would have continued to provide assistance to Mrs O'Keeffe. Thus, her *quantum meruit* claim would have failed because she could not point to any reason, or unjust factor, why the benefit received by Mrs O'Keeffe was unjust. Her intention to benefit Mrs O'Keeffe was not qualified or vitiated.[33] This analysis is consistent with established restitutionary principles and avoids recourse to implied contract analysis.

Although the unjust enrichment principle had been accepted in Ireland,[34] Canada,[35] and Australia,[36] the English courts were slow to formally adopt it. In *Fibrosa*, Lord Wright held:

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep.[37]

However, in spite of this early judicial recognition of the principle against unjust enrichment, English courts remained sceptical of the principle. As late as 1978, Lord Diplock denied the existence of a general doctrine of unjust enrichment in English law, holding that the law simply provided 'specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon the civil law.'[38] It was not until the decision of the House of Lords in *Lipkin Gorman v Karpnale* that the English courts formally recognised that restitutionary causes of action were founded upon the principle against unjust enrichment.[39] However, although considerable dissatisfaction had been expressed judicially

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[33] See below at 24.
[34] *East Cork Foods* [1978] 1 IR 103 (SC) 110-111.
[35] *Rathwell v Rathwell* [1978] 2 SCR 436 (SCC) 455; *Pettkus v Becker* [1980] 2 SCR 834, 117 DLR (3d) 257 (SCC) [38].
[36] *Pavey* (1987) 162 CLR 221 (HCA) 228 (Mason and Wilson JJ), 254 (Deane J); *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 (HCA) 473.
[37] *Fibrosa* [1943] AC 32 (HL) 61. However, Hedley has argued that this decision provides 'rather weak support' for the principle against unjust enrichment: Hedley, *A Critical Introduction to Restitution* (Butterworths, London 2001) 16.
[38] *Orakpo v Manson Investments Ltd* [1978] AC 95 (HL) 104.
[39] *Lipkin Gorman* [1991] 2 AC 548 (HL) 558 (Lord Bridge), 559 (Lord Templeman), 572 and 578 (Lord Goff).

in relation to the fictitious nature of the implied contract theory, [40] the issue was not addressed directly in *Lipkin Gorman*. It was not until the decision of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* that *Sinclair v Brougham* was overruled on this point and the 'implied contract' theory was 'unequivocally and finally' rejected.[41]

B. Parameters of the Principle against Unjust Enrichment

The role of the principle against unjust enrichment has been best explained by Deane J in *Pavey*, where he held that the principle

> constitutes a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a 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 processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case.[42]

Restitution for unjust enrichment 'exists as a distinctive legal concept, separate from both contract and tort'[43] and has been recognised as the third category of the law of obligations. [44] However, the unjust enrichment principle 'is not a principle which in itself defines liability.'[45] Nor does it confer a general discretion on the courts to 'determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or

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[40] See, for example, *United Australia* [1941] AC 1 (HL) 27-28 (Lord Atkin); *Fibrosa* [1943] AC 32 (HL) 69-70 (Lord Wright); *Kiriri Cotton Co Ltd v Dewani* [1960] 1 AC 192 (PC) 204-205.

[41] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 710. See also *Haugesund Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [2010] 1 CLC 770 [73]-[74]; *Cleveland Bridge UK Ltd v Multiplex Constructions (UK) Ltd* [2010] EWCA Civ 139 [118]-[121].

[42] *Pavey* (1987) 162 CLR 221 (HCA) 256-257. See also *Peel* [1992] 3 SCR 762, (1993) 98 DLR (4th) 140 (SCC) [20]; *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 483 (hereafter referred to in the text as 'the *Bricklayers Hall* case'); *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 386; Barker, 'Understanding the Unjust Enrichment Principle in Private Law' (n 5) 81. See also, Goff and Jones, *The Law of Restitution* (7th edn Sweet and Maxwell, London 2007) 13. Footnotes omitted.

[43] *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 483.

[44] *Fibrosa* [1943] AC 32 (HL) 61; *BFC* [1999] 1 AC 221 (HL) 227. See also Burrows, 'Contract, Tort and Restitution—A Satisfactory Division or Not?' (n 5); Birks, 'The Independence of Restitutionary Causes of Action' (1990) University of Queensland Law Journal 1, 1.

[45] *Hookway v Racing Victoria Ltd* [2005] VSCA 310 [19].

unconscionable.'[46] Instead, the law of restitution has developed four conditions that a plaintiff must satisfy in order to obtain restitution. He must show that:

1. The defendant obtained an enrichment.

2. The enrichment was obtained at the expense of the plaintiff.

3. The enrichment was unjust, insofar as it was obtained in circumstances in which the law recognises an obligation to make restitution.

4. There is no reason why the plaintiff should be denied restitution (the defendant cannot rely on any defences).

Once these conditions are satisfied, the plaintiff is entitled to restitution as of right. His entitlement to a remedy is not at the court's discretion. This approach has been adopted in England[47] and Australia.[48] In *Dublin Corporation v Building and Allied Trade Union*, Keane J's analysis of restitution for unjust enrichment principle in Irish law reflects the English and Australian approach to restitution:

> The authorities also demonstrate that, while there is seldom any problem in ascertaining whether two essential preconditions for the application of the doctrine have been met—ie an enrichment of the defendant at the expense of the plaintiff—considerably more difficulty has been experienced in determining when the enrichment should be regarded as "unjust" and whether there are any reasons why, even where it can be regarded as "unjust", restitution should nevertheless be denied to the plaintiff.[49]

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[46] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 379; *Pavey* (1987) 162 CLR 221 (HCA) 256; *Lipkin Gorman* [1991] 2 AC 548 (HL) 560 (Lord Goff). See also *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 387 (Evans LJ). Compare, *Brook's Wharf & Bull Wharf Ltd v Goodman Bros* [1937] 1 KB 534 (CA) 544, where Lord Wright MR held that the obligation 'is imposed by the Court simply under the circumstances of the case and on what the Court decides is just and reasonable, having regard to the relationship of the parties.'

[47] *BFC* [1999] 1 AC 221 (HL) 227. See also *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47; [2004] 1 WLR 2775 [22]; *R (Rowe) v Vale of White Horse DC* [2003] EWHC 388 (Admin) [11]; *Portman Building Society v Hamlyn Taylor Neck (a firm)* [1998] 4 All ER 202 (CA) 206. See also Edelman, 'Limitation Periods and the Theory of Unjust Enrichment' (2005) MLR 847, 855.

[48] *Hollis v Atherton Shire Council* [2003] QSC 147 [9]; *Spangaro v Corporate Investment Australia Funds Management Ltd* [2003] FCA 1025, 54 ATR 241 [48]. The Canadian courts have taken a different approach to restitution for unjust enrichment, which is discussed in Section C.

[49] *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 483. See also *Criminal Assets Bureau v JWPL* [2007] IEHC 177 [3.3].

The third limb of the enquiry, the requirement that the enrichment is unjust, is not based on a broad, subjective, conception of injustice; it manifests itself through specific causes of action, or 'unjust factors'. [50] In the *Bricklayers Hall*, Keane J noted that

> [T]he law, as it has developed, has avoided the dangers of "palm tree justice" by identifying whether the case belongs in a specific category which justifies so describing the enrichment: 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.[51]

Many unjust factors turn on the vitiation of the plaintiff's intention to confer a benefit on the defendant. [52] As Ormiston JA noted in *Hookway v Racing Victoria Ltd,* the presence of an unjust factor means that the payment

> may be characterised, ... as involuntary in that the payer's will is defeated or qualified by events or circumstances such as extortion, compulsion, undue influence, unconscionable conduct and mistake of fact or law which might, at least in broad terms, be said to deny, at least to some significant extent, the exercise of free will by the payer.[53]

Traditional unjust factors reflecting this approach will be considered further in Chapter 5. However, two final observations should be made in relation to this issue. First, focus on intention is specific to unjust factors and is confined to restitution for unjust enrichment.

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[50] *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) [13]; *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [21] (Lord Hope) (hereafter *DMG*); *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656 (Comm), [2010] 1 Lloyd's Rep 631 [62]-[65].

[51] *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 484. See also *Peel* [1992] 3 SCR 762, (1993) 98 DLR (4th) 140 (SCC) [57]:

> The courts' concern to strike an appropriate balance between predictability in the law and justice in the individual case has led them in this area, as in others, to choose a middle course between the extremes of inflexible rules and case by case "palm tree" justice. The middle course consists in adhering to legal principles, but recognizing that those principles must be sufficiently flexible to permit recovery where justice so requires having regard to the reasonable expectations of the parties in all the circumstances of the case as well as to public policy.

However, recent Canadian cases have taken a step back from this approach, noting that restitution 'is an equitable remedy that will necessarily involve discretion and questions of fairness': *Garland v Consumers' Gas Co* [2004] 1 SCR 629 [44]; *Pacific National Investments Ltd v Victoria (City)* [2004] SCC 75, 245 DLR (4th) 211 [13].

[52] Burrows 'Understanding the Law of Restitution' in Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Hart, Oxford 1998) 55.

[53] *Hookway v Racing Victoria Ltd* [2005] VSCA 310 [23]. See also *BFC* [1991] 1 AC 221 (HL) 234 (Lord Hoffmann); *DMG* [2006] UKHL 49, [2007] 1 AC 558 [59] (Lord Hope).

Where the plaintiff seeks restitution for wrongdoing,[54] there is no need to identify an unjust factor or to satisfy the four principled enquiries. In such instances, the law of restitution is responding to the defendant's wrong, rather than the unjust enrichment of the defendant at the plaintiff's expense. Second, where the case is one of restitution from public authorities, the claimant is not confined to the traditional, intention-oriented, unjust factors[55] but can rely on additional, policy motivated unjust factors, such as the principle in *Woolwich Equitable Building Society v IRC*.[56]

C. A Civilian Approach: Absence of Basis

In contrast to the approach adopted in Australia, Ireland, and England, Canadian law, drawing on its mixed common law and civil law tradition, focused on an 'absence of juristic reason' rather than upon the presence of unjust factors. This draws on the civilian approach to restitution, which focuses on an absence of legal basis to justify the transfer. Canadian law recognises three requirements for a cause of action in restitution. A plaintiff must demonstrate 'an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment.'[57] The Canadian courts, instead of requiring that the enrichment was received at the expense of the plaintiff, require that the plaintiff sustain a loss corresponding to the defendant's gain. [58]

Until very recently, the Canadian courts generally interpreted 'absence of juristic reason' in terms of unjust factors.[59] Thus, a plaintiff seeking restitution could establish that there was no juristic reason for a payment that was made as a result of mistake,[60] duress,[61] or for a failure of consideration.[62] In *Garland v Consumers' Gas Co*, the Supreme Court of Canada reinterpreted 'absence of juristic reasons' to align it with a civilian approach to unjust

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[54] A possible example in the public authority context would be where the defendant has breached a statutory duty owed to the plaintiff. Discussed in Chapter 9.
[55] Discussed in Chapter 5.
[56] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 ('the *Woolwich* principle'). This principle is discussed further in Chapter 6.
[57] *Rathwell* [1978] 2 SCR 436 (SCC) 455; *Pettkus* [1980] 2 SCR 834, 117 DLR (3d) 257 (SCC) [38]. See also *Peel* [1992] 3 SCR 762, (1993) 98 DLR (4th) 140 (SCC) [21]; *Peter v Beblow* [1993] 1 SCR 980, 101 DLR (4th) 621 (SCC) [3]; *Kerr v Baranow* [2011] SCC 10, 328 DLR (4th) 577 [32]; Smith, 'The Province of the Law of Restitution' (1992) 71 Canadian Bar Review 672, 675.
[58] This is discussed further in Chapter 4.
[59] See Hunt, 'The Decline of Juristic Reasons? Unjust Enrichment and the Supreme Court of Canada' (2010) 43 University of British Columbia Law Rev 173, 179.
[60] *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) (SCC) 161.
[61] *Eadie v Township of Brantford* [1967] SCR 573, 63 DLR (2d) 561 (SCC).
[62] *Kiss v Palachik* [1983] 1 SCR 623, 146 DLR (3d) 385 (SCC) [16]-[21].

enrichment. [63] Iaccobucci J developed a two stage analysis for establishing an absence of juristic reason. First, the defendant may justify retention of the enrichment by pointing to a juristic reason. Categories of juristic reason include, but are not limited to: [64] contracts, dispositions of law, donative intent, and other valid common law, equitable, or statutory obligations. In *Garland,* Iaccobucci J specifically held that, while valid legislation constituted a valid juristic reason,[65] invalid legislation[66] or 'constitutionally inoperative measures'[67] did not.

Second, the courts will consider whether there is any reason to deny recovery, notwithstanding the *prima facie* absence of a juristic reason. This inquiry is independent of any defences available to the defendant. Thus, a defendant may be able to defeat a claim for restitution on the basis of a recognised defence where he has failed on the second limb of the absence of juristic reason enquiry. The court will have regard to the reasonable expectations of the parties and public policy considerations. In *Garland,* the defendant was entitled to rely on inoperative provisions where it was not aware of their invalidity, so that the right to recovery arose only when it was no longer reasonable for it to rely on their validity.[68] In *Kingstreet Investments Ltd v New Brunswick (Department of Finance),* Bastarache J held that policy considerations to be considered under the second limb of the *Garland* test were confined to those that

> have traditionally informed the development of restitutionary law. Otherwise, they risk turning the test into a subjective analysis that has less to do with legal reasoning than with the dispensing of "palm tree" justice.[69]

Although the Canadian Supreme Court has repeatedly affirmed the *Garland* test,[70] courts have struggled to adapt to the conceptual shift that has ensued. For example, in *Pacific*

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[63] *Garland* [2004] SCC 25, 237 DLR (4th) 385 [44]-[46]. See also *Pacific National Investments* [2004] SCC 75, 245 DLR (4th) 211 [23]-[27]; *Kingstreet* [2007] SCC 1, (2007) 276 DLR (4th) 342, [2007] 1 SCR 3 [36]. See *Wilson v Fotsch* [2010] BCCA 226, 319 DLR (4th) 26 [11] for an outline of the new Canadian structure of the law of restitution.

[64] *Kerr* [2011] SCC 10, 328 DLR (4th) 577 [41].

[65] See also *Reference re Excise Tax Act (Canada)* [1992] 2 SCR 445, 94 DLR (4th) 51 (SCC) [49].

[66] *Garland* [2004] SCC 25, 237 DLR (4th) 385 [48]-[49]. See also *Kerr* [2011] SCC 10, 328 DLR (4th) 577 [41].

[67] *Ibid,* [53].

[68] *Ibid* [60]. However, the state will not be permitted to rely on public policy considerations to defeat a claim where this will allow the state to obtain an unjust enrichment by frustrating the legitimate expectations of another party. Compare *Pacific National Investments* [2004] SCC 75, 245 DLR (4th) 211 [53] and [57].

[69] *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [38].

[70] *Kerr* [2011] SCC 10, 328 DLR (4th) 577 [40]-[45]; *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342; *Pacific National Investments* [2004] SCC 75, 245 DLR (4th) 211.

National Investments Ltd v Victoria (City), the plaintiff developer had provided various municipal benefits pursuant to an ultra vires transaction. The Supreme Court allowed recovery, but held:

> The finding of common mistake is important to the appellant's claim to recover the cost of the extra works and improvements. If there had been just the *ultra vires* transaction without the added element of common mistake, it would have been a different case and the outcome would not necessarily be the same.[71]

It is not clear why the plaintiff's mistake was relevant if the strict absence of juristic reasons approach developed in *Garland* is followed. If the contract was ultra vires the local authority, it was void. If the contract was void, there was no juristic reason for the enrichment and so, on the basis of *Garland,* restitution should follow. Subsequently, in *Kingstreet*, Bastarache J held that the civilian model for unjust enrichment claims was inappropriate in claims for restitution of overpaid tax, even though an absence of basis approach appears to be particularly well suited for the accommodation of claims for restitution of unlawfully exacted taxes.[72] In *BMP Global Distribution Inc v Bank of Nova Scotia*, Deschamps J, giving judgment for the Supreme Court, applied the traditional test for mistake set out in *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd,*[73] without referring to the absence of basis approach.[74] Deschamps J's reference to the 'application of the well-established doctrine of mistake'[75] seems incongruous given that, if *Garland* was correctly decided, that doctrine has been superseded by an absence of juristic reasons analysis. More recently, in *Kerr v Baranow*, Cromwell J stated that retained traditional unjust factors, such as 'benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the defendant's request', continued to constitute categories in which the courts recognised that there was no juristic reason for the enrichment.[76] This reconciliation of the relationship between juristic reasons and unjust factors is undesirable. The onus is on the defendant to establish a juristic reason for the enrichment, whereas, traditionally, the plaintiff had to establish the existence of an unjust factor. To recognise both

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[71] *Pacific National Investments* [2004] SCC 75, 245 DLR (4th) 211 [31].
[72] Smith, 'Public Justice and Private Justice: Restitution after *Kingstreet*' (2008) 46 Canadian Business Law Journal 11, 20. See also McInnes, 'Restitution for Ultra Vires Taxes' (2007) 123 LQR 365, 367; Hunt, 'The Decline of Juristic Reasons? Unjust Enrichment and the Supreme Court of Canada (n 59) 187. Discussed below in Chapter 6.
[73] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QBD).
[74] *BMP Global Distribution Inc v Bank of Nova Scotia* [2009] SCC 15, 304 DLR (4th) 292 [22]-[25].
[75] *Ibid,* [93].
[76] *Kerr* [2011] SCC 10, 328 DLR (4th) 577 [31]-[32].

as bases for restitution would bifurcate the burden of proof in unjust enrichment claims. Commenting on the confused state of the Supreme Court's jurisprudence, Hunt has observed that, at the root of the conceptual confusion lies the Supreme Court's unwillingness to discard unjust factors as an analytical tool:

> *Garland* has thus created a framework in which the traditional approach is embedded in the juristic reasons analysis, thereby sowing the seeds of doctrinal confusion. The post-*Garland* jurisprudence has borne this out: as judges charge ahead with the civilian orientation they continue to look backwards to derive explanatory power from the traditional approach.'[77]

Hunt considers that unjust factors continue to have a role in the Canadian law of restitution because 'absence of a juristic reason does not ... explain *why* the basis fails; for this we need to consider the traditional unjust factors.'[78]

A civilian approach has also been advocated by Professor Birks,[79] who argued that traditional, consent-oriented, unjust factors did not adequately explain the outcome of many cases involving restitution of ultra vires payments. The true basis on which restitution was awarded in such cases was because there was no legal basis for the payments: 'the ...money had been paid to discharge a contractual obligation and that obligation did not exist.'[80] Birks considered that the traditional unjust factors could be relied upon, in addition to other bases of invalidity, to demonstrate that the payment had been made without basis, which in turn demonstrated that the enrichment was unjust.[81] To date, neither commentators[82] nor the judiciary have followed Birks's change in direction,[83] although in *Deutsche Morgan Grenfell,* Lord Walker held that he welcomed 'any tendency of the English law of unjust enrichment to align itself more closely with Scottish law, and so to civilian roots.'[84]

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[77] Hunt, 'The Decline of Juristic Reasons? Unjust Enrichment and the Supreme Court of Canada' (n 59) 182.
[78] *Ibid,* 181.
[79] See generally, Birks, *Unjust Enrichment* (2nd edn OUP, Oxford 2005) Chapter 5.
[80] *Ibid,* 113. Edelman has suggested that 'support for the existence of the civilian theory in English law might also be seen in from the leading case in which the law of unjust enrichment was explicitly recognised and the implied contract fiction wholly banished: *Lipkin Gorman v Karpnale Ltd':* Edelman, 'Limitation Periods and the Theory of Unjust Enrichment' (2005) MLR 847, 855.
[81] Birks, *Unjust Enrichment* (n 79) 116.
[82] Burrows, Barker, Mitchell, Worthington, Stevens, Krebs, Virgo, Swadling, McMeel, Tettenborn, 'The New Birksian Approach to Unjust Enrichment' [2004] RLR 260; Häcker, 'Still at the Crossroads' (2007) 123 LQR 177, 182; Webb, 'What is Unjust Enrichment?' (2009) 29 Oxford Journal of Legal Studies 215; Williams, *Unjust Enrichment and Public Law* (Hart Publishing, Oxford 2010) 192-200.
[83] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [21]-[22] (Lord Hoffmann).
[84] *Ibid* [154]-[158].

There has been no consideration of a civilian approach in Irish law. However, in *Harris v Quigley*, Gilligan J in the High Court interpreted *Woolwich* and *O'Rourke v Revenue Commissioners* in language traditionally associated with an absence of basis approach:

> ... the plaintiff has made a payment for which there is *no legal basis* and therefore the defendants in their capacity as a public authority stand unjustly enriched by the payment and are holding it unlawfully from the date on which the payment was made because it was paid over pursuant to an unlawful demand. In my view as a result, they are required at common law to refund the sum paid over.[85]

However, the absence of basis approach does not, and should not, form part of Irish law. This is because such an approach is both unnecessary and incoherent. It is unnecessary because traditional unjust factors are capable of responding to, and reversing, unjust enrichment. It is incoherent because neither Professor Birks's approach nor the Canadian approach can satisfactorily reconcile unjust factors within the new approach. [86]

II. Policy Reasons Underpinning Restitution from Public Authorities—What Makes Public Authorities Different?

Restitution from public authorities is different to restitution claims between private individuals.[87] The constitutional principle of equality requires that the state is treated the same as private citizens, and is subject to the same restitutionary liabilities as those to which private litigants are subject.[88] However, although general principles of the law of restitution are applicable to public bodies,[89] other principles and policies mandate that public bodies are treated differently from private individuals. Some of these principles have been developed within the law of restitution itself, supplemented by constitutional considerations. Part A discusses these principles and the provisions of the Irish Constitution that support them. Part

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[85] *Harris v Quigley* [2005] IEHC 81, [2006] 1 IR 165 [32]. Emphasis added.

[86] This issue is considered further in Chapter 6.

[87] See generally, Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' [1993] 6 British Tax Review 442; Virgo, *Principles of the Law of Restitution* (n 1) 401; Birks, 'Restitution from Public Authorities' (1980) *Current Legal Problems* 191; Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' in Finn (ed) *Essays on Restitution* (Law Book Co, Sydney 1990) 177-183; Burrows, 'Public Authorities, Ultra Vires and Restitution' in Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press, Oxford 1991).

[88] Birks, 'Restitution from Public Authorities' (n 87) 191; Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' (n 87) 165-166.

[89] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [133]; *Pacific National Investments* [2004] SCC 75, 245 DLR (4th) 211 [58]. *Magical Waters Fountains Ltd v Sarnia (City)* 74 OR (2d) 682, 73 DLR (4th) 734 [41] (Gautreau J). This decision was reversed on appeal but this specific issue was affirmed: *Magical Waters Fountains Ltd v Sarnia (City)* (1992) 91 DLR (4th) 760 [10]-[11].

B, considers the restitutionary principles that mandate a more restrictive approach where restitution is sought from a public body, specifically the fiscal chaos defence. Finally, there is another layer of analysis applicable to restitution from public authorities which has not yet been fully explored. Section C argues that it is possible to reconceptualise restitution of unlawfully exacted taxes in terms of property rights and explores how the right to property—whether derived from the Irish Constitution, from the European Convention on Human Rights (ECHR), or from the EU Charter on Fundamental Rights (EU Charter) — can buttress a claim for restitution of unlawfully exacted taxes.

A. Restitutionary Principles and Constitutional Considerations

(i) No Taxation without Representation

Restitution of unlawfully exacted taxes involves a 'constitutional dimension' which, in England, derives from Article 4 of the Bill of Rights 1689: ' levying of money for or to the use of the Crown, by pretence or prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted is illegal.'[90] Although the scope[91] and pre-eminence[92] of this imperative have sometimes been questioned, it has been generally accepted that the principle of 'no taxation without representation' is 'central to our conception of democracy and the rule of law,'[93] and retention of overpaid taxes is variously described as 'particularly obnoxious'[94] and 'the stuff on which revolutions are founded.'[95] As a result, Article 4 provides a strong principled basis for restitution of unlawfully exacted taxes[96] and led Lord Goff to develop the *Woolwich* principle, as 'full effect can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right.'[97]

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[90] Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 87) 443-444.
[91] Burrows, 'Public authorities, Ultra Vires and Restitution' (n 87) 61-62.
[92] *Air Canada* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC) [92].
[93] *Kingstreet* [2007] SCC 1, (2007) 276 DLR (4th) 342, [2007] 1 SCR 3(SCC) [14]. See also *Gosling v Veley* (1850) 12 QB 328, 407; *Attorney General v Wilts United Dairies Ltd* (1921) 37 TLR 884 (CA) 885; (1922) 38 TLR 781 (HL) 782; *Congreve v Home Office* [1976] QB 629 (CA) 652.
[94] *Woolwich* [1993] AC 70 (HL) 172.
[95] *Eagerpath Ltd v Edwards (Inspector of Taxes)* [2001] STC 26 (CA) [28].
[96] Birks, 'Restitution from Public Authorities' (n 87) 203; McKendrick, 'Restitution of Unlawfully Demanded Tax' [1993] LMCLQ 88, 96; Virgo, 'Restitution from Public Authorities: Past, Present and Future' [2006] Judicial Review 370, 371. See also *Attorney General v Wilts United Dairies Ltd* (1921) 37 TLR 884 (CA) 885-886 (1922) 38 TLR 781 (HL) 782; *Congreve v Home Office* [1976] QB 629 (CA) 652; *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174 [22] (Lord Hope).
[97] *Woolwich* [1993] AC 70 (HL) 172. See also *DMG* [2006] UKHL 49, [2007] 1 AC 558 [40]; *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch), [2009] STC 254, [340]. This analysis has been accepted in Australia: *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 69. See also Virgo, *Principles of the Law of Restitution,* (n 1) 401.

Although Article 4 of the Bill of Rights is not specifically reproduced in the Irish Constitution, the principle embodied therein is reflected in the primacy given to Dáil Éireann[98] in matters pertaining to taxation. This primacy is in part derived from the exclusive legislative power vested in the Oireachtas. Article 15.2.1° of the Irish Constitution provides that

> The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

This legislative power is 'absolute and all-embracing, subject to the qualifications imposed upon it by the Constitution,'[99] and can only be delegated where the delegation is no more 'than a mere giving effect to principles and policies which are contained in the statute itself.'[100] This 'principles and policies' test is stringently applied and the courts will strike down legislation that purports to vest power to tax in the Executive. In *McDaid v Sheehy*, Blayney J held that legislation 'giving the Government power to impose customs and excise duties, and to terminate and vary them in any manner whatsoever' constituted 'an impermissible delegation of the legislative power of the Oireachtas.'[101] Therefore, to permit the Executive to levy, and to subsequently retain, unlawful taxes is a breach of the constitutional separation of powers.[102]

In addition to Article 15.2.1°, Articles 21 and 22 provide that Dáil Éireann has legislative primacy in relation to Money Bills. Article 21.1.1° provides that Money Bills, which are defined in Article 22 of the Constitution, 'shall be initiated in Dáil Éireann only.' Article 21.2.1° provides that the Dáil 'may accept or reject all or any of the recommendations of Seanad Éireann.' Furthermore, Article 28.7.1° provides that 'The Taoiseach, the Tánaiste and the member of the Government who is in charge of the Department of Finance must be members of Dáil Éireann.' Thus, as noted by Keane J in *Laurentiu v Minister for Justice,* the

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[98] The popularly elected chamber of Ireland's parliament, which, in turn, is known as the Oireachtas.

[99] *State (Walshe) v Murphy* [1981] IR 275 (HC) 284. See also *Laurentiu v Minister for Justice* [1999] 4 IR 26 (SC) 60 (Denham J).

[100] *Cityview Press v An Chomhairle Oiliuna* [1980] IR 381 (SC) 399. See also *Pigs Marketing Board v Donnelly (Dublin) Ltd* [1939] IR 413 (HC) 421.

[101] *McDaid v Sheehy* [1991] 1 IR 1 (HC) 9. The issue was not considered on appeal to the Supreme Court: *McDaid v Sheehy* [1991] 1 IR 1 (SC) 16-17. As noted by Keane J in *Laurentiu v Minister for Justice* [1999] 4 IR 26 (SC) 89: 'the appeal against the finding of unconstitutionality was allowed, but solely on the ground that the issue was moot and the view of Blayney J technically *obiter*.' See also Hogan and Whyte, *Kelly: The Irish Constitution* (4th edn Butterworths, Dublin 2003) 342.

[102] For general commentary on the constitutional separation of powers in Ireland, see *Buckley v Attorney General* [1967] IR 50 (HC)(SC); *Sinnott v Minister for Education* [2001] 2 IR 545 (SC); *TD v Minister for Education* [2001] 4 IR 259 (SC).

Dáil occupies a 'central role' in legislating for the raising of revenues.[103] Hogan and Whyte note that Articles 15, 21-22 and 28.7.1°:

> ...broadly reproduce British practice, which in its turn is the product of a long historical evolution resulting in the primacy of the popularly elected House of Commons in raising taxation and appropriating public moneys; and in the rule that any specific proposal to do either of these things must originate with the Executive.[104]

(ii) Legality

Restitution from public authorities is also justified by an appeal to principles of legality and respect for the rule of law. [105] This imperative was explained by Bastarache J in *Kingstreet* as follows:

> When the government collects and retains taxes pursuant to ultra vires legislation, it undermines the rule of law. To permit the Crown to retain an ultra vires tax would condone a breach of this most fundamental constitutional principle. As a result, a citizen who has made a payment pursuant to ultra vires legislation has a right to restitution.[106]

Upholding a right to restitution of unlawfully paid taxes reinforces respect for the rule of law because the state has little incentive to impose unlawful taxes where such taxes are recoverable as of right. [107]

This issue takes on a particular importance in cases in which a taxation provision has been held to be contrary to constitutional law. The Canadian courts have held that there is a particular constitutional imperative in ensuring that state bodies are not permitted to retain monies levied in excess of their constitutional powers:[108]

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[103] *Laurentiu* [1999] 4 IR 26 (SC) 92-93.
[104] Hogan and Whyte, *Kelly: The Irish Constitution* (n 101) 337. Footnotes omitted.
[105] See Butler, 'Restitution of Overpaid Taxes, Windfall Gains, and Unjust Enrichment: *Commissioner of State Revenue v Royal Insurance Australia Ltd*' (1994-1995) 18 University of Queensland Law Journal 318, 324; Beatson, 'Finessing Substantive "Public Law" Principles into "Private Law" Relations' [1997] Acta Juridica 1, 17; Alder, 'Restitution in Public Law: Bearing the Cost of Unlawful State Action' (2002) 22 Legal Studies 165, 170-171.
[106] *Kingstreet* [2007] SCC 1, (2007) 276 DLR (4th) 342, [2007] 1 SCR 3 [15].
[107] McInnes, 'Mistaken Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance*' (1996) Monash University Law Review 209, 241; Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' (n 87) 203.
[108] *Amax Potash Ltd v Saskatchewan* [1977] 2 SCR 576, 71 DLR (3d) 1 (SCC) [25] and [27]. See also *Air Canada* [1989] 1 SCR 1161, 59 DLR (4th) 161 [15] (Wilson J).

> 'To allow moneys collected ... pursuant to an ultra vires statute, to be retained would be tantamount to allowing the provincial legislature to do indirectly what it could not do directly, and by covert means to impose illegal burdens'. [109]

In this context, there may be thought to be a distinction between cases where a taxing provision is unconstitutional and those where legislation has simply been misapplied or invalidated by a mere technical irregularity, holding that the force of the principle of legality is lessened in the latter case.[110] However, in Ireland and in England, it is irrelevant whether the statute is unconstitutional, [111] ultra vires, [112] or simply mistakenly applied; [113] the imperative for restitution remains the same.[114]

(iii) Equality Considerations

Principles of equality manifest themselves in two different ways where restitution is sought from public authorities. First, restitution of unlawfully exacted taxes should be available as of right, so as to place recovery of ultra vires payments made to the state on the same footing as recovery of ultra vires payments made by the state. Most common law jurisdictions, including Ireland, recognise the principle in *Auckland Harbour Board v R.* This principle provides that state funds paid without parliamentary authority are recoverable as of right.[115] This principle is supplemented by Articles 11 and 17 of the Irish Constitution. Article 11 establishes a central fund for state Revenue:

> All revenues of the State from whatever source arising shall, subject to such exception as may be provided by law, form one fund, and shall be appropriated for the purposes and in the manner and subject to the charges and liabilities determined and imposed by law.

Article 17.2 provides:

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[109] *Amax Potash Ltd* [1977] 2 SCR 576, 71 DLR (3d) 1 [25] and [27]. See also *Air Canada* [1989] 1 SCR 1161, 59 DLR (4th) 161 [15] (Wilson J).

[110] See, for example, the decision of the ECtHR in *National & Provincial Building Society v UK* (App no 117/1996/736/933-935) (1997) 25 EHRR 127.

[111] *Murphy v Attorney General* [1982] IR 241 (SC).

[112] *Woolwich* [1993] AC 70 (HL).

[113] *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC).

[114] See *Woolwich* [1993] AC 70 (HL); *O'Rourke* [1996] 2 IR 1 (HC).

[115] *Auckland Harbour Board v R* [1924] AC 318 (PC) 326; *R v Toronto Terminals Railway* [1948] 4 DLR 468 (SCC) [40]; *Great Southern and Western Railway Company of Ireland v R* [1925] 59 ILTR 85 (HL); *Kenny v Cosgrave* [1926] 1 IR 517 (SC) 528-529. See also *Dolan v Neligan* [1967] IR 247 (HC) 262, where Kenny J referred to the *Auckland Harbour Board* principle without expressly referring to the case.

> Dáil Éireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to Dáil Éireann by a message from the Government signed by the Taoiseach.[116]

Article 17.2 has been interpreted as providing that any expenditure, even where required in the defence of a citizen's constitutional rights, must be disbursed in accordance with the provisions in Article 17.2.[117] Therefore, in many cases, an ultra vires disbursement from the Central Fund will not only be ultra vires, it may also be unconstitutional.

These articles, when read together, provide strong constitutional support for the principle in *Auckland Harbour Board v R.* Commentators have pointed to the principle in *Auckland Harbour Board v R* to justify a right to recovery of overpaid tax, arguing that, if there is a right to recovery of payments of state funds made without parliamentary authority, this 'constitutes a strong argument, in the name of reciprocity, for an equally strict right of restitution for the subject as payor'.[118] This argument has been accepted in England, Canada, and Australia.[119] In *Kingstreet,* Bastarache J held:

> If the constitutional rule requiring the Crown to only spend public funds under legislative authority has sufficient weight to compel recovery of an unauthorized expenditure by the Crown, notwithstanding the principles of unjust enrichment, then it is difficult to understand a common law bar to the recovery of unconstitutionally imposed taxes. Presumably, the constitutional limitations on the Crown's power to spend are of equal importance as the constitutional limitations on the Crown's power to raise revenue. In my view, these principles are really two sides of the same coin.[120]

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[116] A specific instance of such a provision is to be found in Article 29.5.2°, which provides that the state will not be bound by an international agreement involving a charge upon public funds unless its terms have been approved by Dáil Éireann. Any such agreements laid that have not been laid before Dáil Éireann will therefore be held to be invalid. See *State (Gilliland) v Governor of Mountjoy Prison* [1987] IR 201 (SC) 237-238.

[117] *Sinnott v Minister for Education* [2001] 2 IR 545 (SC) 695.

[118] Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' (n 87) 182. See also, Collins, 'Restitution from Government Officials' (1984) 29 McGill Law Journal 407, 411; Burrows, *The Law of Restitution* (n 12) 518; Virgo, 'Restitution from Public Authorities: Past, Present and Future' (n 96) 371; Virgo, *Principles of the Law of Restitution* (n 1) 401; Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 87) 444.Williams has argued that both should be 'regarded as the same action—reversal of an *ultra vires* transfer of money': Williams, 'Recovery of *Ultra Vires* Taxes: a Wholly Public Approach?' [2007] RLR 130, 131.

[119] *Woolwich* [1993] AC 70 (HL) 177. *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [24]; *British American Tobacco Australia Ltd v Western Australia* [2003] HCA 47, 217 CLR 30 (HCA) [83] (McHugh, Gummow and Hayne JJ).

[120] *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [24].

Similarly, in *Woolwich*, Lord Goff expressly relied on this argument as a justification for developing the principle that overpaid taxes should be recoverable as of right. [121]

However, in practice, Articles 11 and 17 have been relied upon by the Irish Supreme Court to restrict the availability of restitution of unlawfully exacted taxes, by providing constitutional support for existing common law defences. In *Murphy v Attorney General,* Henchy J, invoking the doctrine of laches, held that payment of unconstitutional taxes into the Central Fund, coupled with the plaintiffs' delay in instituting proceedings, made it inequitable to allow relief. He held that the plaintiff's right to recover the funds began the year in which they first objected to the payment of taxes in to the Central Fund. Prior to that time,

> the State was entitled, in the absence of any claim of unconstitutionality, to act on the assumption that the taxes in question were validly imposed, that they were properly transmissible to the central fund, and that from there they were liable to be expended, according to the will of Parliament, for the multiplicity of purposes for which drawings are made on the central fund of the State. Equally, every taxpayer ...could not avoid having imputed to him the knowledge that the tax he was paying was liable to be immediately spent by the State. As time went by, his right to complain of the State's unjust enrichment ran the risk of being extinguished by laches on his part.[122]

Similarly, although O'Higgins CJ was of the view that the constitutional invalidity only dated from the time of judgment, he would also have been unwilling to deny restitution on the basis of estoppel, once the money had been paid into the Central Fund:

> Under Article 11 of the Constitution all monies raised in revenue form one fund and all such monies are appropriated and expended for the purposes and in the manner determined by law. This must be taken as a matter of general knowledge. Any citizen who accepts such taxation laws as are in operation and who pays his taxes without protest does so in the full knowledge that as a member of the community he will share in the expenditure and derive a benefit from the Central Fund. Such a citizen can scarcely have merits if after invalidity is established he seeks to recover back what has

[121] *Woolwich* [1993] AC 70 (HL) 177.
[122] *Murphy* [1982] IR 241 (SC) 318. See further, Chapter 7.

already been collected and appropriated with his knowledge and implied approval for the common good.[123]

These statements have led Hogan and Whyte to argue:

> Accordingly, while the court is willing to see a sum invalidly collected in tax, and flowing into the Central Fund, as an unjust enrichment, access to the appropriate remedy is qualified by the presumption that the taxpayer who fails to challenge the law at once, knows (as Henchy J put it) 'that tax payments are likely to be quickly absorbed into the financial system of the State, and not to be amenable to extraction and repayment without considerable disruption and unfairness.'[124]

Second, equality considerations are relevant because of the inequality of taxpayers, compared with the power of the state. Although constitutional principles of equality recognise the formal equality between the state and its citizens, the state and its citizens cannot always be treated equally as a matter of fact. Private litigants, be they individuals or large corporations,[125] cannot be regarded as being in an equal position to the state.[126] Demands for payment made by the state carry an implicit coercive force.[127] This force may be evident from the terms of the statute, particularly where a taxing statute carries penalties for non-payment or late payment.[128] It can also be a more subtle force, derived from respect for the rule of law. Acts of the legislature enjoy a strong presumption of validity[129] and, in

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[123] *Murphy* [1982] IR 241 (SC) 302.

[124] Hogan and Whyte, *Kelly: The Irish Constitution* (n 101) 187.

[125] *Woolwich* [1993] AC 70 (HL) 198 (Lord Browne Wilkinson); *British Steel plc v Customs and Excise Commissioners* [1997] 2 All ER 366 (CA) 378; *State Bank of New South Wales Limited v Commissioner of Taxation* (1995) 62 FCR 371 (FCA) 381.

[126] See, for example *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10 (SC) 43-44 (O'Flaherty J).

[127] Pannam, 'The Recovery of Unconstitutional Taxes in Australia and the United States', (1964) 42 Texas Law Review 777, 788; Birks, 'Restitution from Public Authorities' (n 87) 205; Collins, 'Restitution from Government Officials' (n 118) 429 and 436; Wells, 'Restitution from the Crown: Private Rights and Public Interest' (1994) 16 Adelaide Law Review 191, 194; McKendrick, 'Restitution of Unlawfully Demanded Tax' (n 96) 96. However, Williams has acknowledged the relevance of the coercive force but does not consider it to be the direct reason for restitution, arguing that 'the significance of coercive power is indeed not that it provides the reason for restitution, but that it indicates the presence of the public law, or *ultra vires,* event which does provide the reason': Williams, 'The Beginnings of a Public Law of Unjust Enrichment?' (2005) 16 Kings College Law Journal 194, 205.

[128] *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 126. In *Woolwich* [1993] AC 70 (HL) 172-173, Lord Goff held:

> when the revenue makes a demand for tax, that demand is implicitly backed by the coercive powers of the state and may well entail ... unpleasant economic and social consequences if the taxpayer does not pay.

[129] Alder, 'Restitution in Public Law: Bearing the Cost of Unlawful State Action' (n 105) 170-171.

Ireland, enjoy a presumption of constitutionality.[130] These presumptions are simply legal reflections of the *de facto* presumption of validity attributed to taxing statutes, as people are unlikely to question the validity of demands for payment in practice:

> Citizens are expected to be law-abiding. They are expected to pay their taxes. Pay first and object later is the general rule. The payments are made pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and the holding out of such validity by the legislature.[131]

Some cases have acknowledged that it 'would be unrealistic to overlook the pressure placed on a commercial organisation by a demand for payment of tax' when considering restitution from public authorities.[132] In *Dolan v Neligan,* Kenny J referred to the coercive power of the state and went so far as to take judicial notice of the fact that private citizens are reluctant to challenge the actions of the Revenue Commissioners:

> I think that I can take judicial notice of the fact that importers of large quantities of goods into this country are very reluctant to enter into controversy with customs officials or the Revenue Commissioners and are even more reluctant to engage in litigation with them. The plaintiff described his reaction to the letter of the 31st May as "the gun was to my head and I had to pay" and, when asked whether he knew that he could appeal against the Revenue Commissioners' ruling, stated that "it is only in desperation that one goes to law." I know that this represents a view which is held by the great majority of business people in this country.[133]

Similarly, in *Bank of Ireland Trust Services Ltd v Revenue Commissioners*, Kelly J recognised that the *Woolwich* principle was developed in order to address concerns regarding the coercive power of the state where a tax is being demanded:

> ...the nature of a demand for tax or similar impost on the citizen by the State, with the perceived economic and social consequences of non-payment stemming from the inequality of the parties' respective positions, and the unjust enrichment falling on the State where the citizen paid an unlawful demand to avoid those consequences,

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[130] *Pigs Marketing Board v Donnelly* [1939] IR 413 (HC) 417; *Re Article 26 and the Offences Against the State (Amendment) Bill 1940* [1940] IR 470 (SC) 478.
[131] *Air Canada* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC) [13] (Wilson J).
[132] *State Bank of New South Wales Limited v Commissioner of Taxation* (1995) 62 FCR 371 (FCA) 381.
[133] *Dolan v Neligan* [1967] IR 247 (HC) 252.

warranted a reformation of the law of restitution so as to recognise a prima facie right of recovery based solely on payment of money to an ultra vires demand by the public authority.[134]

(iv) Probity

Finally, the law on restitution from public authorities is underpinned by a recognition that higher standards of probity ought to be demanded of public officials than of private litigants.[135] Although the state is in the same position as an ordinary person in the sense that it is entitled to rely on the defences generally available to private citizens, it is expected to conform to higher standards of probity and fair dealing:

> the defendants being an emanation of the Crown, which is the source and fountain of justice, are in my opinion bound to maintain the highest standards of probity and fair dealing, comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control...[136]

This principle underpins the judicial approach to restitution from public authorities in several jurisdictions and underpins judicial comments that a statutory discretion to repay should normally be exercised in favour of repayment.[137] The application of the *in pari delicto* exception[138] to the mistake of law rule[139] in restitution claims against from public authorities is also derived from this principle, as it places a greater obligation on state officials to know the law than it places on private citizens.

B. Fiscal Chaos and the Security of the Public Purse

The imperatives in favour of restitution outlined in Section A must be balanced against policies that mandate a restrictive approach to restitution from the executive to preserve the integrity of the public finances.[140] Where a taxing statute has been struck down, money may

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[134] *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC) 187.

[135] *R v Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd* [1988] AC 858 (HL) 877; *R v Inland Revenue Commissioners Ex p Unilever Plc* [1996] STC 681 (CA). See also, *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333 (HCA) 342. In *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 69 FCR 346 (FCA) 368; McKenna, 'Mistake of Law between Statutory Bodies and Private Citizens: An Examination of the Rationale for Recovery of Money Paid' (1979) 17 University of Toronto Faculty Law Review 223, 224.

[136] *Sebel Products LD v Commissioners of Customs and Excise* [1949] Ch 409 (Ch) 413.

[137] *Dolan v Neligan* [1967] IR 247 (SC) 275; *R v Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd* [1988] AC 858 (HL) 880 (Lord Goff); *Royal Insurance* (1994) 182 CLR 51, 64-65; *The Commonwealth of Australia v SCI Operations Pty Limited* [1998] HCA 20, 192 CLR 285 [63].

[138] See *Kiriri Cotton Co Ltd v Dewani* [1960] 1 AC 192 (PC) and related cases, discussed in Chapter 5.

[139] See *Eadie* [1967] SCR 573, 63 DLR (2d) 561 (SCC) [25]-[26]. Discussed further in Chapter 5.

[140] Virgo, *Principles of the Law of Restitution* (n 1) 401-402; Virgo, 'Restitution from Public Authorities: Past, Present and Future' (n 96) 371; Alder, 'Restitution in Public Law: Bearing the Cost of Unlawful State Action'

have been paid pursuant to that statute by a large body of taxpayers, over a long period of time. In such cases, it has been suggested the state should be entitled to rely on a policy driven defence, based on fiscal chaos considerations, to defeat claims for restitution that would otherwise be successful.[141] Previously, it has been suggested that fiscal disruption would rarely be a credible threat.[142] However, the growth in claims seeking restitution of unlawfully exacted taxes, particularly in the wake of the *Hoechst/Metallgesellschaft* litigation before the ECJ, means that fiscal chaos concerns may be more relevant than commentators had previously thought.[143]

A concern to prevent fiscal disruption by limiting restitution is evident from early cases in the area. Birks has suggested that *William Whitely v R*, in which recovery was denied, 'can be understood as tacitly affirming that the courts themselves, without waiting for the legislature, must see to it that the danger of fiscal disruption does not eventuate.'[144] Similarly, in *Glasgow Corporation v Lord Advocate,* Lord President Clyde's fears of fiscal disruption led to his rejection of a right to restitution on constitutional grounds, as such a ground of recovery would 'introduce an element of quite unwarrantable uncertainty into the relations between the taxpayers and the Exchequer if there could be a wholesale opening up of transactions between them whenever any Court put a new interpretation upon an existing statutory provision imposing a tax.'[145] Isaacs J evinced similar concerns in *Sargood Bros v The Commonwealth.*[146]

In recent years, the approach to this issue has varied from jurisdiction to jurisdiction. In *Woolwich,* Lord Goff left open the question as to whether specific limits should be imposed on restitution of unlawfully exacted taxes.[147] In *Royal Insurance,* Mason CJ was reluctant to recognise 'a vague and amorphous defence based on the notion of avoiding

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(n 105) 171; Wells, 'Restitution from the Crown: Private Rights and Public Interest' (n 127) 195; Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 87) 444.

[141] McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law' (1983) 17 University of British Columbia Law Review 233, 265; Wells, 'Restitution from the Crown: Private Rights and Public Interest' (n 127) 212. See also *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306, [2009] Ch 69 [6] (Arden LJ).

[142] McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law' (n 141) 257; Burrows, 'Restitution in Respect of Mistakenly Paid Tax' (2005) 121 LQR 540, 543.

[143] In the past, many commentators were of the view that risks of fiscal disruption were greater in constitutional regimes that permitted the striking down of primary legislation. However, it seems that the greater risk stems from a finding by the ECJ that a taxing provision is contrary to EU law. See Wells, 'Restitution from the Crown: Private Rights and Public Interest' (n 127) 209; Birks, 'Restitution from Public Authorities' (n 87) 205; Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' (n 87) 202-203.

[144] Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' (n 87) 196-197.

[145] *Glasgow Corp v Lord Advocate* 1959 SC 203, 230 (Court of Session).

[146] *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 (HCA) 288.

[147] *Woolwich* [1993] AC 70 (HL) 176. See also *DMG* [2005] EWCA Civ 78, [2006] Ch 243 [271] (Buxton LJ).

disruption of public finances.'[148] Similarly, the Irish courts have not allowed fiscal chaos concerns to operate as a complete defence to restitution claim, although, in *Murphy v Attorney General,* fiscal chaos considerations were relied upon to justify a particularly expansive application of the change of position defence.[149] In *Muckley v Ireland*, Barrington J considered *Murphy* to have established a 'fiscal chaos' defence, holding that 'it was found to be impracticable to vindicate the rights of married couples who had paid an invalid tax because directing the State to refund taxes unconstitutionally collected would have caused administrative and financial chaos.'[150] However, the Irish courts have held that the mere cost to the state of making restitution will not be sufficient to constitute fiscal chaos,[151] and, in the *Health Amendment Bill* case, the Irish Supreme Court was unpersuaded by arguments of a fiscal chaos nature when considering legislative validation of unlawfully obtained health charges.[152]

Of the four jurisdictions surveyed in this thesis, the Canadian courts have been the most open to a fiscal chaos defence. In *Air Canada,* La Forest J held that fiscal chaos considerations, without more, could defeat a claim in restitution.[153] This approach places pragmatic considerations of efficacy over constitutional principle, placing as it does the state's interest in retaining the money over the constitutional right of the plaintiff to its return.[154] As Birks has noted, 'inconvenience and disruption are usually ignored in establishing liabilities.'[155] A broadly defined 'fiscal chaos' defence, such as that adopted in *Air Canada,* would undermine the important constitutional imperative in favour of restitution of unlawfully exacted taxes.[156] In practical terms, it confers a qualified immunity on the state

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[148] *Royal Insurance* (1994) 182 CLR 51 (HCA) 68. See also, *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 69 FCR 346, 139 ALR 595. Burrows has also argued that a 'fiscal chaos' defence would be 'hopelessly vague and arbitrary': Burrows, 'Public authorities, Ultra Vires and Restitution' (n 87) 58. See also Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 87) 464.

[149] *Murphy v Attorney General* [1982] IR 241 (SC) 320. Discussed in Chapter 8 at 298-302.

[150] *Muckley v Ireland* [1985] IR 472 (HC) 482.

[151] See *Tate v The Minister for Social Welfare* [1995] 1 IR 418 (HC) 432; *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [129]. However, *Dellway Investment Limited v National Asset Management Agency* [2010] IEHC 364 suggests that the courts are becoming more sensitive to fiscal chaos concerns. This matter is discussed further in Chapter 8 at 316-318.

[152] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [129]. See also, *Tate v The Minister for Social Welfare* [1995] 1 IR 418 (HC) 432.

[153] *Air Canada* [1989] 1 SCR 1161, 59 DLR (4th) 161.

[154] See Virgo, *Principles of the Law of Restitution* (n 1) 422.

[155] Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' (n 87) 202.

[156] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch) [340]. *Royal Insurance* (1994) 182 CLR 51 (HCA) 69 (Mason CJ); *Air Canada* [1989] 1 SCR 1161, 59 DLR (4th) 161 [15] (Wilson J). See also Virgo, 'Striking a Balance in the Law of Restitution' [1995] LMCLQ 362, 367; Merralls, 'Recovery of Taxes After the Royal Insurance Case' in McInnes (ed) *Restitution: Developments in Unjust Enrichment* (LBC Information Services, Sydney 1996) 122.

where restitution of taxes is sought, subject to a requirement of fiscal disruption.[157] In her dissenting judgment in *Air Canada* Wilson J spoke out strongly against denying recovery on the basis of fiscal chaos concerns:

> I cannot, with respect, accept my colleague's proposition that the principle should be reversed for policy reasons in the case of payments made to governmental bodies. What is the policy that requires such a dramatic reversal of principle? Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government's mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of government's unconstitutional act. If it is appropriate for the courts to adopt some kind of policy in order to protect government against itself (and I cannot say that the idea particularly appeals to me), it should be one which distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due.[158]

A similar approach to that of Wilson J in *Air Canada* can be derived from the decision of the Irish Supreme Court in *Re Article 26 and The Employment Equality Bill*, in which it was called upon to consider, *inter alia*, whether section 16(3) of the Equality Bill, which imposed an obligation on employers to bear the cost of facilitating the needs of disabled employees, constituted an unconstitutional interference with property rights. Hamilton CJ observed that

> the difficulty with the section now under discussion is that it attempts to transfer the cost of solving one of society's problems on to a particular group.[159]

Thus, it appears from *Re Article 26 and The Employment Equality Bill* that requiring a sector of the population to bear an unjustified expense, above that borne by the rest of the

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[157] Deschamps J observed in *Marcotte v Longueuil (Ville)* [2009] SCC 43, 311 DLR (4th) 1 [102]: 'the incorporation of fiscal chaos considerations, so as "to hold that the courts have a discretion to dismiss an action on the basis that the consequences of a judgment would be too great would amount to granting the defendants immunity" to which they are not entitled.'

[158] *Air Canada* [1989] 1 SCR 1161, 59 DLR (4th) 161 [14].

[159] *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 (SC) 367-368. Hereafter *Employment Equality Bill.*

population, may constitute unconstitutional interference with their constitutional right to property.[160]

Air Canada has been overturned by the Canadian Supreme Court in *Kingstreet.* Bastarache J held that 'privileging policy considerations in the case of ultra vires taxes threatens to undermine the rule of law.'[161] He concluded that fiscal chaos concerns were not 'proper policy considerations' to be considered under the second limb of the *Garland* test.[162]

The problems underpinning the *Air Canada* defence suggest that if a fiscal chaos defence is to be adopted at all, it should, at the very least, be confined to cases of severe fiscal disruption. Many commentators who have advocated the adoption of a fiscal chaos defence have recommended that it is limited to exceptional circumstances, where there is a real risk of serious disruption to the public finances.[163] This restrictive approach was adopted in many of the cases that have considered a defence based on fiscal disruption. In *Air Canada,* La Forest J held that the defence was an 'exceptional rule, and should not be construed more widely than is necessary to fulfil the values which support it.'[164] Similarly, in *Waikato Regional Airport* the Privy Council refused to recognise a defence based on fiscal disruption as 'the amount at stake, although significant for the appellants, cannot possibly be regarded as such as to threaten the disruption of public finances in New Zealand.'[165]

However, these observations bring us to another significant problem attendant upon the fiscal chaos defence: it is almost impossible to determine what will constitute 'fiscal chaos'.[166] The Irish courts have considered fiscal disruption on several occasions and have adopted an 'I'll know it when I see it' approach to fiscal chaos. In *Murphy*, Henchy J

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[160] Subsequent cases on this point are inconsistent. *Re Article 26 and of Part V of the Planning and Development Bill* [2000] 2 IR 321 (SC) (hereafter *Planning and Development Bill*), the Supreme Court took the contrary view. However, the reasoning in *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 reflects that adopted by Hamilton CJ in the *Employment Equality Bill* case.

[161] *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [21]. See also, *Sorbara v Canada (Attorney General)* (2008) 304 DLR (4th) 470 (Ont SCJ) [32].

[162] *Ibid,* [38], relying on *Garland v Co* [2004] SCC 25, 237 DLR (4th) 385. See also *Marcotte v Longueuil (Ville)* [2009] SCC 43, 311 DLR (4th) 1 [102]-[105].

[163] McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law' (n 141) 257; Mitchell, 'Restitution, "Passing On," and the Recovery of Unlawfully Demanded Taxes: Why Air Canada Doesn't Fly' (1995) 53 University of Toronto Faculty Law Review 130, 141 and 143. Although Virgo is not a devotee of the fiscal chaos defence, he argues that such a defence, if adopted, should be tightly limited: Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 87) 464.

[164] *Air Canada* [1989] 1 SCR 1161, 59 DLR (4th) 161 [94]. See also *Peel* (1990) 75 DLR (4th) 523 [38].

[165] *Waikato Regional Airport Limited v Attorney General* [2003] UKPC 50, [2004] 3 NZLR 1 [82].

[166] See also McInnes, 'Mistake Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance*' (n 107) 227; Burrows has also argued that a 'fiscal chaos' defence would be 'hopelessly vague and arbitrary': Burrows, 'Public authorities, Ultra Vires and Restitution' (n 87) 58; *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 68.

observed that the State's fiscal stability could be undermined by restitution claims made by 'tens of thousands of married'[167] couples who had been taxed at extremely high rates of tax[168] over a considerable period of time. These fiscal chaos concerns prompted the court to adopt a wide interpretation of the change of position defence.[169] At the other end of the spectrum, in *O'Rourke,* Keane J held that the fiscal chaos concerns adverted to in *Murphy* were not applicable in the case before him. The pool of potential plaintiffs was limited to between eighty and ninety people, a number 'so relatively small as to render the distortion of the State's finances minimal'.[170] In the *Health Amendment Bill* case, the Supreme Court held that the State could not rely on fiscal chaos considerations to justify legislative measures purporting to retrospectively validate unlawfully levied health charges:. It held that although

> the financial burden on the State of making the relevant repayments is a substantial one, it is by no means clear that it can be described as anything like catastrophic or indeed that it is beyond the means of the State to make provision for this liability within the scope of normal budgetary management.[171]

Thus, although the Irish courts have not given any indication of what they consider to be necessary features of 'fiscal disruption', it is clear that the size of the class seeking restitution will be significant.[172] However, Williams has argued that, if the fiscal chaos defence is recognised, it would operate as a complete bar to restitution claims:

> It is also difficult to see that it would really operate as a defence at all, rather than a complete bar to all such claims. Public bodies specifically raise money in order to spend it in the public interest and could therefore always argue that return of the money would upset their finances.[173]

Recent decisions demonstrate a reluctance to permit reliance on a fiscal chaos defence. Many judges—such as Mason CJ in *Royal Insurance,*[174] Lord Slynn in *Woolwich,*[175]

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[167] *Murphy* [1982] IR 241 (SC) 317.
[168] See Scannell, 'The Taxation of Married Women. *Murphy v Attorney General'* in O'Dell (ed) *Leading Cases of the Twentieth Century* (Round Hall Sweet & Maxwell, Dublin 2000).
[169] *Murphy* [1982] IR 241 (SC); *FII Group Litigation* [2008] EWHC 2893, [2009] STC 254. This issue is discussed in Chapter 8.
[170] *O'Rourke* [1996] 2 IR 1 (HC) 18.
[171] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [128]. See also, *Tate* [1995] 1 IR 418 (HC) 432.
[172] McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law' (n 141) 256.
[173] Williams, *Unjust Enrichment and Public Law* (n 82) 159.
[174] *Royal Insurance* (1994) 182 CLR 51(HCA) 68.

and Bastarache J in *Kingstreet*[176]—have argued that the formulation of such a defence is a task best left to the legislature.[177] In *O'Rourke*, Keane J followed the approach adopted by Lord Slynn, observing that the 'State is in a position to ensure by legislation, if it is so minded, that taxpayers who find themselves in a similar position may have their common law right of recovery constrained by statutory provisions of the nature referred to by Lord Slynn in the *Woolwich* case'.[178] This comment sits uneasily with the superior courts willingness to endorse the application of fiscal chaos concerns in principle, as the Supreme Court did in *Murphy* and as Keane J himself did in *O'Rourke*. However, it is noteworthy that such principles have not been successfully relied upon since the decision of the Supreme Court in *Murphy*, suggesting a relatively limited role for fiscal chaos concerns in future.[179]

The question therefore remains as to whether, having largely rejected a pure 'fiscal chaos defence', the courts will allow fiscal chaos considerations to influence specific areas of the law of restitution. There are several ways in which this might be possible. First, fiscal chaos concerns may cause the court to adopt a narrow conception of an existing cause of action where a more expansive one might lead to disruption of the public finances. For example, fiscal chaos concerns underpinned the arguments of commentators who proposed retention of the mistake of law bar.[180] However, many courts have taken the reverse approach, holding that the constitutional imperative in favour of restitution of unlawfully exacted taxes requires a particularly expansive approach to defining causes of action.[181]

Second, fiscal chaos concerns may influence the courts' application of defences to claims for restitution from public bodies, allowing public bodies to rely on more expansively

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[175] *Woolwich* [1993] AC 70 (HL) 200. See also *Mallusk Cold Storage Ltd v Dept of Finance and Personnel* [2003] RA 370 [25].

[176] *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [25]. See also, *Marcotte v Longueuil (Ville)* [2009] SCC 43, 311 DLR (4th) 1 [105].

[177] *Mallusk Cold Storage* [2003] RA 370 [25].

[178] *O'Rourke* [1996] 2 IR 1 (HC) 18.

[179] However, see *Dellway Investment Limited v National Asset Management Agency* [2010] IEHC 364; *J & J Haire & Company Ltd v Minister for Health and Children* [2009] IEHC 562. These cases are discussed further in Chapter 8.

[180] McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law' (n 141). Such concerns may also have underpinned the approach of the Court of Appeal in *DMG* [2005] EWCA Civ 78, [2006] Ch 243 [271] (Buxton LJ). However see Virgo, 'Deutsche Morgan Grenfell: The Right to Restitution of Tax Paid by Mistake Rejected' [2005] British Tax Review 281, 285; McInnes, 'Mistaken Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance*' (n 107) 213.

[181] *Dolan v Neligan* [1967] IR 247 (HC) (mistake); *Murphy* [1982] IR 241 (SC) (duress *colore officii*); *Woolwich* [1993] AC 70 (HL) (recovery as of right).

defined defences than are available to private litigants.[182] For example, such fiscal chaos concerns appear to underpin the expansive approach to the change of position defence in *Murphy v Attorney General*.[183] In a similar vein, the Law Commission of England and Wales has recommended the adoption of specific defences to prevent against the risk of fiscal disruption. These include denying recovery where there the claimant had failed to exhaust the statutory remedies, where there has been a change in a settled view of the law, and where restitution would unjustly enrich the claimant. [184] In *Monro v Revenue Commissioners,* Arden LJ noted that the prevailing practice defence in section 33 of the Taxes Management Act 1977 was motivated by fiscal chaos considerations.[185] This issue is considered further in Chapters 7 and 8.

Third, other commentators have suggested that fiscal chaos concerns may be addressed through the procedure applicable to claims against the state. The short time limits attendant upon judicial review applications and the discretionary nature of relief available in judicial review proceedings have prompted some commentators to consider whether public law procedures might be better suited to restitutionary claims involving public authorities than private law claims.[186] This issue is discussed further in Chapter 6. [187]

Fourth, states may impose more stringent limitation periods where restitution is sought from public bodies. Although this approach has been favoured by some commentators as the most appropriate means of addressing fiscal chaos concerns, [188] it has not been universally welcomed. [189] In England, sections 320 and 321 of the Finance Act 2004 significantly curtail restitution claims in respect of overpaid taxes. These limitation periods,

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[182] Virgo has suggested that it is more appropriate to address fiscal chaos concerns in setting the parameters of the available defences, rather than restricting the available causes of action: Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 87) 442.

[183] *Murphy* [1982] IR 241 (SC) 320. Discussed above at 297-300.

[184] *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Commission Report No 227: Cm 2731, 1994) Chapter 11. See also, Virgo, *Principles of the Law of Restitution* (n 1) 421-422; Goff and Jones, *The Law of Restitution* (n 42) [27-005].

[185] *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306, [2009] Ch 69 [6].

[186] Virgo, 'Deutsche Morgan Grenfell: The Right to Restitution of Tax Paid by Mistake Rejected' (n 180) 285.

[187] See below at 222-253.

[188] Burrows, 'Restitution in respect of Mistakenly Paid Tax' (2005) 121 LQR 540, 543; Collins, 'Restitution from Government Officials' (n 118) 435. See also *Marcotte v Longueuil (Ville)* [2009] SCC 43, 311 DLR (4th) 1 [107].

[189] Chowdry, 'Finance Act notes: Limitation Period in Old Actions for Mistake of Law Relating to Direct Tax' [2007] British Tax Review 577, 580. See also Section 107 of the Finance Act 2007 (UK).

and their potential inapplicability where a taxing provision is contrary to European Law, are discussed in Chapter 7.[190]

It has been argued above that there should be no defence based simply on the fact of 'fiscal disruption'. Of the four alternative roles for fiscal chaos concerns outlined in this section, the fourth alternative is to be preferred. Although restitutionary causes of action and defences should be tailored to reflect the unique position of the state, the trend has been in favour of broadening causes of action and restricting restitutionary defences, reflecting the importance of the principle that unlawfully exacted taxes should not be retained by the state. Reformulating existing causes of action and defences to respond to fiscal chaos concerns would undermine important constitutional imperatives in favour of restitution. If fiscal chaos concerns and constitutional concerns were accommodated within existing causes of action and defences, these conflicting imperatives would render the causes of action and defences hopelessly incoherent. As a matter of principle, and to ensure coherent and workable causes of action and defences, it is more appropriate for the legislature to impose specific limitations upon restitutionary claims, whether in the form of shorter time limits or specific statutory defences.

C. The Right to Property

The right to property protects citizens from any unlawful interference with their property. In Ireland, this right receives its primary protection under the Irish Constitution.[191] In England, recent property rights jurisprudence, by virtue of the Human Rights Act 1998, has focused on Article 1 of the First Protocol to the European Convention on Human Rights (ECHR).[192] The means by which the Irish and English courts protect and vindicate property rights is through the application of the proportionality doctrine. The Irish proportionality test was imported from Canadian jurisprudence,[193] which, in turn, reflects the core features of the proportionality doctrine developed by the European Court of Human Rights (ECtHR)[194] and applied in English jurisprudence.[195] Moreover, the Courts of Justice of the European Union

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[190] See below at 269-271.

[191] See Article 40.3.2° and Article 43 of the Irish Constitution. Article 1 of the First Protocol to the ECHR supplements this constitutional protection.

[192] See, for example, *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419; *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816; *R (SRM Global Master Fund LP) v Treasury Commissioner* [2009] EWCA Civ 788, [2009] UKHRR 1219.

[193] In *Heaney v Ireland* [1994] 3 IR 593 (HC), Costello J drew on the Canadian case *Chaulk v R* [1990] 3 SCR 1303 (SCC).

[194] See generally Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff, Leiden 2009).

[195] See below at 49-51.

(CJEU) have applied their own version of the proportionality test in considering whether interference with property rights is justified.[196]

Where a public authority levies taxes or charges in the absence of lawful authority, this constitutes an unlawful interference with the property rights of the individuals affected.[197] Therefore, the unlawful levying of taxes and other charges engages not only the private law principles of the law of restitution, but also public law protections of property rights. The right to property and the proportionality test will be considered in greater detail when considering the right to interest on unlawfully exacted tax[198] and the change of position defence.[199] The purpose of the present discussion is to establish that property rights can be engaged by the exaction of unlawfully exacted tax and remain engaged when considering the right to restitution of those taxes.

(i) Articles 43 and 40.3 of the Irish Constitution

Although some jurisdictions have questioned whether money can constitute a form of constitutionally protected property,[200] the Irish courts have taken an expansive approach to the concept of property[201] and taxation measures have been frequently assessed for compatibility with constitutionally protected rights, including the right to property.[202] In *Madigan v Attorney General,* O'Higgins CJ acknowledged that a taxation measure

> necessarily interferes with the property rights of affected citizens. However, such interference cannot be challenged as being unjust on that account, if what has been done can be regarded as action by the State in accordance with the principles of social justice and having regard to the exigencies of the common good as envisaged by Article 43.2 of the Constitution.[203]

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[196] See, for example Case 44/79 *Hauer* [1979] ECR I-3727 [23]; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351 [355]; Joined cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico* [2010] ECR I-2007 [80].

[197] Hoffman, 'The Law of Restitution and the Human Rights Act 1998' [2004] RLR 64, 68-69.

[198] See Chapter 3.

[199] See Chapter 7.

[200] See the decision of the High Court of Australia in *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155 (HCA) 201 (Dawson and Toohey JJ). However, this view was not accepted by the rest of the court—172-173 (Mason CJ), 184 (Deane and Gaudron JJ)—and 'may now be regarded as having been discarded': *Australian Capital Territory v Pinter* (2003) 121 FCR 509 [174].

[201] GW Hogan and G Whyte, *JM Kelly: The Irish Constitution* (n 101) 1971-1972.

[202] *Brennan v Attorney General* [1984] ILRM 355 (SC); *Daly v Revenue Commissioners* [1995] 3 IR 1 (HC) 12-13.

[203] *Madigan v Attorney General* [1986] ILRM 136 (SC) 161. See also *Daly* [1995] 3 IR 1 (HC) 12-13.

Restitution of overpaid taxes may engage two different kinds of property rights. First, money has long been recognised as a constitutionally protected form of property.[204] Thus, requiring the payment of money without legislative basis constitutes an interference with an individual's property rights. Second, the right to property is not limited to possessions but also includes intangible property such as contractual rights[205] and choses in action.[206] The right to litigate has been held to be both a personal right[207] and a property right.[208] Therefore, a restitutionary cause of action to recover overpaid tax is, in itself, a constitutionally protected form of property. This was recognised in *Orange v Revenue Commissioners,* where a chose in action in the form of a debt owed by the Minister for Finance to the plaintiff was held to constitute a property right.[209] Similarly, in the *Health Amendment Bill* case, Murray CJ held that elderly patients who had been unlawfully charged for residential care had a cause of action in restitution, which itself constituted a species of constitutionally protected property.[210]

It has been argued that a

> combination of limited rights and judicial reticence renders it very difficult to challenge successfully the constitutionality of a taxation statute under the fundamental rights provisions of the Constitution unless there is clear arbitrariness or patent irrationality.[211]

In *Madigan v Attorney General*, O'Hanlon J observed that '[i]n challenging the validity of a taxation statute enacted by the Oireachtas, ... a plaintiff faces a very uphill battle,' holding that 'tax laws are in a category of their own, and that very considerable latitude must be

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[204] See, for example, *Buckley v Attorney General* [1950] IR 67.

[205] *East Donegal Co-Operative Society v The Attorney General* [1970] IR 317 (HC) 332. The issue was not considered on appeal: *East Donegal Co-Operative Society v The Attorney General* [1970] IR 317 (SC) 351; *PMPS v Attorney General* [1983] IR 339 (SC) 359. See also *J & J Haire & Company Ltd v Minister for Health and Children* [2009] IEHC 562; *Dellway Investment Limited v National Asset Management Agency* [2010] IEHC 364 [7.10]. This issue was queried on appeal: *Dellway Investments v NAMA* [2011] IESC 14.

[206] *Maher v Minister for Agriculture* [2001] 2 IR 139 (SC) 186.

[207] *O'Brien v Manufacturing Engineering Company* [1973] IR 334 (SC) 364.

[208] *O'Brien v Manufacturing Engineering Company* [1973] IR 334 (SC) 366-367; *Maher v Minister for Agriculture* [2001] 2 IR 139 (SC) 186. Although in *Tuohy v Courtney* [1994] 3 IR 1 (SC) 46-47, Finlay CJ held that it was unlikely to make a difference either way:

> On the facts of this case, neither counsel for the plaintiff nor counsel for the defendants have been able to point to any material difference in the constitutional protection which would apply to this right to litigate if it were on the one hand considered to be exclusively an unenumerated personal right or on the other hand if it were considered to be exclusively a constitutional property right or indeed if it were considered to be both.

[209] *Orange v Revenue Commissioners* [1995] 1 IR 517 (HC) 521.

[210] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [76].

[211] Corrigan, *Revenue Law* (Roundhall Ltd, Dublin 2000) 97.

allowed to the legislature in the enormously complex task of organising and directing the financial affairs of the State.'[212] A similar approach was taken by Arden LJ in relation to Article 1 of the First Protocol to the ECHR in *Monro v Revenue and Customs Commissioners*:

> Legislation in relation to claims to recover payments made in error as to whether they are due as tax is subject to the same principles as the taxing legislation itself. Therefore, a wide margin of discretion must be allowed to national authorities in the determination of policy in relation to claims to recover tax.[213]

However, in the context of restitution of unlawfully paid taxes, we are generally not concerned with constitutionality of the taxing measure itself. In many cases where restitution is sought, the tax is already acknowledged to have been exacted unlawfully, whether because the taxing statute relied upon was not applicable in the circumstances of the case,[214] or it was invalid as being *ultra vires* a parent statute,[215] or the taxing measure was unconstitutional.[216] In general, for the purposes of the restitution claim, the right to property is relevant, not to the constitutionality of the taxing measure, but rather to restrictions on the right of recovery of tax paid pursuant to an invalid measure. However, if the courts were to adopt the approach taken by Arden LJ in *Monro,* discussed further below, the courts' permissive approach when considering the constitutionality of a taxation measure may bleed into the law of restitution of unlawfully paid tax.

(ii) Article 1 of the First Protocol to the European Convention on Human Rights

Article 1 of the First Protocol to the ECHR guarantees the individual's peaceful enjoyment of his possessions, subject to the state's interest in controlling the right to property in the public interest.[217] Where taxes are paid that were not lawfully due, a chose in action to recover such payments has also been recognised to be a form of property.[218] In determining

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[212] *Madigan v Attorney General* [1986] ILRM 136 (HC) 151-152. However, on appeal, O'Higgins CJ held:
> This special and particular treatment of a Money Bill, however, does not survive its enactment into law. As an Act of the Oireachtas, such a legislative measure must be subject to the same test, scrutiny and examination as any other Act and, if on the question being raised, unconstitutionality is established, the High Court or this Court will be bound so to declare: [1986] ILRM 136, (SC) 159.

[213] *Monro* [2008] EWCA Civ 306, [2009] Ch 69 [33].

[214] *O'Rourke* [1996] 2 IR 1 (HC).

[215] *Woolwich* [1993] AC 70 (HL); *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105.

[216] *Murphy* [1982] IR 241 (SC).

[217] *James v UK* (App No 8793/79) (1986) 8 EHRR 123 [37]; *Pressos Compania Naviera v Belgium* (App No 17849/91) (1996) 21 EHRR 301 [33]. See also Janis, Kay, and Bradley, *European Human Rights Law* (3rd edn OUP, Oxford 2008) 519.

[218] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105. See also *National & Provincial Building Society v UK* (App no 117/1996/736/933-935) (1997) 25 EHRR 127.

whether a measure restricting an individual's property rights constitutes a violation of Article 1 of the First Protocol, the European Court of Human Rights, like the Irish courts, has adopted a proportionality test.[219] The protection afforded by Article 1 of the First Protocol is weak and qualified.[220] In particular, the right to property is heavily qualified by the wide margin of appreciation afforded to states when adopting measures aimed at facilitating the payment of taxes[221] and remedying social injustice.[222] This weak protection is compounded by the lacklustre jurisprudence of the ECtHR on property rights[223] and is also directed by the wording of Article 1 of the First Protocol itself. Neuberger LJ in R *(Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* observed that Article 1 of the First Protocol, unlike other Convention provisions, does not require measures adopted by contracting states to be objectively necessary in a democratic society. Instead, it is sufficient that the contracting state *deemed* the measure to be necessary.[224] The right to property under the ECHR, and the proportionality test adopted by the ECtHR, will be considered further in the context of the change of position defence.[225]

The English courts have held that the common law right to restitution of unlawfully exacted taxes is reinforced by Article 1 of the First Protocol.[226] If restitution of unlawfully exacted taxes engages Article 1 of the First Protocol, courts should consider the proportionality of measures, including common law defences, that permit the *ex post* expropriation of taxes. However, although some English cases have adverted to the relevance of Convention property rights in the context of restitution from public authorities,[227] little consideration has been given to how these principles could, or should, shape the substantive law concerning restitution from public authorities.[228] Although the ECHR has been incorporated into Irish law,[229] Article 1 of the First Protocol is rarely relied upon in

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[219] *Bosphorus Hava Yollari Turizm Ve Ticaret AS v Ireland* (App No 45036/98) (2006) 42 EHRR 1 [149].
[220] See Beatson J's comments in *R (Burnley Borough Council) v The First Secretary of State* [2006] EWHC 798 (Admin) [48].
[221] *National & Provincial Building Society v UK* (1997) 25 EHRR 127.
[222] *James v UK* (1986) 8 EHRR 123 [46]; *Earl Cadogan v Sportelli* [2008] UKHL 71, [2010] 1 AC 226 [48].
[223] See, for example, *National & Provincial Building Society v UK* (1997) 25 EHRR 127.
[224] *R (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1580, [2005] 1 WLR 1267 [50]-[51].
[225] See Chapter 8 at 308-315.
[226] *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2009] EWCA Civ 1058 [34]. Hoffman, 'The Law of Restitution and the Human Rights Act 1998' [2004] RLR 64.
[227] *Ibid* [34]; *FII Group Litigation* [2010] EWCA Civ 103 [228]. See also *Monro* [2008] EWCA Civ 306, [2009] Ch 69 [30]-[33]. See, however, Longmore LJ's comments in the same case at [41]. In the Irish context, see *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105.
[228] See, however, Hoffman, 'The Law of Restitution and the Human Rights Act 1998' (n 227).
[229] European Convention on Human Rights Act 2003.

preference to Articles 40.3 and 40.1.3, as these constitutional provisions provide a greater measure of protection for property rights than is currently available under the ECHR.[230]

(iii) Article 17 of the Charter of Fundamental Rights of the European Union

Article 17.1 of the Charter of Fundamental Rights of the European Union provides:

> Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.

If, as discussed above, the right to restitution of overpaid taxes and charges can be reconceptualised in terms of property rights, the right to property under Article 17 of the Charter reinforces the imperative for restitution of overpaid taxes. Furthermore, if the right to property is a right protected under European law, any provision that restricts this right in an unjustified and disproportionate manner, must be disapplied by a national court in order to give effect to rights protected under Community law.

The right to property in EU law 'is not an absolute right and must be viewed in relation to its social function.'[231] The ECJ has held that the right to property can be restricted

> provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the very substance of the rights guaranteed.[232]

However, recent decisions of the Court demonstrate that Article 17 has teeth when protecting the property rights of individuals and rights to due process in relation to decisions affecting those property rights. In *Kadi,* the Court held that a measure will be disproportionate where it

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[230] *J & J Haire & Company* [2009] IEHC 562; *Dellway* [2010] IEHC 364 [10.3.2].

[231] Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v Ministero delle Politiche Agricole e Forestali* [2005] ECR I-03785 [119]; Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351 [355]; Case C-306/93 *SMW Winzersekt GmbH v Land Rheinland-Pfalz* [1994] ECR I-05555 [22].

[232] Case C-347/03 *Regione autonoma Friuli-Venezia Giulia and Agenzia regionale per lo sviluppo rurale (ERSA) v Ministero delle Politiche Agricole e Forestali* [2005] ECR I-03785 [119]; Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351 [355].

impairs 'the very substance of the right so guaranteed'.[233] The Court held that a regulation freezing the funds of persons suspected to be associated with Al-Qaeda infringed the applicants' right to property, as it restricted their control of property without affording them due process rights.[234]

D. General Principles of European Law

European law is increasingly relevant to restitution claims against the state for several reasons. [235] First, EU law provides a basis for nullifying the effect of domestic charging provisions.[236] In particular, taxes and charges will be recoverable where they infringe the principles of free movement of persons, [237] free movement of goods, [238] freedom of establishment,[239] and free movement of capital,[240] or infringe substantive rights under the Charter.[241] Second, Williams has noted that Community law has provided the impetus for the extension of restitutionary relief in a wholly domestic context.[242] In *Woolwich,* Lord Goff referred to the right to recovery of charges levied contrary to Community law, embodied in the *San Giorgio*[243] principle, as a justification for the creation of a similar right of recovery in domestic law, commenting:

> at a time when Community law is becoming increasingly important, it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under European law.[244]

Third, the CJEU has become increasingly prescriptive when defining the relief necessary to give taxpayers an effective remedy in domestic law. General principles of European law,

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[233] Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351 [355]. See also Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451 [126].
[234] Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351 [369]-[371].
[235] Williams, *Unjust Enrichment and Public Law* (n 82) 207. Footnotes omitted. See generally, Jones, *Restitution and European Community Law* (Mansfield Press, London 2000); Tatham, 'Restitution of Charges and Duties Levied by the Public Administration in Breach of European Community Law: a Comparative Analysis' (1994) 19 European Law Review 146; Magliveras, 'Unjust Enrichment and Restitution in Community Law' (1997) 6 Irish Journal of European Law 190
[236] See Williams, *Unjust Enrichment and Public Law* (n 83) 235.
[237] Case 309/85 *Barra v Belgium* [1988] ECR 355.
[238] Joined cases C-192/95 to C-218/95 *Société Comateb v Directeur général des douanes et droits indirects* [1997] ECR I-165.
[239] Joined cases C-397/98 and C-410/98 *Metallgesellschaft Ltd and Hoechst AG v Commissioners of Inland Revenue* [2001] ECR I-1727; *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* [2006] ECR I-11753.
[240] Joined cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] ECR I-1727; *FII Group Litigation* [2006] ECR I-11753.
[241] See above at Section C.
[242] Williams, *Unjust Enrichment and Public Law* (n 82) 246.
[243] Discussed in Chapter 6 at 186-190.
[244] *Woolwich* [1993] AC 70 (HL) 177.

such as the right to an effective remedy, have been instrumental in expanding and shaping the scope of domestic restitutionary relief for the recovery of taxes levied in breach of EU law. In particular, the jurisprudence of the CJEU has had a considerable impact on several principles of the law of restitution, including: the availability of interest,[245] the availability of a settled understanding of the law defence,[246] the ambit of the passing on defence,[247] and permissible limitation periods for restitution claims.[248] This new trend in CJEU jurisprudence has prompted Williams to question whether EU simply provides

> an imperative for national courts to reach a particular outcome in a particular case, regardless of the national mechanism chosen to do so, or has EU law begun to develop its own conceptions of those mechanisms?[249]

Several principles of European law are relevant to restitution from public authorities in Ireland. First, the unjust enrichment principle is a general principle of European law, to which effect must be given, subject to the principle of national procedural autonomy. Second, the institutions of Member States must 'respect the general principles of law, for example, the principles of proportionality, legitimate expectations, legal certainty, non-retroactivity, equality, subsidiarity and fundamental rights.'[250] Section (i) considers the principles most relevant to the law on restitution from public authorities: the principle against unjust enrichment, the proportionality principle and the right to protection of legitimate expectations. Section (ii) considers the relationship between the CJEU and domestic courts. Section (iii) discusses the judicial techniques adopted by domestic courts in giving effect to Community law.

(i) Substantive principles of EU Law

The ECJ has recognised that the principle against unjust enrichment is a principle common to the Member States, holding that

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[245] Joined cases C-397/98 and C-410/98 *Metallgesellschaft Ltd* [2001] ECR I-1727. See Chapter 2.
[246] Case C-188/95 *Fantask A/S and others v Industriministeriet (Erhvervsministeriet)* [1997] ECR I-6783. See Chapter 8.
[247] See Chapter 8.
[248] See Chapter 7.
[249] Williams, *Unjust Enrichment and Public Law* (n 82) 208.
[250] Jones, *Restitution and European Community Law* (n 235) 4.

> a person who has suffered a loss which increases the wealth of another person without there being any legal basis for that enrichment has the right, as a general rule, to restitution from the person enriched, up to the amount of the loss.[251]

In addition to a general principle against unjust enrichment, the ECJ has developed a specific principle, the *San Giorgio* principle, which establishes that citizens have a right to restitution of charges levied contrary to EU law.[252] Not only is the principle against unjust enrichment a general principle of European law, it can be relied upon by[253] or against[254] EU institutions and is not confined to restitution from national authorities for charges levied in breach of EU law—the factual matrix most familiar to restitution lawyers. [255]

Fiscal chaos considerations may also be relevant in European law. Although the ECJ is unlikely to be swayed by arguments that making restitution would provide an unbearable burden on the public purse, it has acknowledged that some concession may be necessary in the interest of fiscal stability. For example, the ECJ has been willing to accept that the need for fiscal certainty justifies the imposition of stringent limitation periods on restitution claims; the fixing of a limitation period is 'an application of a fundamental principle of legal certainty which protects both the authority concerned and the party from whom payment is claimed',[256] provided that the conditions for recovery 'are not less favourable than those governing the same right of action on an internal matter.'[257] Similarly, the prospective overruling doctrine adopted by the ECJ in *Defrenne* was motivated by the risk of possible fiscal disruption that would arise as a result of the Court's ruling in that case.[258] However, the Court has been careful to emphasise that such practical concerns should not undermine the principle of legality:

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[251] Case C-47/07 P *Masdar (UK) Ltd v Commission of the European Communities* [2008] ECR I-9761 [44].
[252] Case 199/82 *San Giorgio* [1983] ECR 3595 [12]; Case 309/85 *Barra* [1988] ECR 355 [17]; Joined cases C-192/95 to C-218/95 *Société Comateb* [1997] ECR I-165 [20]; Joined cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] ECR I-1727 [84]; *FII Group Litigation* [2006] ECR I-11753 [202]. See Schermers and Waelbroeck, *Judicial Protection in the European Union* (6th edn Kluwer Law International, The Hague 2001) 119-120; Wyatt, Dashwood, Dougan, Arnull, Ross and Spaventa, *Wyatt and Dashwood's European Union Law* (5th edn Sweet and Maxwell, London 2006) 221-223.
[253] See, for example, Case 36/72 *Meganck v Commission* [1973] ECR 527; Case 71/72 *Kuhl v Council* [1973] ECR 705. Both discussed in Williams, *Unjust Enrichment and Public Law* (n 83) 212-214.
[254] Case C-47/07 P *Masdar* [2008] ECR I-9761 [47]. See also Case T-171/99 *Corus UK v Commission* [2001] ECR II-2967 [55]-[56], discussed in Williams, *Unjust Enrichment and Public Law* (n 82) 220-221.
[255] This area of law is comprehensively discussed in Williams, *Unjust Enrichment and Public Law* (n 82) 212-214. As the focus of this thesis is on restitution from public authorities in Ireland, consideration of the unjust enrichment principle in European law will be confined to a consideration of the potential impact of principles of European law on restitution from the state in Irish law.
[256] Case 45/76 *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043 [18].
[257] *Ibid* [19].
[258] Case 43/75 *Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455 [69]-[75].

> Although the practical consequences of any judicial decision must be carefully taken into account, it would be impossible to go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from such a judicial decision.[259]

The proportionality principle is a generally applicable principle of European law and can be relied upon where any community rights are engaged.[260] It is a 'balancing principle, used in order to consider whether some legally recognised or protected interest or right was being excessively restricted.'[261] It has long been recognised in Community jurisprudence[262] and is now to be found in Article 52.1 of the Charter of Fundamental Rights:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

De Búrca described the early application of the proportionality test as

> a sliding scale of scrutiny whose intensity altered considerably on the range of variables; on the importance and clarity of the legal right restricted, on the importance and nature of the public or other interest for which the right was being limited, and a range of other considerations.[263]

However, the formulation of the proportionality principle in European law offers less protection to individuals than that adopted in Irish constitutional jurisprudence. First, the text of Article 52 of the Charter contains no requirement that the effect on the individual be proportionate to the objective sought to be achieved; it permits the court to conclude that a measure is proportionate once it is justified by a necessary and genuine objective.[264] It would therefore appear that a *proportionality* requirement forms no part of the proportionality test set out in Article 52.1. Second, the CJEU has held that Member States have a wide margin of

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[259] *Ibid* [71].
[260] Wyatt et al, *Wyatt and Dashwood's European Union Law* (n 252) 240.
[261] De Burca, 'Proportionality and Subsidiarity as General Principles of Law' in Bernitz and Nergelius (eds), *General Principles of European Community Law* (Kluwer Law International, The Hague 2000) 97.
[262] Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351 [355]; Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-06279.
[263] De Burca, 'Proportionality and Subsidiarity as General Principles of Law' (n 261) 97.
[264] See, for example, Case C-479/04 *Laserdisken* [2006] ECR I-8089 [56]-[59].

appreciation in considering whether a measure is justified.[265] This may lead to considerable deference where issues of domestic taxation are involved. Despite these limitations, commentators have predicted an increasingly important role for the proportionality principle:

> an increasing number of national rules will be subjected to the proportionality scrutiny, and the principle will become even more central in the assessment of the compatibility of national legislation with Community law.[266]

The principle of legitimate expectations may also be relevant to restitution claims where Community Law is engaged. In *Masdar (UK) Ltd v Commission of the European Communities*, the ECJ was willing to consider a possible claim for breach of legitimate expectations (although rejected on the facts) in a contractual context.[267] This principle is less likely to be relevant in the context of taxation and more likely to be relevant in claims where a citizen has conferred a non-monetary benefit on the state, for example, in the form of services.

(ii) National Procedural Autonomy

Although the right to a refund of taxes levied in breach of Community law stems from Community law, the principle of national procedural autonomy recognises that

> it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law.[268]

However, qualifying this broad principle, national rules governing the refund of charges levied in breach of community law must be consistent with the principles of equivalence and effectiveness.[269] The principle of equivalence requires that national rules governing recovery

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[265] Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351 [360].
[266] Wyatt et al, *Wyatt and Dashwood's European Union Law* (n 252) 243.
[267] Case C-47/07 P *Masdar* [2008] ECR I-9761 [71] *et seq*.
[268] Case C-446/04 *FII Group Litigation* [2006] ECR I-11753 [201]-[203]. Joined cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] ECR I-1727 [85]-[86]; Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989 [5]. See also Case 45/76 *Comet* [1976] ECR 2043 [13]; *Martin v An Bord Pleanála* [2002] 2 IR 655 (HC) 661. See also, Tatham, 'Restitution of Charges and Duties Levied by the Public Administration in Breach of European Community Law: a Comparative Analysis' (n 235) 165.
[269] Jones, *Restitution and European Community Law* (n 235) 8; Williams, *Unjust Enrichment and Public Law* (n 82) 237. See, generally, Schermers and Waelbroeck, *Judicial Protection in the European Union* (n 252) 199-210, especially at 203-204; Tridimas, 'Enforcing Community Rights in National Courts' in Kilpatrick, Novitz and Skidmore (eds) *The Future of Remedies in Europe* (Hart, Oregon 2000).

of charges 'are not less favourable than those governing similar domestic actions',[270] and the principle of effectiveness requires that such national rules 'do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.'[271]

Although the ECJ continues to refer to the principle of national procedural autonomy, it has become increasingly prescriptive as to the nature of relief required to protect Community rights. In 2000, Harlow observed that '[i]n practice we find that the jurisprudence has often departed considerably from the spirit of its *Saarland* ruling, from time to time trenching considerably on national procedural autonomy.'[272] This development has been welcomed by some commentators, who consider that the harmonisation of national procedural rules will 'give adequate judicial protection to all, independently of their nationality or place of residence and to avoid possible forum shopping.'[273] Irrespective of whether such harmonisation is desirable, cases such as *FII* and *Metallgesellschaft* can be viewed as examples of the continued erosion of the principle of national procedural autonomy. In *Metallgesellschaft,* the ECJ held that an award of interest was 'essential in restoring the equal treatment guaranteed by Article 52 of the Treaty',[274] notwithstanding that English law did not recognise the such a claim.[275] Similarly, in *FII,* the ECJ specified that the remedy to be made available in the national courts was a refund of the money, rather than any other form of relief.[276] Although some European influence over domestic claims is necessary to ensure that rules of national procedure do not render Community rights nugatory, it is questionable whether it is appropriate for the CJEU to enter into the minutiae of a claim to the extent that it prescribes the remedy to be provided, as it did in *FII.*

The Irish courts have taken a robust approach insofar as issues of national procedural autonomy are concerned. In *Pigs and Bacon Commission v Mc Carren and Company Limited*, the ECJ held that a levy charged by the plaintiff was contrary to Community law

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[270] Case C-446/04 *FII Group Litigation* [2006] ECR I-11753 [203]. Joined cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] ECR I-1727 [85].
[271] Case C-446/04 *FII Group Litigation* [2006] ECR I-11753 [203]. Joined cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] ECR I-1727 [85].
[272] Harlow, 'A Common European Law of Remedies?' in Kilpatrick, Novitz and Skidmore (eds) *The Future of Remedies in Europe* (Hart, Oregon 2000) 71-72. See also Tridimas, 'Enforcing Community Rights in National Courts' (n 269) 36; Williams, 'European Competition Law — "Beer Tie" Cases — Restitution — In Pari Delicto Rule' (2001) 23 Dublin University Law Journal 194, 200.
[273] Schermers and Waelbroeck, *Judicial Protection in the European Union* (n 252) 199. See also Tatham, 'Restitution of Charges and Duties Levied by the Public Administration in Breach of European Community Law: a Comparative Analysis' (n 235) 166-167.
[274] Joined cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] ECR I-1727 [87].
[275] *Ibid* [85]-[92].
[276] Case C-446/04 *FII Group Litigation* [2006] ECR I-11753 [202].

insofar as it constituted a restriction on the free movement of goods. Charges were recoverable insofar as they were devoted to purposes that were contrary to community law, subject to a right of set off in respect of any bonuses paid by the Commission to participants in the scheme. The ECJ held that, although traders who had paid the levy were entitled to reimbursement in principle:

> it is for the national court to determine, on the one hand, whether and to what extent the levy charged on a product coming under the common organization of the market and devoted to purposes incompatible with that organization must be reimbursed and, on the other hand, whether and to what extent there may be set off against that right to reimbursement the amount of the bonuses paid to the trader concerned.[277]

In the High Court, Costello J interpreted the principles of national procedural autonomy broadly, holding that he was entitled to dismiss the defendant's claim for reimbursement of the levies in its entirety:

> whilst in principle a right of reimbursement exists under Community law, I must assess on the facts of this particular case whether according to Irish law portion of the levy is recoverable by the defendants. In my view, it is not recoverable. As I pointed out in my previous judgment the defendants had paid the levy under an arrangement to which they were a party and I concluded that, whilst they were free to withdraw their consent to the arrangement ... they were precluded, as a matter of law, from claiming repayment of the sums previously paid pursuant to the arrangement. I regard the judgment of the European Court as permitting me to give effect to this opinion and, accordingly, I will dismiss the defendants' claim to reimbursement, either in whole or in part, of the levies paid prior to 1975.[278]

It is questionable whether Costello J was entitled to deny the applicants the relief that they sought on the basis of the rules of national procedural autonomy. Although the ECJ has accepted that payments pursuant to a valid contract are not recoverable pursuant to the principle against unjust enrichment,[279] there appears to be a difference between a valid contract, such as that in *Masdar,* and a payment which, although pursuant to a commercial agreement, is one that is contrary to Community law. If restitution aims to ensure the full

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[277] Case 177/78 *Pigs and Bacon Commission v Mc Carren and Company Limited* [1979] ECR 2161 [25]-[26].
[278] *Mc Carren* [1981] IR 451 (HC) 464.
[279] Case C-47/07 P *Masdar* [2008] ECR I-9761 [46].

protection of rights under community law and the effectiveness of community law, payments should be recoverable notwithstanding an apparently consensual arrangement between the parties.

Furthermore, Costello J's approach is also inconsistent with the approach of the ECJ in the later case of *Cotter and McDermott v Minister for Social Welfare.* In that case, the ECJ held that the Irish Courts were not entitled to refuse to pay social security benefits from the claimant on the basis that payment of the benefits would unjustly enrich the claimants. The ECJ held that no derogations from the principle of equal treatment were permissible. To allow the state to rely on a principle of national law such as the principle against unjust enrichment would allow the state to rely on its own unlawful conduct to deprive the principle of equal treatment of its full effect.[280] In light of the ECJ's increasing prescription in the area of restitution of overpaid tax, it is unlikely that Costello J's approach will withstand scrutiny if a preliminary issue is made on this point to the ECJ.

(iii) Judicial Techniques to give effect to Community Law in a Domestic Context

To balance the principle of national procedural autonomy with the principles of equivalence and effectiveness, certain interpretive techniques must be adopted by courts of Member States to ensure that effect is given to Community law. First, the duty of conforming interpretation mandates that 'in applying the national law ... national courts are required to interpret their national law in the light of the wording and the purpose of the directive'.[281] Although the duty of conforming interpretation was initially confined to directives having direct effect,[282] this duty now 'applies to all rules of community law, including fundamental rights, general principles of Community law and rules of international law which are applicable in Community law.'[283] It is unclear whether this expansive approach to conforming interpretation has been adopted by the Irish Courts. Although Kelly J in *Byrne v Conroy* referred to the obligation 'to construe the relevant provisions of the Extradition Act ...

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[280] Case C-377/89 *Cotter and McDermott v Minister for Social Welfare* [1991] ECR I-1155 [25]-[26]. See also Case C-208/90 *Emmott v Minister for Social Welfare and Attorney General* [1991] ECR I-4269.

[281] Case 14/83 *Von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891 [26]. See also Case C-106/89 *Marleasing v La Comercial Internacional de Alimentación* [1990] ECR I-4135 [8]; Case C-334/92 *Wagner Miret v Fondo de Garantía Salarial* [1993] ECR I-6911 [20].

[282] See, for example, *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 (HL) 558; *Nathan v Bailey Gibson Ltd* [1998] 2 IR 162 (SC) 174; *Telecom Éireann v O'Grady* [1998] 3 IR 432 (SC) 442.

[283] Lenaerts and Van Nuffel, *Constitutional Law of the European Union* (2nd edn Sweet and Maxwell, London 2005) 668. See *Fleming (t/a Bodycraft) v Customs and Excise Commissioners* [2008] UKHL 2, [2008] 1 WLR 19 [24]-[25] (Lord Walker); *FII Group Litigation* [2010] EWCA Civ 103 [260].

in a manner which is consistent with the obligations of the State to the European Union'[284] rather than in a manner that was simply consistent with the regulation in question, the Irish courts have generally confined the principle of conforming interpretation to directives,[285] regulations,[286] and framework decisions:[287]—situations in which its application has been specifically recognised by the CJEU or is required by the wording of the Treaties.[288] The precise ambit of the principle of conforming interpretation has not been addressed directly by the Irish courts, and it is not possible to express a conclusive opinion on the matter.[289] Second, the duty of disapplication, developed in *Simmenthal II,*[290] provides that

> if national legislation infringes directly enforceable Community rights, the national court is obliged to disapply the offending provision. The provision is not made void but it must be treated as being (as Lord Bridge of Harwich put it in *R v Secretary of State for Transport, Ex p Factortame Ltd*) "without prejudice to the directly enforceable Community rights of nationals of any member state of the EEC".[291]

These techniques are of considerable importance because they provide the most direct means by which provisions of Community law can be given effect in domestic courts. In England, the courts have proven themselves willing to disapply statutory limitations periods[292] and common law defences[293] where such disapplication was necessary to give effect to

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[284] *Byrne v Conroy* [1998] 3 IR 1 (SC) 23. See also *Kelly v University College Dublin* [2008] IEHC 464 [20], where McKechnie J referred to the principle of conforming interpretation as imposing 'an obligation to interpret domestic legislation "so far as possible" in a manner both compatible with and in conformity to European law'.

[285] *O'Grady* [1998] 3 IR 432 (SC) 442.

[286] *Albatros Feeds Ltd v Minister for Agriculture* [2007] 1 IR 221.

[287] *Dundon v Governor of Cloverhill Prison* [2006] 1 IR 518.

[288] See, for example, *Dundon v Governor of Cloverhill Prison* [2006] 1 IR 544-545,

[289] However, the doctrine is also subject to limitations, as noted by Vos J in *Littlewoods,* the meaning contended for pursuant to the doctrine of conforming interpretation 'should " go with the grain of the legislation " and be " compatible with the underlying thrust of the legislation being construed ", and should not be " inconsistent with a fundamental or cardinal feature of the legislation " since this would cross the boundary between interpretation and legislation.': *Littlewoods Retail Limited v Revenue and Customs Commissioners* [2010] EWHC 1071 (Ch) [74]. See also *HMRC v EB Central Services Ltd* [2008] EWCA Civ 486 [81] (Dyson LJ); *Vodafone 2 v Revenue and Customs Commissioners* [2009] EWCA Civ 446, [2010] Ch 77 [44].

[290] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629 [21]. See also Case C-213/89 *R v Secretary of State for Transport, ex p Factortame Ltd* [1990] ECR I-2433 [20]-[21].

[291] *Fleming (t/a Bodycraft) v Customs and Excise Commissioners* [2008] UKHL 2; [2008] 1 WLR 19 [24]-[25]. Internal citations omitted. See also *Autologic Holdings plc v Inland Revenue Commissioners* [2005] UKHL 54, [2006] 1 AC 118 [16]-[17]; *Eircom Limited v Commission for Communications Regulation* [2006] IEHC 138, [2007] 1 IR 1 [41]-[42].

[292] In *FII Group Litigation* [2010] EWCA Civ 103 [227] the Court of Appeal held that the application of section 320 of the Finance Act 2004 and of section 107 of the Finance Act 2007 was not precluded by Community law, on the sole basis that a mistake claim was not necessary to give an effective remedy under community law.

[293] In *FII Group Litigation* [2008] EWHC 2893 (Ch) [304], Henderson J was willing to disapply the change of position defence to mistake claims insofar as this was necessary to give effect to the *San Giorgio* principle. On appeal, the Court of Appeal held that all the *San Giorgio* claims fell within the *Woolwich* principle and so it was

Community law. Similarly, in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*, the Court of Appeal reinterpreted section 33(2A) of the Taxes Management Act 1970 to render it compliant with England's Treaty obligations.[294]

Conclusions

Several conclusions may be drawn from the themes discussed in this Chapter. First, Irish law recognises restitution for unjust enrichment, although the Irish courts have not fully considered the scope of the principle against unjust enrichment or its role in the law of restitution. Furthermore, as will be seen in chapters 3 to 6, little judicial consideration has been given to the scope of the elements of a cause of action in restitution. However, although the Irish courts have not expressly adopted many of the principles adopted in other jurisdictions, the development of the law of restitution in Ireland is similar to that of other common law jurisdictions and to the English law of restitution in particular. This Chapter has demonstrated that historical development of the law of restitution in Ireland bears a close relationship with that of the other common law jurisdictions surveyed in this Chapter. In particular, the Irish courts have recognised the principle against unjust enrichment and have rejected the implied contract theory in common with other jurisdictions. Moreover, the structural development of the law of restitution in Ireland is broadly similar to that adopted in England and in Australia, as it focuses on the enrichment of the defendant at the expense of the plaintiff and the presence of an unjust factor. However, the failure of the Irish courts to engage in principled and reflective development of law of restitution undermines the development of the law to date, as evidenced by the decision of Hogan J in *Coleman v Mullen*.

Second, the Irish Courts are willing to apply the private law of restitution to claims for unlawfully exacted tax. However, although public bodies are subject to the private law of restitution, public law considerations must also be brought to bear on the claims where restitution is sought from the state. This Chapter has sought to trace the relationship between the 'traditional' reasons advanced for restitution from the state and principles of constitutional law, as well as considering the potential impact of international human rights documents on the law of restitution. It has argued that, although the public law considerations

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not necessary to consider the application of the change of position defence to mistake claims: *FII Group Litigation* [2010] EWCA Civ 103 [191].

[294] *FII Group Litigation* [2010] EWCA Civ 103 [246]-[264].

that derive from the law of restitution are well documented, these considerations may also be buttressed by principles deriving from the Irish Constitution. Furthermore, recent developments in England demonstrate that restitution in claims against the state may also engage substantive rights under international human rights documents such as the ECHR and the EU Charter. However, it is unclear what role that substantive rights, such as the right to property, will play in specific restitutionary doctrines.

Chapter 3: Enrichment

In order to establish that a defendant has been unjustly enriched, he must receive an enrichment; 'for recovery to lie, something must have been given, whether goods, services or money.'[1] Enrichment can be positive, where the defendant receives a benefit, or negative, where the defendant is saved an expense;[2] both have the effect of increasing the defendant's net assets.[3] The principles to be applied in establishing an enrichment apply irrespective of whether restitution is sought from a private litigant or from the state. Therefore, Part I of this Chapter discusses these principles in general terms.

There is little divergence between tests that each of the relevant jurisdictions—Canada, England, Australia and Ireland—have adopted to establish enrichment. However, in contrast to other common law jurisdictions, where much ink has been spilled considering when a recipient can be said to be enriched,[4] the Irish courts have not subjected the concept of 'enrichment' to rigorous analysis. In *Bricklayers Hall,* Keane J observed:

> ...while there is seldom any problem in ascertaining whether two essential preconditions for the application of the doctrine have been met - i.e. an enrichment of the defendant at the expense of the plaintiff - considerably more difficulty has been experienced in determining when the enrichment should be regarded as "unjust" and whether there are any reasons why, even where it can be regarded as "unjust", restitution should nevertheless be denied to the plaintiff.[5]

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[1] *Peel (Regional Municipality) v Canada* [1992] 3 SCR 762; (1993) 98 DLR (4th) 140 (SCC) 154.
[2] *Ibid,* 156.
[3] Tettenborn, *Law of Restitution in England and Ireland* (3rd edn Cavendish Publishing, London 2002) 7; Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2011) 45; Goff and Jones, *The Law of Restitution* (7th edn Thomson Sweet and Maxwell, London 2007) [1-017]. Australian law also recognises that benefits can be actual or constructive, constructive benefits being 'full or partial performance of something requested to be done': *Foran v Wight* (1989) 168 CLR 385 (HCA) 438 (Deane J).
[4] See, for example, Burrows, 'Free Acceptance and the Law of Restitution' (1988) 104 LQR 576; Birks, "In Defence of Free Acceptance" in Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press, Oxford 1991); Virgo, *The Principles of the Law of Restitution* (2nd edn OUP, Oxford 2006) Chapter 4; Goff and Jones, *The Law of Restitution* (n 3); Smith et al, *The Law of Restitution in Canada, Cases Notes And Materials* (Edmond Montomgery Publications Ltd, Toronto 2004) 271.
[5] *Corporation of Dublin v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 483. See also, Maddaugh and McCamus, *The Law of Restitution* (2nd edn Canada Law Book, Aurora 2004) 45; *Olchowy v McKay* (1996) 136 Sask R 241 [19] (Sask QB); *Valley v McLeod Valley Casing Services Ltd* [2004] ABQB 302, 31 Alta LR (4th) 80 [145].

In fact, the question of what constitutes an enrichment is 'surprisingly complex.'[6] However ,each of the jurisdictions surveyed in this thesis has developed its own, different formulations for each individual test for enrichment. Although the Irish courts have not given much consideration to this question,[7] a closer study of Irish authorities demonstrates that the Irish courts have often implicitly adopted many of the principles developed in other jurisdictions. In particular, the Irish courts recognise that objective and subjective conceptions of value are relevant in considering whether the defendant has been enriched. Therefore, it is important to consider tests that courts in other jurisdictions have developed to balance these competing conceptions, as the Irish courts are likely to adopt many of these tests.

The question of enrichment is the area of the law of restitution that is most directly affected by academic commentaries. Academic writings have played an important role in drawing seemingly unrelated cases on restitution into the coherent and principled tests for establishing enrichment that are applied by the courts today. Therefore, it is necessary to have regard to how commentators in England, Canada and Australia have developed a framework for analysing 'enrichment', before considering how the tests that have been developed out of this analysis could be applied in an Irish context.

Part II considers whether interest is payable to reflect the use value of money that the state obtained through the levying of illegal charges, an issue that is of particular relevance where restitution is sought from public authorities. It argues that, while the Irish courts do not currently recognise a common law right to compound interest in respect of overpayments, they should follow the example set by the English courts in *Sempra Metals Ltd v IRC*[8] and hold that compound interest is available in restitution claims. This should be the case in all claims for overpayments, whether restitution is sought from private individuals or from the state. However, Part II argues that considerations of public law provide a particular impetus for an award of compound interest where restitution is sought from the state.

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[6] Burrows, 'Free Acceptance and the Law of Restitution' (n 4) 578; McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (2003) 48 McGill Law Journal 419, 424; McInnes, 'Incontrovertible Benefits in the Supreme Court of Canada' (1994) 23 Canadian Business Law Journal 122, 123.

[7] In contrast the Canadian courts have recognised the principles but have not applied them in a consistent or faithful manner: McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (n 6) 433.

[8] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 [48] (hereafter *Sempra*).

I. Establishing Enrichment

In considering whether a defendant has been enriched, is it sufficient that the defendant received something of an objective market value? Or must the defendant himself consider that he has received something of value? Commentators generally agree that both objective and subjective conceptions of value are relevant to establishing enrichment, but differ wildly as to whether primacy should be given to objectivity or subjectivity. Section A considers to what extent our approach to enrichment should reflect objective or subjective conceptions of value. Section B considers the judicial techniques that the courts use to strike a balance between these competing conceptions.

Furthermore, difficulties surrounding the concept of enrichment are compounded by the dual role that enrichment plays in the law of restitution:

> [t]he concept of enrichment serves a dual purpose: It most obviously satisfies the first element of unjust enrichment (ie an enrichment to the defendant), but assuming that the other components of the action are similarly met, it also governs, along with the concept of a corresponding deprivation, the quantification of relief. These two purposes are inextricably linked.[9]

McInnes has argued that the Canadian courts have failed to distinguish between these two roles.[10] The same could be said in respect of the Irish courts, although, in truth, the Irish courts have not directed *any* conceptual analysis to the question of whether there has been an enrichment in the first place. Because issues of objective and subjective value are relevant to both establishing and valuing the enrichment, to a considerable extent the same techniques are used by the courts at both stages of the analysis. However, certain novel issues arise in the context of valuing the enrichment and Section C considers specific issues that arise in this context.

A. Establishing Enrichment: Objective and Subjective Considerations

Common law jurisdictions recognise that money, goods and services are capable of constituting an enrichment. Money is clearly of benefit to the defendant. It is the universal medium of exchange and, as an indicator of economic worth, has an irrefutable objective

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[9] McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (n 6) 424.
[10] *Ibid,* 425.

value.[11] However, difficulties arise when valuing goods and services as enrichment, as the law must have regard to both objective and subjective conceptions of enrichment. Focus on the objective value of goods or services recognises that such commodities have an independent, objectively ascertainable, value and so may constitute an objective enrichment. However, the law of restitution is premised upon the inviolability of the defendant's economic freedom of choice:[12] 'Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.'[13] If a defendant was liable in restitution to pay for something to which he did not attribute value, this would fail to respect his freedom of choice.[14] Burrows has noted that:

> The problem with a purely subjective approach is that one can never be sure what the defendant is thinking and, in any event, one would probably not wish to prejudice the plaintiff according to the eccentricities of the defendant. On the other hand, the problem with a purely objective approach is that it may involve a complete sacrifice of the individual's values for those of society. It would seem therefore that the best approach is one that takes a line somewhere between these two extremes.[15]

Much of the commentary on this issue has been concerned with striking a balance between these considerations. While no commentator has suggested that either a wholly subjective or a wholly objective test should be adopted by the law of restitution,[16] most have fallen within a spectrum of positions between these extremes, depending on the consideration to which they seek to give priority. At one end of the spectrum, commentators who prioritise the defendant's freedom of choice and priority of expenditure take a more subjective approach in establishing enrichment, with less emphasis on the objective value of the

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[11] *Banco de Portugal v Waterlow and Sons* [1932] AC 452 (HL) 508; *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QBD) 799.

[12] *Peel* [1992] 3 SCR 762, 794-795, (1993) 98 DLR (4th) 140 (SCC) 152-153. See, generally, McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (n 6) 424; McInnes, 'Enrichment Revisited' in Neyers, McInnes and Pitel (eds) *Understanding Unjust Enrichment* (Hart, Portland 2004).

[13] *Falcke v Scottish Imperial Insurance Co* (1887) LR 34 Ch D 234 (CA) 248 (Bowen LJ). See also *Fensom v Cootamundra Racecourse Reserve Trust* [2000] NSWSC 1072 [77]; *Lumbers v W Cook Builders Pty Ltd (In liq)* [2008] HCA 27, 232 CLR 635 [80].

[14] *Perpetual Trustees Victoria Ltd v Ford* [2008] NSWSC 29 [119]; Burrows, 'Free Acceptance and the Law of Restitution' (n 4) 579; Virgo, *The Principles of the Law of Restitution* (n 4) 68; Fung, *Pre-contractual Rights and Remedies: Restitution and Promissory Estoppel* (Sweet and Maxwell Asia, Singapore 1999) 29; Maddaugh and McCamus, *The Law of Restitution* (n 5) 46; Smith et al, *The Law of Restitution in Canada, Cases Notes And Materials* (n 4) 271.

[15] Burrows, 'Free Acceptance and the Law of Restitution' (n 4) 579.

[16] Although Garner has come close to arguing for a wholly subjective test: Garner, 'The Role of Subjective Benefit in the Law of Unjust Enrichment' (1990) 10 Oxford Journal of Legal Studies 42.

goods.[17] At the other end of the spectrum, commentators emphasise the objective value of the enrichment, marginalising the role of subjective devaluation in establishing enrichment.[18]Other commentators have taken intermediary positions along this spectrum.[19] Some of the differences in approach along the spectrum are nuanced. However, in areas of controversy—for example, whether realisable benefits should constitute enrichment,[20] whether pure services should constitute enrichment,[21] or whether the existence of an unenforceable contract should place a cap on damages[22]—the approach advocated by commentators is motivated by their individual balancing of objective and subjective conceptions of enrichment. However, because commentators occupy positions on a spectrum, rather than falling into two camps, those who may be thought to take similar views in relation to objectivity and subjectivity in general may disagree on discrete issues pertaining to enrichment.[23]

When balancing objective and subjective conceptions of enrichment, the English courts have adopted an initial test of objective value, subject to the principle of subjective devaluation. This approach was outlined by Lord Hope in *Sempra Metals Ltd* as follows:

> Once the claimant has shown that prima facie he is entitled to a restitutionary remedy, direct knowledge of the extent of the benefit, if any, that has been received can be assumed to lie with the recipient. It is open to the recipient to demonstrate that there was no actual enrichment when the money fell into his hands notwithstanding the opportunity to turn it to account.[24]

The subjective devaluation principle allows a defendant to argue that, although the enrichment could be considered objectively valuable, he did not subjectively value the

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[17] *Ibid;* Gautreau, 'When are Enrichments Unjust?' 10 Advocates' Quarterly 258, 261; Spence, 'In Defence of Subjective Devaluation' (1998) 43 McGill Law Journal 889, 916-917.

[18] Burrows, 'Free Acceptance and the Law of Restitution' (n 4); Beatson, 'Reliance and the Structure of Unjust Enrichment' [1987] Current Legal Problems 71, 77-80; Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (OUP, Oxford 1991) Chapter 2.

[19] Goff and Jones, *The Law of Restitution* (n 3); McInnes, 'Incontrovertible Benefits in the Supreme Court of Canada' (n 6).

[20] Discussed below at 74-77.

[21] Discussed below at 87-89.

[22] Discussed below at 91-92.

[23] See the differing views taken by Birks, McInnes, and Goff and Jones on the question as to whether realisable benefits can constitute an enrichment: Discussed at 74-78.

[24] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 [48]. See, however, Lord Mance's comments at [233], which appear to consider a test of subjective benefit to be the beginning and the end of the analysis.

benefit.[25] This may be because he did not value what he received, or because he would not have prioritised the expenditure over other purchases.[26] As Gautreau J observed in *Magical Waters Fountains Ltd v Sarnia*: '"It is not your job to make my choices."'[27] Therefore, in situations where the defendant would not have chosen to spend his money in a particular way,[28] or could have obtained the same benefit for less than its objective value elsewhere,[29] or had no opportunity to exercise his freedom of choice because he was not in a position to reject the benefit,[30] the law will allow him to devalue the benefit received by him at the plaintiff's expense. This subjective devaluation principle, developed by Birks,[31] was judicially adopted in *Ministry of Defence v Ashman*.[32]

Canadian jurisprudence has also adopted an objective starting point, taking a 'straightforward economic approach' to the issue of enrichment.[33] However, although the Canadian courts have explicitly recognised the subjective devaluation principle, it has not been applied consistently. In *Estok v Heguy,* restitution was awarded against the defendant in respect of manure spread on his property by the plaintiff, even though the defendant had no use for the improved quality of the soil.[34] In contrast, Australian cases take the view that services do not constitute an enrichment until they have been shown to have been valued by the defendant,[35] indicating that Australia has adopted a subjective starting point for its test of enrichment, rather than an objective one.

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[25] *Ibid,* [119] (Lord Nicholls). See, McInnes, 'The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution' (1999) 37 Alberta Law Review 1, 31.

[26] Spence, 'In Defence of Subjective Devaluation' (n 17) 893; See also Erbacher, *Australian Restitution Law* (2nd edn Cavendish Publishing, Sydney 2002) 37

[27] *Magical Waters Fountains Ltd v Sarnia* (City) 74 OR (2d) 682, 73 DLR (4th) 734 [46] (Gautreau J). See also Gautreau, 'When are Enrichments Unjust?' (n 17) 268.

[28] *Ibid,* 261.

[29] See, for example, *Sempra* [2007] UKHL 34, [2008] 1 AC 561, where the Revenue could borrow at more favourable rates than those available commercially.

[30] *Ministry of Defence v Ashman* (1993) 25 HLR 513 (CA) 520.

[31] Birks, *An Introduction to the Law of Restitution* (revised edn, Clarendon Press, Oxford 1989) 109.

[32] *Ministry of Defence v Ashman* (1993) 25 HLR 513 (CA) 518. See also *Boulton v Jones* 157 ER 232 (Court of Exchequer).

[33] *Peter v Beblow* (1993) 101 DLR (4th) 621, [1993] 1 SCR 980 [8], [76] (SCC); *Pacific National Investments Ltd v Victoria (City)* [2004] SCC 75, 245 DLR (4th) 211 [15]; *Valley v McLeod Valley Casing Services Ltd* [2004] ABQB 302, 31 Alta LR (4th) 80 [141].
McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (n 6) 425.

[34] *Estok v Heguy* (1960) 40 DLR (2d) 88, 89. See also *Sherbeth v Sherbeth* [2007] MBQB 50, [2007] 5 WWR 672 [24]-[27]; McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (n 6) 432; Spence, 'In Defence of Subjective Devaluation' (n 17) 901.

[35] See *Lumbers v W Cook Builders Pty Ltd (In liq)* [2008] HCA 27, 232 CLR 635; *Strang Patrick Stevedoring Pty Ltd v The Owners of The Motor Vessel Sletter (Formerly The Hibiscus Trader)* (1992) 38 FCR 501 (FCA); *J Gadsden Pty Ltd v Strider 1 Ltd* (1990) 103 FLR 56 (NSWSC).

There has been little or no attempt to rely on the subjective devaluation principle before the Irish courts. Early *quantum meruit* cases establish that the defendant must first receive a benefit that is of value to him, suggesting a subjective approach. In *Stokes and Quirke Ltd v Clohessy*[36] the defendant instructed the plaintiff auctioneers to sell his house. The auctioneers introduced a prospective buyer but, before an agreement of sale was concluded between the defendant and the buyer, the defendant sold the house to a third party. The plaintiffs' claim to recover their fees on a *quantum meruit* basis was rejected as, short of any service that resulted in the completion of the sale of the house, 'any services rendered by the plaintiffs to the defendant were of no value to him.'[37] McLoughlin J approved counsel's suggestion that, in determining a reasonable sum for a *quantum meruit* claim, the court must have regard to the value *to the* defendant of the services rendered by the plaintiff.[38] However, in more recent cases involving *quantum meruit* claims, the courts awarded a reasonable sum having regard to the circumstances of the case,[39] or 'a charge of an amount which both parties could have reasonably agreed to',[40] suggesting that the Irish courts are not committed to a wholly subjective conception of enrichment. The current approach allows some scope for subjective devaluation, as defendants are entitled to argue that they would not have reasonably agreed to pay a certain sum. However, by requiring that the defendant must have *reasonably* refused to pay for the benefit, it does not allow defendants to devalue enrichments by reference to their idiosyncratic tastes. Thus, the Irish courts have imported an objective standard into their test for subjective devaluation.

The approach of the English and Canadian courts is to be preferred to those adopted in Australia and Ireland. The objective value of the enrichment provides a useful starting point for the valuation process. It makes sense for the plaintiff to argue that the defendant has received an objective benefit and for the burden to shift the defendant to say that he did not subjectively value what was received. To require the plaintiff to establish that the defendant subjectively valued the enrichment would require the plaintiff to establish that which he has no means of establishing. An approach that begins with a subjective assessment of enrichment, such as that which appears to have been adopted in Australia, may make it difficult for plaintiffs to establish that the defendant has been enriched. However, at the same

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[36] *Stokes and Quirke Ltd v Clohessy* [1957] IR 84.
[37] *Ibid,* 89.
[38] *Ibid,* 89.
[39] *Callinan v Voluntary Health Insurance Board (*High Court, 22 April 1993).
[40] *Crilly v T & J Farrington Limited* [2001] 3 IR 251 (HC) 262; *McCabe Builders (Dublin) Ltd v Sagamu Developments Ltd & Ors* [2007] IEHC 391 [65].

time, the availability of recourse to the subjective devaluation principle in English and Canadian law means that the defendant's freedom of choice is preserved. The Irish courts, in adopting a reasonableness standard, have elided the objective and subjective elements of the enrichment test and so have failed to identify the important issues of principle that underpin the question of what constitutes an enrichment.

Not all commentators favour the label of 'subjective devaluation'. Bant and Edelman consider the label to be misleading as it implies that defendant's are entitled to assess the value of benefits subjectively, whereas value of enrichments are assessed objectively once enrichment has been established. [41] However, this overlooks the fact that subjective devaluation can operate both in relation to establishing and to valuing enrichment. Even where enrichment is established, it is open to the recipient to argue that he would not have paid the market value of the commodity received. In addition, Tettenborn has argued that the subjective devaluation principle goes to the issue of whether the defendant was enriched unjustly, rather than whether he is enriched at all.[42] This view fails to acknowledge that the concept of enrichment adopted by the law of restitution is essentially subjective enrichment. The true question for the law of restitution was whether the defendant regarded himself as enriched. If the defendant did not so regard himself, then he was not enriched for the purposes of restitution, and the question of whether the enrichment is unjust is not relevant.

B. Overcoming Subjective Devaluation

There are two ways in which a plaintiff may overcome the defendant's contention that he did not subjectively value the enrichment. First, a defendant's subjective devaluation can be refuted by demonstrating that what was received could not be devalued by any reasonable person. This is known as the 'incontrovertible benefit' principle. It appeals to objective conceptions of enrichment, preventing recourse to subjective devaluation on the basis that no reasonable person could deny that he or she had been benefited. [43] There is no need to establish any manifestation of the defendant's freedom of choice, [44] because there is no scope for that freedom of choice to operate.[45] A plaintiff can establish incontrovertible benefit

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[41] Edelman and Bant, *Unjust Enrichment in Australia* (OUP, Melbourne 2006) 108; Bant, 'Incapacity, *Non Est Factum* and Unjust Enrichment' (2009) 33 Melbourne University Law Review 368.
[42] Tettenborn, *Law of Restitution in England and Ireland* (n 3) 11.
[43] Burrows, 'Free Acceptance and the Law of Restitution' (n 4) 579.
[44] *J Gadsden Pty Ltd v Strider 1 Ltd* (1990) 103 FLR 56, 20 NSWLR 57 (NSWSC).
[45] However, the stringency with which you define the tests in falling under the incontrovertible principle may depend on the position you occupy on the spectrum between objective and subjective conceptions of enrichment.

where the defendant received money, had realised the benefit in money, or was saved a necessary expense. These considerations are discussed in part (i).

Second, a plaintiff can overcome subjective devaluation by demonstrating that the defendant did in fact exercise his freedom of choice and therefore subjectively valued the benefit.[46] Therefore, defendants who requested the benefit, failed to return a readily returnable benefit, or freely accepted a benefit, will be precluded from relying on the subjective devaluation principle. These issues are discussed in part (ii).

(i) Obviating Freedom of Choice: Incontrovertible Benefit

The law of restitution will not allow a defendant to deny that he has been enriched where he has been incontrovertibly benefited—that is to say, where 'no reasonable man could seriously deny that he has been benefited.'[47] The argument that the defendant's freedom of choice has been infringed loses its force where the defendant has received a benefit that he cannot deny.[48] Incontrovertible benefit is 'an unquestionable benefit, a benefit which is demonstrably apparent and not subject to debate and conjecture';[49] the beneficial quality of the enrichment cannot be disputed. The English courts have endorsed the incontrovertible principle as discussed in the leading texts on restitution[50] but have not defined the principle. In *Coys of Kensington,* Mance LJ adopted the test proposed by Birks, holding that a defendant could be held to be incontrovertibly benefited 'where no reasonable man would say that the defendant was not enriched'.[51]

Incontrovertible benefit is an umbrella term[52] that cannot, of itself and without more, establish enrichment or give rise to liability in restitution.[53] However, some Canadian cases

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[46] See Garner, 'The Role of Subjective Benefit in the Law of Unjust Enrichment' (n 16) 43.
[47] Burrows, *The Law of Restitution* (n 3) 48.
[48] McInnes, 'Incontrovertible Benefits in the Supreme Court of Canada' (n 6) 128 and 134. See also, *Peel* [1992] 3 SCR 762, (1993) 98 DLR (4th) 140, 159 and 161.
[49] *Ibid*, 159; *Alyea v South Waterloo Edgar Insurance* Brokers Ltd (1993) 20 CCLI (2d) 81 (ONSC) [29].
[50] *Procter & Gamble Philippine Manufacturing Corpn v Peter Cremer GmbH & Co (The Manila)* [1988] 3 All ER 843 (QBD) 855; *Countrywide Communications Ltd v ICL Pathway Ltd & Anor* [2000] CLC 324 (QBD) 343 (hereafter *Countrywide Communications*); *Cressman v Coys of Kensington (Sales) Ltd (McDonald, Part 20 defendant)* [2004] EWCA Civ 47, [2004] 1 WLR 2775 [28]; *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [232]. However, Sir Andrew Morritt VC has described incontrovertible benefit as 'more debatable' than freely accepted or requested benefits as a means of establishing enrichment: *Time Group Limited v OT Computers Limited* [2003] EWHC 1119 [16] (Ch).
[51] *Cressman* [2004] EWCA Civ 47; [2004] 1 WLR 2775 [33].
[52] Virgo, *The Principles of the Law of Restitution* (n 4) 73-86. This approach has been approved in *Sharwood & Co v Municipal Financial Corp* 197 DLR (4th) 477 [18] (Ontario CA) citing Maddaugh and McCamus, *The Law of Restitution* (Canada Law Book, Aurora 1990) 42.

have treated the concept of incontrovertible benefit as an independent basis for establishing enrichment. In *Gidney v Shank* it was held that the plaintiffs' repairs to the defendant's stolen canoe constituted an incontrovertible benefit to the defendant as, without them, the canoe would not have been usable.[54] In doing so, the judge treated incontrovertible benefit as an independent basis for establishing restitution. But, in that case, the benefit was not incontrovertible in that the expense fell within one of the recognised categories of incontrovertible benefit—i.e. one that would be inevitably incurred by the defendant or one that constituted a realised benefit in money. The benefit was an objective benefit that could have been subjectively devalued by the defendant, by demonstrating that he would not have repaired the canoe or realised its value. [55]

There are three recognised forms of incontrovertible benefit. The first is money, which is considered to have an irrefutable objective value. Other situations in which incontrovertible benefit has been recognised are analogous to the receipt of money—'the functional equivalent of a monetary benefit'.[56] Gautreau has argued that '[T]he closer the subject-matter of enrichment is to money, the more readily it will be viewed as a benefit.'[57] Therefore, where a benefit such as a good or service can be considered to be 'like money' the courts will consider it to be an incontrovertible benefit. Of the situations currently considered to be incontrovertible benefits, only benefits realised in money and anticipation of a necessary expenditure fit within this category. Other situations commonly considered to be incontrovertible benefits—such as requested benefits or readily returnable benefits that are retained—are better accommodated in category (ii), below.

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[53] See McInnes, 'The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution' (n 25) 33-34.

[54] *Gidney v Shank* [1995] 5 WWR 385, 101 Man R (2d) 197 [54] (Manitoba Ct of QB). While the decision was overturned on appeal, Huband JA upheld the trial judge's conclusions on enrichment: *Gidney v Shank* [1996] 2 WWR 383 [13] (Manitoba CA). See McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (n 6) 441.

[55] McInnes, 'Enrichment Revisited' (n 12) 189. However, the defendant was not present at trial and so did not adduce evidence to subjectively devalue the enrichment, for example by arguing that he would not have repaired the canoe.

[56] McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice (n 6) 435; McInnes, 'Incontrovertible Benefits in the Supreme Court of Canada' (n 6) 128.

[57] Gautreau, 'When are Enrichments Unjust?' (n 17) 260-261. See also Edelman and Bant, *Unjust Enrichment in Australia,* (n 41) 109.

Money

Money is the 'medium of exchange' and, as such, is considered to be an incontrovertible benefit.[58] Money's role as a medium of exchange means that the receipt of money will empower a defendant to exercise his freedom of choice by spending the money in a manner that he thinks fit. However, a recent Australian case has been interpreted as suggesting that there are some rare exceptions to this principle. In *Ford v Perpetual Trustees Victoria Ltd*[59] the appellant received a loan from the respondent. The loan had been procured by the unconscientious conduct of the appellant's son. The appellant suffered from an intellectual disability and did not understand the nature of the loan transaction nor the purpose to which it would be put.[60] At first instance, the appellant successfully relied upon a plea of *non est factum*. Nonetheless, the Bank had succeeded in its claim for restitution of the money paid under the loan transaction. Notwithstanding his concern that Mr Ford had not truly exercised freedom of choice, the judge at first instance considered himself bound by established principles of restitution to hold that the receipt of the money constituted an incontrovertible benefit.[61] This finding was overturned on appeal. In no substantive sense could the appellant be said to have been enriched other than a small sum remaining in his account.

Bant has argued that *Ford* suggests that, where a defendant did not subjectively value the receipt of money, for example where, like Mr Ford, the recipient did not understand the concept of money, he cannot be held to have been incontrovertibly benefited.[62] As a result, Bant concludes that subjective value is relevant to the receipt of money, but 'is rarely explicitly invoked as the freedom of choice concerns that it seeks to address are usually met'.[63] This view is incorrect. *Ford* should not be regarded as a case of subjective devaluation but as a case of ministerial receipt.[64] Where a recipient does not receive the substance of the benefit, for example where he receives money as an agent or as a trustee, he

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[58] *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QBD) 799. *Peel* [1992] 3 SCR 762, 790; (1993) 98 DLR (4th) 140, 156; *Garland v Consumers' Gas Co* [2004] SCC 25, 237 DLR (4th) 385 [36]; *Sharwood & Co v Municipal Financial Corp* 197 DLR (4th) 477 [18] (Ontario CA). See also Jeanblanc, "Restitution Under the Statute of Frauds: What Constitutes a Legal Benefit" (1950) 26 Indiana Law Journal 1, 9; Fung, *Precontractual Rights and Remedies: Restitution and Promissory Estoppel* (n 14) 26; McInnes, 'The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution' (n 25) 32.

[59] *Ford v Perpetual Trustees Victoria Ltd* [2009] NSWCA 186, (2009) 257 ALR 658. See Bant, 'Incapacity, *Non Est Factum* and Unjust Enrichment' (n 41) 368.

[60] The loan was obtained to finance the purchase of a dry cleaning business.

[61] *Ford* [2008] NSWSC 29 [120]-[125].

[62] Bant,'Incapacity, *Non Est Factum* and Unjust Enrichment' (n 41) 377.

[63] *Ibid*, 375.

[64] *Ford* [2009] NSWCA 186 (2009) 257 ALR 658 [123]-[127].

cannot be said to have been substantively enriched. Mr Ford had received the money as a mere conduit or pawn of his son and the money did not substantively benefit him. The court was also influenced by the need to ensure that the law protective policies rendering contracts entered into by minors other than for necessaries unenforceable were not subverted by the law of restitution.[65] Thus, to suggest that *Ford* constitutes a fundamental revision of the concept of enrichment is misguided.

Benefits realisable/realised in money

'Realisation in money precludes the argument that the defendant subjectively devalues the services or resulting improvements...since money is by definition immune from subjective devaluation.'[66] Early cases indicate that a defendant will be benefited where he has realised the benefit conferred on him by the plaintiff.[67] In *Leigh v Dickeson*, Cotton LJ held that, where property is sold at an increased value as a result of repairs, the cost of the repairs executed by the occupying tenant-in-common are recoverable.[68] This means of establishing enrichment may be relevant where the state has sold assets it has acquired from the plaintiff. For example if the Irish National Asset Management Agency (NAMA)[69] were to sell the assets on which a loan it acquired from a bank, or indeed if the loan itself was sold,[70] the state would not be entitled to devalue the commodity below the price at which it was sold.

This category has been not been confined to benefits realised, or realisable, in money, as the law recognises that benefits can also be realised in other ways.[71] Architectural plans might be used to obtain planning permission or a building licence[72] or publicity services may be used to submit a successful tender for a project.[73] In such circumstances, the received services are similar to cases where property received has been consumed or converted. Because the defendant has made use of the property, he cannot deny that he has been

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[65] *Ford* [2009] NSWCA 186 (2009) 257 ALR 658 [131]. See Bant, 'Incapacity, *Non Est Factum* and Unjust Enrichment' (n 41) 384-385.
[66] Spence, 'In Defence of Subjective Devaluation' (n 17) 898.
[67] *Leigh v Dickeson* (1884-85) LR 15 QBD 60 (CA) 67; *Greenwood v Bennett* [1973] QB 195 (CA) 202.
[68] *Leigh v Dickeson* (1884-85) LR 15 QBD 60 (CA) 67. *Park Lane Ranch Ltd v Fleetwood Village Holdings (Phase II) Ltd 17* RPR 35 (BCSC) [10].
[69] The National Asset Management Agency is a state body that has been set up in response to Ireland's banking crisis. It acquires 'bad' debts from Irish banks and seeks to recoup as much of the debts as possible.
[70] However, in the example proffered, the individual whose loan has been acquired may struggle to establish an unjust factor where the transaction by which NAMA acquired the assets was between the lending bank and NAMA.
[71] See also Maddaugh and McCamus, *The Law of Restitution* (n 5) 51.
[72] *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932; *Magical Waters Fountains Ltd v Sarnia (City)* 74 OR (2d) 682, 73 DLR (4th) 734 [15]: Benefit realised where plans used to obtain Ministry of Environment approval. Reversed on other grounds.
[73] *Countrywide Communications* [2000] CLC 324 (QBD) 346.

enriched by the receipt. Similarly, where the defendant has made use of the service received, it should not lie in his mouth to claim that he did not value the service rendered. [74] In *Countrywide Communications Ltd v ICL Pathway Ltd*, Judge Strauss QC held that enrichment could be established on the basis that the benefit conferred by the plaintiff had been realised, as the advice provided by Countrywide had been used by the defendant in its tender submission.[75]

Some commentators claim that it is unnecessary that the benefits were realised, it is sufficient that the benefits were realisable.[76] Once benefits are realisable in monetary terms, this is sufficient evidence of their subjective value. Although this approach has not been universally accepted in academic circles, [77] it has been adopted in recent cases,[78] motivated by the fear that unscrupulous defendants would otherwise wait until the trial was over before realising the benefit.[79] However, this approach is undesirable as a matter of principle. First, it 'unnecessarily subverts the principle of individual autonomy,'[80] as it requires the defendant to pay for a commodity he would not have otherwise paid for, once the objective value of that commodity is capable of being realised on the market. Second, the concept of realisable benefits is overly broad and a defendant may be considered enriched where he did not value the benefit conferred and where it is unreasonable to expect him to realise the benefit. For example, it is unjust that a defendant should be deemed to have been benefited by unsolicited improvements to his property where he is unwilling to sell his property and realise those benefits. Until he has sold the property and realised the benefit, in the form of an increased market value of the property, he cannot be said to be incontrovertibly benefited.[81]

The Canadian case *Sherbeth v Sherbeth*, demonstrates how a failure to insist that the benefit be realised can significantly undermine the subjective devaluation principle. Menzies

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[74] McKendrick, 'Work Done in Anticipation of a Contract which does not Materialise' in Cornish et al (eds) *Restitution, Past Present and Future* (Hart, Oxford 1998) 179-180. Cited in *Countrywide Communications* [2000] CLC 324, 346.

[75] *Countrywide Communications* [2000] CLC 324 (QBD) 349.

[76] Goff and Jones, *The Law of Restitution* (n 3); Maddaugh and McCamus, *The Law of Restitution* (n 5) 51; McInnes, 'Incontrovertible Benefits in the Supreme Court of Canada' (n 6). Compare however Spence, 'In Defence of Subjective Devaluation' (n 17).

[77] See Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney 1995) 47-48, and 49; Birks, 'In Defence of Free Acceptance' (n 4) 131; Gautreau, 'When are Enrichments Unjust?' (n 17) 261 and 270-272.

[78] *Countrywide Communications* [2000] CLC 324, 347; *Cressman v Coys of Kensington (Sales) Ltd (McDonald, Part 20 defendant)* [2004] EWCA Civ 47, [2004] 1 WLR 2775 [34]-[36]; *ERDC Group Limited v Brunel University* [2006] EWHC 687 [45]. However, see *Peel v Ontario* [1992] 3 SCR 762, (1993) 98 DLR (4th) 140, 160.

[79] Edelman and Bant, *Unjust Enrichment in Australia* (n 41) 110; McInnes, 'Enrichment Revisited' (n 12) 190.

[80] Virgo, *The Principles of the Law of Restitution* (n 4) 81.

[81] See also, Burrows, *The Law of Restitution* (n 3) 48: 'An improvement to a car is not realisable to a person who cannot afford to sell it and buy a suitable replacement.'

J held that the defendant had been incontrovertibly benefited by the construction of a property on his land where the benefit would be realisable in money through the sale of the property, notwithstanding that he accepted the defendant's evidence that the defendant intended to demolish the property and put the yard site to grass.[82] To find a benefit in such circumstances impermissibly marginalises the subjective devaluation principle. A defendant should not be deemed to have been benefited where a benefit is realisable but he has established that he will never realise the benefit in fact.

Third, this approach has potential to cause confusion. Although the Canadian courts have recognised that a benefit realisable in monetary terms will constitute an enrichment,[83] some cases suggest that a benefit that is realisable in non-monetary terms will not constitute an enrichment unless it is in fact realised,[84] giving rise to an inconsistency of approach between benefits realisable in money and benefits realisable in another manner. Fourth, to allow recovery in the case of realisable benefits renders the subjective devaluation principle redundant. If subjective devaluation can be defeated by the fact that a benefit is realisable in money, this effectively brings us full circle to the objective benefit of the property. The mere fact that the benefit has some objective market value will be sufficient to establish enrichment.

Burrows has sought to reconcile these conflicting views by suggesting that a defendant will be enriched where it is reasonably certain that he will realise the benefit.[85] It has been suggested that this test should be confined to situations where the defendant retains the benefit at trial, otherwise it is likely to give rise to difficulties in its application.[86] Other commentators have suggested that the defendant should be considered enriched where the benefit was realisable without detriment to him.[87] While this argument forestalls objections on practical grounds, it fails to address the principled objections outlined above. Furthermore, the law of restitution is not solely concerned with avoiding detriment to the defendant but

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[82] *Sherbeth v Sherbeth* [2007] MBQB 50, [2007] 5 WWR 672 [24]-[27].

[83] However, some cases have not considered an unrequested benefit to constitute an enrichment even where the benefit was realisable in money terms: *Campbell v Campbell* 173 DLR (4th) 270.

[84] *Little Island Fisheries Ltd v Royal Harbour Seafoods* Inc [2009] NSSC 300 [55]-[64].

[85] Burrows, *The Law of Restitution* (n 3) 49.

[86] *Cressman v Coys of Kensington (Sales) Ltd (McDonald, Part 20 defendant)* [2004] EWCA Civ 47, [2004] 1 WLR 2775 [35]-[40]

[87] McInnes, 'Incontrovertible Benefits in the Supreme Court of Canada' (n 6) 144; Maddaugh and McCamus, *The Law of Restitution* (n 5) 52. Edelman and Bant suggest that the best way of resolving the dispute is 'to take into account the nature of the benefit conferred, the difficulty involved in realising the benefit in money and the identity and individual circumstances of the defendant': Edelman and Bant, *Unjust Enrichment in Australia* (n 41) 110.

also seeks to protect his freedom of choice. By expanding incontrovertible benefits to include realisable benefits, the law fails to do this. Furthermore, where restitution is sought from the state, a test of 'realisable benefits' is unworkable in practice, as it is unclear how it could be employed without making an order requiring the state to sell the property concerned, which would breach the constitutional separation of powers.[88]

Anticipation of necessary expenditure

Where the plaintiff anticipates an expenditure that the defendant would have had to incur as a matter of necessity, the defendant cannot deny that he has been enriched.[89] Expenditure may be legally or factually necessary. Legally necessary expenditure will be easily established where the plaintiff discharged a legal obligation owed by the defendant, such as the discharge of debt owed by the defendant[90] or the performance of a legal duty owed by the defendant.[91] Factually necessary expenditure may be more difficult to establish,[92] although it has been suggested that as 'long as it can be shown that the in the ordinary course of events the defendant would have incurred the expenditure it should be possible to conclude that the defendant had been incontrovertibly benefited.'[93]

This approach has been adopted in Canada, where the anticipation of an expense that the defendant would have had to incur is recognised to constitute an incontrovertible benefit.[94] There has been little consideration of this particular basis of establishing enrichment in Australia. There is a suggestion in *Angelopoulos v Sabatino* that the saving of a necessary expense may constitute a benefit.[95] Similarly, in *Bunbury-Harvey Regional Council v Giacci Bros Pty Ltd,* Hasluck J refused to allow the defendants to subjectively devalue the dumping services provided by the plaintiff as they would have been unable to procure a similar service at such short notice.[96]

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[88] *Sinnott v Minister for Education* [2001] 2 IR 545 (SC); *TD v Minister for Education* [2001] 4 IR 259 (SC).
[89] Maddaugh and McCamus, *The Law of Restitution* (n 5) 50.
[90] *East Cork Foods v O'Dwyer Steel* [1978] IR 103 (SC) 111; *Exall v Partridge* (1799) 8 Term Reports 308, 311; *Peel (Regional Municipality) v Canada* (1993) 98 DLR (4th) 140 (SCC) 156.
[91] *Carleton (County of) v Ottawa (City of)* [1965] SCR 663 (SCC) 669.
[92] McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (n 6) 438.
[93] Virgo, *The Principles of the Law of Restitution* (n 4) 77.
[94] See *Concord Carriers Ltd v Alnet Holdings Ltd* (2005) 46 CLR (3d) 311 (ONSC) [25].
[95] *Angelopoulos v Sabatino* (1995) 65 SASR 1 (SASC) 13.
[96] *Bunbury-Harvey Regional Council v Giacci Bros Pty Ltd* [2000] WASC 223 [169].

Factually necessary expenditure may be subjectively devalued, for example where the defendant could have procured the commodity for less than the sum demanded by the plaintiff[97] or where having the expense met by the plaintiff entailed disadvantages that the defendant could have avoided if he had procured the service or commodity for himself. In *JS Bloor Limited v Pavillion Developments Limited*, the defendant successfully established that it did not value the access road constructed for its use by the plaintiff, where the defendant could have had a road built, to its own specifications, for considerably less than the sum demanded by the plaintiffs, particularly where it remained liable for the state of the road under occupiers' liability legislation.[98]

In Ireland, *Goodman v Minister for Finance* suggests that the enrichment will only accrue to the defendant at the time his liability to meet the expenditure arises. The plaintiffs obtained orders for the costs of their participation in the Beef Tribunal.[99] They claimed interest on those costs, under the Debtors (Ireland) Act, 1840 and further contended that the state would be unjustly enriched if interest was not paid on the sums owed. Laffoy J rejected this claim. The Tribunal's power to award costs was not self-executing[100] and the defendant's duty to pay the plaintiffs' costs of legal representation did not arise until the costs had been taxed by the Taxing Master.[101] Thus, the rejection of the plaintiffs' claim for interest on their costs can be understood on the basis that, until the costs were taxed, the defendant was not enriched, there was no necessity to be met.

O'Dell has suggested that this basis of establishing enrichment may be relevant to recovery of overpaid nursing home charges. Elderly patients who were denied the free nursing care to which they were entitled and who obtained private nursing home care at their own expense, saved the Government the expense that it would otherwise have incurred in meeting its obligations under section 52 of the Health Act 1970.[102] However, although the State has been saved a necessary expense, in that it would otherwise have had to provide

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[97] See for example *Boulton v Jones* (1857) 2 Hurl & N 564 (Court of Excequer), where the defendant had a right of set off against the plaintiff's predecessor in title.

[98] *J S Bloor Limited v Pavillion Developments Limited* [2008] EWHC 724 [45] (TCC). See also McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (n 6) 435.

[99] The Beef Tribunal was a tribunal of inquiry set up in 1991 to investigate irregularities in the beef export trade and the involvement of politicians in these irregularities.

[100] *Goodman v Minister for Finance* [1999] 3 IR 356 (HC) 368-369.

[101] *Ibid,* 370-371.

[102] Dr O'Dell's comments are to be found at: http://www.cearta.ie/2010/11/have-older-people-in-private-nursing-homes-received-a-fair-deal-from-the-state/. For further background to this litigation, see the report of the Ombudsman: 'Who Cares? An Investigation into the Right to Nursing Home Care in Ireland' (A Report to the Dáil and Seanad in accordance with section 6(7) of the Ombudsman Act 1980, Office of the Ombudsman, November 2010) Chapter 8.

nursing home care for these elderly people, it will be able to rely on the subjective devaluation principle. The State may be able to argue that it was in a position to 'bulk-buy' nursing home services and so it would not have paid the full cost of the nursing home charges incurred by private patients. In this regard, the State's arguments would be comparable to those successfully relied upon by the Revenue Commissioners in *Sempra* who subjectively devalued the use value of money over time by demonstrating that the State could borrow money at lower rates than those available on the commercial market.[103]

(ii) Demonstrating Freedom of Choice: Requested Benefits, Readily Returnable Benefits and Free Acceptance.

Where a defendant requested the benefit, failed to return a readily returnable benefit, or freely accepted a benefit, he will be considered to have subjectively valued the benefit and will be precluded from relying on the subjective devaluation principle. This category does not seek to negate freedom of choice, but instead seeks to establish that the defendant did in fact exercise his freedom of choice and therefore subjectively valued the benefit.[104]

Requested Benefits

Where a defendant has requested a particular benefit, his request may indicate that he valued the benefit and that he understood that it was not conferred gratuitously.[105] English[106] and Canadian[107] cases recognise that benefits conferred at the request of another are enrichments. Similarly, some Australian cases have held that a defendant can be enriched even where no benefit has been conferred upon him.[108]

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[103] *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [49] (Lord Hope), [103] and [128] (Lord Nicholls). See below at 108.

[104] See Garner, 'The Role of Subjective Benefit in the Law of Unjust Enrichment' (n 16) 43.

[105] *Leigh v Dickeson* (1884-85) LR 15 QBD 60 (CA) 64. See also Jeanblanc, 'Restitution Under the Statute of Frauds: What Constitutes a Legal Benefit' (1950) 26 Indiana Law Journal 1, 7; McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (n 6) 446; McInnes, 'Enrichment Revisited' (n 12) 176.

[106] *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428 (CA) 436; *William Lacey (Hounslow) Ltd v Davis* [1957] 1 WLR 932 (QBD); *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QBD) 805; *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504 (QBD) 511; *Brenner v First Artists Management Pty Ltd* [1993] 2 VR 221 (VSC) 258. See also Fung, *Precontractual Rights and Remedies: Restitution and Promissory Estoppel* (n 14) 35; Maddaugh and McCamus, *The Law of Restitution* (n 5) 46.

[107] *Pacific National Investments Ltd v Victoria (City)* [2004] SCC 75, 245 DLR (4th) 211 (SCC) [17]. See Maddaugh and McCamus, *The Law of Restitution* (n 5) 47.

[108] *Independent Grocers' Co-operative Ltd v Noble Lowndes Superannuation Consultants Ltd* (1993) 60 SASR 525 (SASC) 556. However, Mason and Carter have argued that a request should not be sufficient to establish enrichment, contending that '[A]cceptance (actual or constructive) is...a proper basis for establishing enrichment': Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney 1995) 51. Interestingly, a recent Australian High Court decision suggests that acceptance in the absence of a request cannot constitute enrichment: *Lumbers v W Cook Builders Pty Ltd (In liquidation)* [2008] HCA 27, 232 CLR 635 [82]-[86]. See

This issue has not been explicitly considered in Irish case law. However, the case of *Folens and Company Ltd v The Minister for Education*[109] raises not only the question of whether or not a requested benefit can constitute an enrichment, but also addresses the more controversial question of whether a requested benefit can constitute an enrichment even where the defendant has received no part of the benefit. This issue has been considered in other jurisdictions, in an attempt to explain the decision in *Planché v Colburn,*[110] in which the plaintiff had been engaged to provide illustrations/writing to the defendant's Juvenile Library series of publications. The plaintiff had carried out research and had made some drawings, but the defendants repudiated the contract before the plaintiff could deliver any work to them. The plaintiff recovered in respect of the work completed by him, notwithstanding that the defendants received no part of the performance.

Folens bears an uncanny resemblance to the facts in *Planché.* The plaintiff and the defendant agreed to produce an Irish language encyclopaedia. The plaintiff carried out some preliminary work in the absence of a concluded contract. Before a contract could be finalised, the defendants withdrew from the project. The plaintiff sought to recover expenditure incurred on the project, along with a reasonable profit. McWilliam J held that the preliminary work had been done for the benefit of the defendant and that the plaintiff could recover a reasonable sum pursuant to the principles identified in *William Lacy (Hounslow) Ltd v Davis* and *Brewer Street Investments Ltd v Barclay's Woollen Co Ltd.*[111]

Folens encounters similar problems to that in *Planché,* in that no benefit was received by the defendant. The approach in *Planché* and *Folens* has been criticised. Commentators adhering to an objective-centered conception of enrichment argue that the defendant cannot be said to have been enriched where he had received no part of the expected performance.[112] Commentators favouring a subjective approach have also argued that the *Planché/Folens* situation cannot be regarded as restitutionary:

> the *quantum meruit* claim allowed in *Planché v Colburn* was not restitutionary. And this was not just because the defendant had not received any part of the book which

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Bryan, '*Lumbers v W Cook in Liquidation*—Restitution for Services and the Allocation of Contractual Risk' (2009) 33 Melbourne University Law Review 320, 323.

[109] *Folens and Company Ltd v The Minister for Education* (1984) 4 ILRM 265 (HC).

[110] *Planche v Colburn* (1831) 8 Bing 14 (KB).

[111] *Folens and Company Ltd v The Minister for Education* (1984) 4 ILRM 265 (HC) 270-271.

[112] See Rafferty 'Contracts Discharged Through Breach: Restitution for Services Rendered by the Innocent Party' (1999) 37 Alberta Law Review 51, 64; Edelman and Bant, *Unjust Enrichment in Australia* (n 41) 114.

[112] Maddaugh and McCamus, *The Law of Restitution* (n 5) 47.

the plaintiff was writing for him. For subjectively determined benefit does not require an end-product. But it does require an acknowledgment or concession of benefit, and there was none in *Planché v Colburn.* [113]

The preferred interpretation of these cases is not that requested benefits constitute an enrichment if they are not received by the defendant, but that the relief awarded is reliance-based compensation.[114] Subsequent cases have questioned whether the fact that the defendant had requested the service should be sufficient to constitute an enrichment in the absence of a received benefit.[115]

However, the measure of damages awarded in *Folens* cannot be reconciled with a reliance-based approach, as the damages awarded reflects the expectation measure of interest[116] and so is inconsistent with the judge's finding that there was no contract. In fact, the nature of the relief awarded in *Folens* is particularly confused. The plaintiff was awarded damages that reflected his expenditure plus 20% of the profit that it would have earned on the transaction. In addition, interest was awarded on the sum to reflect the plaintiff's loss of the use of money,[117] even though to award both the profit that would have accrued to the plaintiff and interest on the loss of the use of money resulted in double compensation of the plaintiff. However, the requested benefits test has been applied in subsequent Irish cases. In *GF Galvin (Estates) Ltd v Hedigan,* Costello J held that the *quantum meruit* claims in *Folens, William Lacey (Hounslow)* and *Brewer Street Investements* succeeded because, in those cases, the defendants had requested the services.[118]

If the 'requested benefits' category constitutes a basis for establishing enrichment, it subsumes previously suggested categories such as bargained for benefits and benefits conferred under void or unenforceable contracts.[119] However, there may be a residual role for such categories in the context of valuing the enrichment, as it may be harder to establish that

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[113] Garner, 'The Role of Subjective Benefit in the Law of Unjust Enrichment' (n 16) 53-54.
[114] Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (n 18) 33 and 35; Burrows, 'Free Acceptance and the Law of Restitution' (n 4) 589.
[115] *Countrywide Communications* [2000] CLC 324 (QBD) 344. See also Goff and Jones, *The Law of Restitution* (n 3) [1-022].
[116] *Folens and Company Ltd v The Minister for Education* (1984) 4 ILRM 265 (HC) 271. Burrows similarly argues that the relief awarded in *Planché* reflects the expectation interest: Burrows, 'Free Acceptance and the Law of Restitution' (n 4) 589.
[117] *Folens and Company Ltd v The Minister for Education* (1984) 4 ILRM 265 (HC) 272.
[118] *GF Galvin (Estates) Ltd v John Hedigan and Others* [1985] ILRM 295 (HC) 302.
[119] Burrows, 'Free Acceptance and the Law of Restitution' (n 4) 586; Burrows, *The Law of Restitution* (2nd edn Butterworths, London 2002) 21.

the defendant did not intend to pay the market value of the benefit where he had bargained or contracted for it than if he had merely requested it.

Failure to return a readily returnable benefit.

The 'readily returnable benefit' test was developed by Mance LJ in *Cressman and another v Coys of Kensington (Sales) Ltd:*

> I have no doubt that justice requires that a person, who ... has a benefit or the right to a benefit for which he knows that he has not bargained or paid, should reimburse the value of that benefit to the other party if it is readily returnable without substantial difficulty or detriment and he chooses to retain it (or give it away to a third party) rather than to retransfer it on request.[120]

Where the defendant has received a benefit that can easily be returned to the plaintiff, but he refuses to do so, he cannot convincingly argue that he did not value the enrichment.[121] This test could apply to most cases where the enrichment consists of chattels that have not been consumed or converted. [122]

A readily returnable benefit that the defendant refuses to return has been characterised as an 'incontrovertible benefit' by the English courts. However, this means of establishing enrichment does not fit conceptually within the 'incontrovertible benefit' category. Incontrovertible benefits constitute enrichment because it is not open to the defendant to subjectively devalue the benefit. The benefit is so indisputably beneficial that this overrides the defendant's personal assessment of the value of the commodity. Readily returnable benefits are not considered to be an enrichment because of some undeniable objective benefit that attaches to them but because, in failing to return the benefit, the defendant has exercised his freedom of choice and so to hold the commodity to be an enrichment does not interfere with the defendant's autonomy. [123] However, it is unlikely that this ground of establishing

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[120] *Cressman v Coys of Kensington (Sales) Ltd (McDonald, Part 20 defendant)* [2004] EWCA Civ 47; [2004] 1 WLR 2775 [37].

[121] Virgo, *The Principles of the Law of Restitution* (n 4) 77; Burrows, *The Law of Restitution* (n 3) 53-55; Gautreau, 'When are Enrichments Unjust?' (n 6) 261; Edelman and Bant, *Unjust Enrichment in Australia* (n 41) 115.

[122] In cases where the goods have been consumed or converted, enrichment can be established on the basis of the 'realised benefits' test.

[123] McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (n 6) 446; Burrows, *The Law of Restitution* (n 3) 48.

enrichment could be relevant in restitution claims from public authorities. In most cases, the enrichment provided to the state will take the form of money, as in the receipt of taxes, or services provided to the state in a contractual context, neither of which can be classed as a 'readily returnable benefit'.

Free Acceptance

One of the most controversial ways of establishing enrichment is 'free acceptance'. A defendant will have freely accepted a benefit where he, 'as a reasonable man, should have known that the claimant who rendered the services expected to be paid for them, and yet he did not take a reasonable opportunity open to him to reject the proffered services.'[124] Free acceptance has been proposed both as a means of establishing enrichment *and* as an unjust factor. Although many academics have rejected free acceptance as a ground of restitution,[125] some are less vehemently opposed to its application in the context of establishing an enrichment.[126] If the defendant exercised a voluntary choice in accepting the benefits, when he knew that they were to be paid for, to hold that the defendant valued those benefits is consistent with his individual autonomy.[127] The defendant's acceptance of the benefit must demonstrate that he valued the benefit.[128] It will not be possible to rely on free acceptance where the recipient has made it clear that he does not value the benefit and does not intend to pay for it.[129] Similarly, a defendant who had no choice but to accept the benefit will not be deemed to have freely accepted it.[130] In addition, a defendant must have accepted the benefits on the understanding that he was required to pay for them.[131] Where the defendant thinks that the cost was to be met by a third party, he will not be unjustly enriched at the expense of the

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[124] Goff and Jones, *The Law of Restitution* (n 3) [1-019]. See also *ABB Power Generation Ltd v Chapple* [2001] WASCA 412, 25 WAR 158 [10].

[125] Virgo, *The Principles of the Law of Restitution* (n 4) 77; Burrows, *The Law of Restitution* (n 3) 58; Mead, 'Free Acceptance: Some Further Considerations' (1989) 105 Law Quarterly Review 460.

[126] Burrows, *The Law of Restitution* (n 3) 58. Compare Burrows, 'Free Acceptance and the Law of Restitution' (n 4).

[127] Virgo, *The Principles of the Law of Restitution* (n 4) 77.

[128] *Oliver v Lakeside Property Trust Pty Ltd* [2005] NSWSC 1040 [83]; Fung, *Precontractual Rights and Remedies: Restitution and Promissory Estoppel* (n 14) 41.

[129] *Bookmakers Afternoon Greyhound Services Ltd v Wilf Gilbert (Staffordshire) Ltd* [1994] FSR 723 (Ch) 743-744; *Damberg v Damberg* [2001] NSWCA 87, 52 NSWLR 492 [191]-[194].

[130] *Leigh v Dickeson* (1884-85) LR 15 QBD 60 (CA) 65; *Falcke v Scottish Imperial Insurance Co* (1887) LR 34 Ch D 234 (CA) 242; *JS Bloor Limited v Pavillion Developments Limited* [2008] EWHC 724 (TCC) [47]-[50]; *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Limited* [2008] EWCA Civ 1449, [2009] 1 WLR 1580 [47]. However in that case Maurice Kay LJ considered that the defendant's had received an incontrovertible benefit by virtue of being able play matches in their home stadium [65]. This approach is to be preferred. See *Benedetti v Sawiris* [2009] EWHC 1330 (Ch) [575]; Burrows, *The Law of Restitution* (n 3) 49. In Australia see *Angelopoulos v Sabatino* (1995) 65 SASR 1 (SASC) 10.

[131] *ABB Power Generation Ltd v Chapple* [2001] WASCA 412, (2001) 25 WAR 158 [41].

plaintiff.[132] Free acceptance will not be relied upon where the benefit is one that is readily returnable[133] and it is possible that free acceptance can only be relied upon as a means of establishing enrichment where no other test will apply.[134]

Two criticisms can be made of free acceptance as a basis for establishing enrichment. First, free acceptance undermines the principle that the law of restitution will not come to the aid of a risk taker who has conferred a benefit officiously in the hope of being paid.[135] Proponents of free acceptance claim that the fact that the plaintiff acted officiously was offset by the defendant's unconscientious behaviour in accepting the benefit when he knew that it was not conferred gratuitously.[136] Cases that place considerable emphasis on the need to respect a defendant's freedom of choice recognise that a defendant who sat by and allowed a plaintiff to spend his money for the defendant's benefit in the expectation of being paid will be liable to repay the expense incurred.[137] Both concerns are misplaced. While issues of fault may be relevant where the plaintiff seeks to rely on free acceptance as a cause of action, where it is used as a means of establishing enrichment, questions of comparative fault should be irrelevant.

Second, free acceptance does not overcome arguments regarding individual autonomy. Free acceptance simply demonstrates that the defendant was indifferent to the benefit, not that he valued it.[138] Similarly, free acceptance does not acknowledge situations where the defendant values the benefit but is not willing to pay for it 'as a present priority.'[139] In light of these criticisms, the role of free acceptance has been refined by Birks. Rather than

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[132] *Bridgewater v Griffiths* [2000] 1 WLR 524 (QBD) 533.

[133] *Cressman v Coys of Kensington (Sales) Ltd (McDonald, Part 20 defendant)* [2004] EWCA Civ 47, [2004] 1 WLR 2775 [26]-[27].

[134] Birks has made this observation with regard to free acceptance as an unjust factor: Birks, 'In Defence of Free Acceptance' (n 4) 111.

[135] *Leigh v Dickeson* (1884-85) LR 15 QBD 60 (CA) 64-65; *Owen v Tate* [1976] QB 402 (CA) 412; *Bookmakers Afternoon Greyhound Services Ltd v Wilf Gilbert (Staffordshire) Ltd* [1994] FSR 723 (Ch) 743-744; *J Gadsden Pty Ltd v Strider 1 Ltd* (1990) 103 FLR 56, 68 (NSWSC); *Damberg v Damberg* [2001] NSWCA 87, 52 NSWLR 492 [194]. See Mead, 'Free Acceptance: Some Further Considerations' (n 125) 463; Burrows, 'Free Acceptance and the Law of Restitution' (n 4) 578; Spence, 'In Defence of Subjective Devaluation' (n 17). The courts have accepted that free acceptance will not avail a plaintiff who has accepted the risk that he or she will not be paid for the work done: *MSM Consulting Limited v United Republic of Tanzania* [2009] EWHC 121 (QBD) [171]-[175]. Similarly, the law of restitution will not come to the aid of a party who would have conferred the benefit even if the defendant had not promised any reward in return for the benefit: *Coleman v Mullen* [2011] IEHC 179 [17]. This case has been discussed in Chapter 2.

[136] Birks, 'In Defence of Free Acceptance' (n 4) 111.

[137] *Falcke v Scottish Imperial Insurance Co* (1887) LR 34 Ch D 234, 249.

[138] Burrows, *The Law of Restitution* (n 3) 57; Burrows, 'Free Acceptance and the Law of Restitution' (n 4) 580; Virgo, *The Principles of the Law of Restitution* (n 4) 88; Fung, *Precontractual Rights and Remedies: Restitution and Promissory Estoppel* (n 14) 46.

[139] Garner, 'The Role of Subjective Benefit in the Law of Unjust Enrichment' (n 16).

positively establishing that the defendant has received a benefit, the fact that the defendant freely accepted the benefit will prevent him from having resort to the subjective devaluation principle,[140] leading some commentators to conceptualise free acceptance as a form of estoppel.[141] A defendant will be prevented from subjectively devaluing an enrichment where it would be unconscientious for him to do so and it will be unconscientious for him to do so where he freely accepted the benefit in the knowledge that it was not conferred gratuitously.[142] An alternative conception of free acceptances views free acceptance as giving rise to a rebuttable presumption that the recipient valued the services when establishing the enrichment, [143] subject to the principle of subjective devaluation when valuing the enrichment.[144] Therefore, where the defendant accepted the goods in the belief that their objective value was less than market value, he can point to this mistaken belief to subjectively devalue the enrichment.

Canada has adopted free acceptance as a test for restitution, [145] although the courts' permissive approach to the doctrine means that in many cases, enrichment was established where it should have been rejected.[146] However, many of the cases in which free acceptance has been relied upon concern the division of family property, which is underpinned by policy concerns not generally applicable to the law of restitution. [147] Early Australian cases also adopted the free acceptance principle. In *Pavey,* free acceptance was relied upon as a ground of restitution and as the method of valuing the enrichment.[148] In *Angelopoulos v Sabatino*, the Supreme Court of South Australia recognised that free acceptance of a benefit was capable of establishing enrichment in the absence of a request for the service.[149] However, this line of authority has been called into question by *Lumbers v W Cook Builders Pty Ltd (In liq),* where the High Court of Australia rejected the contention that acceptance of a benefit could

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[140] Birks, 'In Defence of Free Acceptance' (n 4); Virgo, *The Principles of the Law of Restitution* (n 4) 91.
[141] Birks, 'In Defence of Free Acceptance' (n 4) 129.
[142] McInnes, 'The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution' (n 25) 34.
[143] Goff and Jones, *The Law of Restitution* (n 3) [1-020]; Fung, *Precontractual Rights and Remedies: Restitution and Promissory Estoppel* (n 14) 47.
[144] Birks, 'In Defence of Free Acceptance' (n 4) 129.
[145] See *Gidney v Shank* [1995] 5 WWR 385, 101 Man R (2d) 197 [44] (Manitoba Ct of QB); *Kendall v Rankin* [1998] BCJ No 3018 (BCSC) [16]. The benefit in that case was also deemed to constitute anticipation of a necessary expenditure [18].
[146] See, for example, *Pettkus v Becker* [1980] 2 SCR 834 (SCC).
[147] *Ibid*; McInnes, 'The Canadian Principle of Unjust Enrichment: Comparative Insights into the Law of Restitution' (n 25) 36-37.
[148] *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5, 162 CLR 221, 228 (Mason and Wilson JJ), 262 (Deane J). This analysis has been accepted in subsequent cases: *Angelopoulos v Sabatino* (1995) 65 SASR 1, (SASC) 9; *ABB Power Generation Ltd v Chapple* [2001] WASCA 412, (2001) 25 WAR 158 [13]-[15].
[149] *Angelopoulos v Sabatino* (1995) 65 SASR 1 (SASC) 9.

constitute an enrichment in the absence of a request.[150] Despite academic misgivings regarding the role of free acceptance in the law of restitution,[151] several recent English cases have adopted the concept, although it is unclear what role the courts have attributed to free acceptance. Both *Rowe v Vale of White Horse* and *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Limited* suggest that free acceptance does not go to establishing enrichment but instead goes to showing that the enrichment was at the expense of the plaintiff.[152]

The Irish courts have not explicitly adopted free acceptance as a basis of establishing enrichment. However, free acceptance was the implicit basis on which liability was imposed in *Premier Dairies Ltd v Jameson*.[153] The defendant milkman had accepted a milk route and £2,000 from the plaintiff in return for acting as its exclusive distributor, but failed to carry out his obligations under the agreement. McWilliam J held that, although there was no contract between the plaintiff and the defendant, the plaintiff was entitled to recover money paid under the agreement:

> as the acceptance by the Defendant of the additional customers and the renewal of supplies to him could only be attributed to an expectation of the completion of the proposed agreement and I was of opinion that this created a liability on the part of the Defendant to restore the parties to their previous positions to the best of his ability.[154]

The defendant had accepted the benefits from the plaintiff in the knowledge that a period of commitment to the agreement would be required from him in return.[155]

Alternatives to free acceptance have been proposed. Burrows has suggested that the appropriate test is one of 'reprehensible seeking out'.[156] However, in *Coys*, Mance LJ, instead of treating reprehensible seeking out as replacing free acceptance, considered both to be available to him. Although he considered that the case before him could be analysed in terms

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[150] *Lumbers v W Cook Builders Pty Ltd (In liq)* [2008] HCA 27, 232 CLR 635 [82]-[86]. See Bryan, '*Lumbers v W Cook in Liquidation*—Restitution for Services and the Allocation of Contractual Risk' (n 108) 323.
[151] Burrows, 'Free Acceptance and the Law of Restitution' (n 4) 586; Burrows, *The Law of Restitution* (n 3) 56-59; Mead, 'Free Acceptance: Some Further Considerations' (n 125).
[152] *R (Rowe) v Vale of White Horse DC* [2003] EWHC 388 (Admin) [12]; *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Limited* [2008] EWCA Civ 1449, [2009] 1 WLR 1580 [66].
[153] *Premier Dairies Ltd v Jameson* [1983] IEHC 89.
[154] *Ibid,* pages 7-8 of the transcript.
[155] *Ibid,* page 8 of the transcript.
[156] *Cressman v Coys of Kensington (Sales) Ltd (McDonald, Part 20 defendant)* [2004] EWCA Civ 47, [2004] 1 WLR 2775 [28].

of free acceptance,[157] he concluded that the benefit was readily returnable and, since the defendant had had every opportunity to return the benefit, it was not open to him to deny that he valued the mark.[158] Burrows has since recanted this test in favour of a test of 'demanding or taking', as he says that '[T]here is no need for the seeking-out to be reprehensible in order to overcome subjective devaluation. It is the positive "choice" that is crucial.'[159]

Estoppel

Virgo has suggested that estoppel can act as a means of establishing enrichment where no benefit has been received by the defendant.[160] However, if the benefit was requested by the defendant, this may be sufficient to establish that the defendant regarded the benefit as enriching. Therefore, if the 'requested benefits' test is accepted as a basis for establishing enrichment, it may be that there is no scope for estoppel to operate as a means of establishing enrichment.

C. Valuing the Enrichment

Once enrichment is established, it is necessary to quantify the value of the enrichment.[161] Money, as discussed above, is a universal medium of exchange and, as such, an incontrovertible benefit in the eyes of the law of restitution.[162] Many, if not most, cases of restitution from public authorities concern the recovery of taxes or charges[163] and therefore valuation difficulties will be straightforward. Similarly, valuing the enrichment represented by goods will rarely cause a problem. Where the benefit takes the form of property, an objective value can be conferred upon the property and development of the 'readily returnable benefit' test in *Coys*[164] will often prevent the defendant from having recourse to the subjective devaluation principle.[165] This test could apply to most cases where the

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[157] *Ibid,* [32].
[158] *Ibid,* [29]-[31].
[159] Burrows, *The Law of Restitution* (n 3) 56.
[160] Virgo, *The Principles of the Law of Restitution* (n 4) 91.
[161] Goff and Jones, *The Law of Restitution* (n 3) [1-020]; Edelman, 'The Meaning of Loss and Enrichment' in Chambers, Mitchell and Penner (eds) *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, Oxford 2009) 211-214. Burrows has argued that Goff J's approach in *BP v Hunt* draws an 'unnecessarily sharp distinction between identifying and valuing the defendant's benefit: Burrows, 'Free Acceptance and the Law of Restitution' (n 4) 590; Burrows, *The Law of Restitution* (n 3) 61.
[162] *Banco de Portugal v Waterlow and Sons* [1932] AC 452 (HL) 508; *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QBD) 799. Mason and Carter, *Restitution Law in Australia* (n 77) 48.
[163] See, for example, *Dolan v Neligan* [1967] IR 247 (HC); *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC); *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC).
[164] *Cressman v Coys of Kensington (Sales) Ltd (McDonald, Part 20 defendant)* [2004] EWCA Civ 47, [2004] 1 WLR 2775.
[165] Virgo, *The Principles of the Law of Restitution* (n 4) 77; Burrows, *The Law of Restitution* (n 3) 53-55.

enrichment remains in the defendant's hands. Where the benefit has been consumed or converted, it can be classed as an enrichment as it has been realised by the defendant.

Difficulties arise when valuing services as enrichment. Unlike goods, services generally cannot be returned and many do not give rise to an end product. [166] It is therefore necessary to distinguish between services that leave an end product and 'pure services', which do not. Although, some commentators have adopted a restrictive conception of enrichment that precludes pure services, [167] it has been widely accepted that all services, pure or otherwise, can constitute enrichment in the eyes of the law.[168]

The Irish courts accept that services can constitute a benefit but have not explicitly recognised relief awarded in such cases to be restitutionary.[169] In *Premier Dairies Ltd v Jameson*, McWilliam J explicitly recognised that services could constitute an enrichment:

> During the course of the arguments I asked counsel for the Defendant if the Plaintiff would have been entitled to a return of the sum of £2,000 if it had been paid before the proposed contract was abandoned and he agreed that it would. Although the expression was not used by either of us, I assume that he meant that the money would be recoverable as money which had been paid for a consideration which had failed. I find it difficult to see any difference in principle between such a situation and the situation which actually arose, that is, that benefits were given to the Defendant at a cost to the Plaintiff...[170]

Similarly, in *McCarron v McCarron,* the Supreme Court held that services performed in relation to a property could give rise to proprietary estoppel:

> In principle I see no reason why the doctrine should be confined to the expenditure of money or the erection of premises on the lands of another. In a suitable case it may well be argued that a plaintiff suffers as severe a loss or detriment by providing his

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[166] *Sharwood & Co v Municipal Financial Corp* 197 DLR (4th) 477 [26] (Ontario CA). For Australian authority on the same point see *Strang Patrick Stevedoring Pty Ltd v The Owners of The Motor Vessel Sletter (Formerly The Hibiscus Trader)* (1992) 38 FCR 501 (FCA) 522; *Independent Grocers' Co-operative Ltd v Noble Lowndes Superannuation Consultants Ltd* (1993) 60 SASR 525 (SASC) 556.

[167] Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (n 18) 31; Beatson, 'Reliance and the Structure of Unjust Enrichment' (n 18) 77-80. Compare, Garner, 'The Role of Subjective Benefit in the Law of Unjust Enirhcment' (n 16) 62-63.

[168] See *Craven-Ellis v Canons Limited* [1936] 2 KB 403 (CA); *Countrywide Communications Ltd v ICL Pathway Ltd & Anor* [2000] CLC 324; *Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Limited* [2008] EWCA Civ 1449, [2009] 1 WLR 1580; *Independent Grocers' Co-operative Ltd v Noble Lowndes Superannuation Consultants Ltd* (1993) 60 SASR 525 (SASC) 538-539 and 556.

[169] See O'Dell, "Restitution" in Byrne and Binchy (eds) [1997] *Annual Review of Irish Law.*

[170] *Premier Dairies Ltd v Jameson* [1983] IEHC 89, pages 10-11 of the transcript.

own labours or services in relation to the lands of another and accordingly should equally qualify for recognition in equity.[171]

The decision of Blayney J in *O'Callaghan and Another v Ballincollig Holdings Limited,*[172] is inconsistent with the approach in *McCarron* and *Premier Dairies*. Blayney J held that money spent on improvements made by the plaintiff to the defendant's property were not recoverable. This is incorrect as a matter of principle. The judge reached his decision notwithstanding references to cases in which money paid to the defendant was recovered[173] and to a case in which the plaintiff had succeeded in a *quantum meruit* claim for services rendered to the defendant.[174] If recovery is permitted in respect of pure services rendered to the defendant, it is unclear why money spent, or services rendered, that improves the defendant's property, should not also be recoverable. In *O'Callaghan*, the premises had been damaged by fire and it would not have been open to the defendant to subjectively devalue the enrichment, as the improvements were factually necessary.

A conceptual problem that arises where services have an end product is whether such services should be evaluated by assessing the reasonable value of the services themselves or whether the enrichment should be evaluated by reference to the end product left by the services. Some commentators have suggested that where the service gives rise to an increase in the defendant's property, the enrichment should be valued as the increase in value in the defendant's property attributable the provision of the service.[175] However, where the reasonable cost of the services far exceeds the cost of the benefit to the defendant, he will be entitled to rely on the principle of subjective devaluation to argue that relief should be confined to the cost of the benefit.[176]

There are several reasons why enrichment should be quantified by reference to the reasonable value of the services,[177] rather than by reference to their end product. First, this approach is consistent with the traditional conception of *quantum meruit* which means 'the amount earned' and is usually calculated by reference to the reasonable value of the

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[171] *McCarron v McCarron* (Supreme Court, 13 February 1997).
[172] *O'Callaghan and Another v Ballincollig Holdings Limited* (High Court, 31 March 1993) pages 6-7 of the transcript.
[173] *Rogers v Louth County Council* [1981] IR 265 (SC).
[174] *O'Connor v Listowel UDC* [1957] Ir Jur Rep 43.
[175] Virgo, *The Principles of the Law of Restitution* (n 4) 98
[176] However, it is unclear whether defendants should be entitled to do so where they have requested the benefit. See above at 79-83.
[177] *Craven-Ellis v Canons Limited* [1936] 2 KB 403 (CA) 411. See also Mason and Carter: Mason and Carter, *Restitution Law in Australia* (n 77) 42; Erbacher, *Australian Restitution Law* (2nd edn Cavendish Publishing, Sydney 2002) 66.

services.[178] Second, it is also consistent with the preferred approach of Robert Goff J in *BP Exploration Co (Libya) Ltd v Hunt (No 2)*, who held that it would have been preferable for the legislature to have to specify the value of services themselves rather than their end value as benefit for the purposes of the Law Reform (Frustrated Contracts) Act 1943. Third, valuing services by reference to their end product is only workable where the services produce an end value. Pure services must be valued by different criteria and it is unclear why differing approaches should be adopted in respect of different services when one approach would suit all.[179] Fourth, where services produce an end product, usually in the form of an increase in value to the defendant's property, it cannot be said that the increase is wholly attributable to the services provided by the plaintiff. Often the additional increase in valuation of the benefit is more closely linked to the value inherent in the house that is unlocked by the improving work. Where the benefit to the defendant is greater than the cost of providing the service, the plaintiff should not be able to recover more than the reasonable value of the services. Where the plaintiff's building skills lead to an increase in the value of the plaintiff's property, only the services themselves can be directly attributed to the plaintiff and thus be said to be at the plaintiff's expense.[180]

This approach is also defensible as a matter of authority. In *Greenwood v Bennet*, Lord Denning MR considered that the defendant was unjustly enriched to the extent of the cost of the repairs rather than to the extent of the increase in value of the car.[181] Similarly, the Australian courts consider the value of the services, rather than the value of the improvements, to be the primary means of quantifying enrichment. In *Pavey*, Deane J held that the reasonable value of the services will ordinarily be the correct measure of restitution but that this will not be applied where the value of the provision of the services exceeds any benefit received by the recipient.[182] Recent Irish cases also confine the plaintiff's recovery to the reasonable value of the services provided, even where the services have increased the value of the defendant's property. In *Linnie v Murphy*[183] the plaintiff agreed to complete renovation works on the defendant's property in return for 12% of the net sale price of the

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[178] Spence, 'In Defence of Subjective Devaluation' (n 17) 912.
[179] *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QBD) 802. Virgo observes that his view is only applicable to those services that do produce an end product rather than what are often termed 'pure services': Virgo, *The Principles of the Law of Restitution* (n 4) 98.
[180] See *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [3] (Lord Scott). See also Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (n 18) 35.
[181] *Greenwood v Bennett* [1973] QB 195 (CA) 202.
[182] *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5, 162 CLR 221. See also *Angelopoulos v Sabatino* (1995) 65 SASR 1 (SASC) 14; *Bunbury-Harvey Regional Council v Giacci Bros Pty Ltd* [2000] WASC 223 [150].
[183] *Linnie v Murphy* [2008] IEHC 362.

property, which was to be sold on completion of the renovation works. Before the plaintiff could finish the works, he was excluded from the property, which ultimately was not sold. Laffoy J held that the plaintiff was entitled to recover on a *quantum meruit* in respect of the improvements made to the property.[184] The measure of damages awarded to the plaintiff represented the reasonable cost of the services rather than the increase in the property's value. Similarly, in *Mc Cabe Builders (Dublin) Ltd v Sagamu Developments Ltd,* Charleton J refused to award a sum that reflected the value of the housing development built by the plaintiffs at the defendant's direction, but instead awarded the reasonable value of the work done by the plaintiffs on the development.[185]

The Canadian approach to this issue has been inconsistent.[186] Canada's adoption of the correspondence principle[187] would suggest that relief should be confined to the cost to the plaintiff of providing the services.[188] However, in *Kerr v Baranow*, Cromwell J held that the courts were not precluded from having regard to the value surviving in the defendants hands.[189] The Canadian courts have generally deemed pure services to be an end product in trusts of family property cases.[190] However, caution should be exercised when approaching Canadian marital property cases, as these concern the expectations of the parties and so the principles developed in those cases cannot be of general application to the law of restitution.[191]

Should a Contract Price Operate as a Ceiling to Valuing the Enrichment?

In some cases, restitution will be sought where the contract governing the transaction is void,[192] incomplete[193] or unenforceable.[194] In such cases, can the contract be used to determine the extent of the enrichment, or, more specifically, act as a ceiling when valuing the enrichment?[195] An unenforceable contract may demonstrate that the defendant valued the

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[184] *Gill v Grant* (1988) 30 ETR 255 (BCSC).
[185] *McCabe Builders (Dublin) Ltd v Sagamu Developments Ltd* [2007] IEHC 391 [66]. Reversed on other grounds: *McCabe Builders (Dublin) Ltd v Sagamu Developments Ltd* [2009] IESC 31.
[186] *Gill v Grant* (1988) 30 ETR 255 (BCSC).
[187] McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (n 6) 423.
[188] See, for example, *Anthony v Berger* [2010] ABQB 3 [51].
[189] *Kerr v Baranow* [2011] SCC 10, 328 DLR (4th) 577 [55].
[190] *Deglman v Guaranty Trust Co of Canada* [1954] SCR 725, 3 DLR 785 [25]-[27]; *Sorochan v Sorochan* [1986] 2 SCR 38, 29 DLR (4th) 1 (SCC) [17]-[19].
[191] McInnes, 'Enrichment Revisited' (n 6) 205.
[192] *Rover International Ltd. and Others v Cannon Film Sales Ltd* [1989] 1 WLR 912 (CA).
[193] *Countrywide Communications Ltd v ICL Pathway Ltd & Anor* [2000] CLC 324.
[194] *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5, 162 CLR 221.
[195] McInnes, 'Enrichment Revisited' (n 12) 202.

benefit and indicates a rate at which he valued the enrichment.[196] It is objectively determined evidence of the defendant's subjective evaluation of the enrichment. On the other hand, if the contract is void or unenforceable, is it legitimate to rely upon it to determine the value of the enrichment?

The English courts have not accepted that the contract should form a ceiling to the plaintiff's claim in restitution. In *Rover International Ltd v Cannon Film Sales Ltd*, the Court of Appeal refused to impose a ceiling on the plaintiff's restitutionary relief by reference to the price stipulated in the void contract concluded between the parties. Kerr LJ held that it was undesirable as a matter of principle that the provisions of a void contract should be applied to determine the extent of liability that arose upon the invalidity of that agreement and that attempts to apply a contractual cap to the claim in restitution would require the court to forecast the hypothetical relative positions of the parties under a non-existent contract.[197] However, recent decisions accept that the contract price may be used as a guide to determine the value that the defendant placed on the services, rather than acting as a strict cap to recovery in restitution.[198] Similarly, prior negotiations can provide evidence as to what the parties considered to be reasonable remuneration,[199] although such negotiations will not be considered where the proposed contract is subsequently abandoned by the parties.[200]

In some Irish cases, the price stipulated in a contract between the parties has been used as the basis for calculating the sum payable in a *quantum meruit* claim. In *Cotter v The Minister for Agriculture*,[201] the plaintiff had carried out work extraneous to a contract that he had entered into with the defendants. Murphy J held that the plaintiff was entitled to a *quantum meruit* award, which would be assessed according to the rate stipulated in the contract for similar work. In *Callinan v Voluntary Health Insurance Board*, Keane J acknowledged that *Rover International Limited & Ors v Cannon Film Sales Limited (No 3)* provides that the terms of an abortive contract should not be relied upon. However, he held that the application of this principle depended on the circumstances of the case and that in the

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[196] Virgo, *The Principles of the Law of Restitution* (n 4) 102.
[197] *Rover International Ltd v Cannon Film Sales Ltd* [1989] 1 WLR 912 (CA) 927-928.
[198] *Taylor v Motability Finance Limited* [2004] EWHC 2619 [26] (Comm); *Benedetti v Sawiris* [2009] EWHC 1330 (Ch) [528]. In Australia see *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5, 162 CLR 221, 250 and 257 (Deane J). This approach is consistent with that adopted in *Way v Latilla* [1937] 3 All ER 759 (HL) 764. This view has met the approval of some commentators. See Virgo, *The Principles of the Law of Restitution* (n 4) 101, 103; Birks, 'In Defence of Free Acceptance' (n 4) 136; Rafferty 'Contracts Discharged Through Breach: Restitution for Services Rendered by the Innocent Party' (n 112) 71.
[199] *Benedetti v Sawiris* [2009] EWHC 1330.
[200] *Ibid,* [534], [550]. Affirmed on appeal: *Benedetti v Sawiris* [2010] EWCA Civ 1427.
[201] *Cotter v The Minister for Agriculture* (High Court, 31 July 1991).

present case it was appropriate to have regard to the terms of the agreement proposed by the plaintiff, as otherwise the defendant would be in a worse position than it would have been in if it had agreed to the plaintiff's terms.[202] In *Dublin Corporation v BATU,* Budd J, relying on the decision of Deane J in *Pavey*, held that an unenforceable contract may constitute evidence of 'what might be fair and reasonable remuneration' in a restitutionary claim.[203] Therefore, the Irish cases suggest that, although the price stipulated in a void or incomplete contract will not act as a ceiling for any subsequent restitutionary claim,[204] this will not preclude the court from having regard to the stipulated contractual price in order to determine what value the defendant attributed to the services provided.

The importance to be attributed to the contractual price of the enrichment varies according to what position the court adopts on the spectrum of reconciliation of objective and subjective conceptions of enrichment:

> If a claim is regarded as based on reliance or as a dependent restitutionary claim the relevance of the contract price as a limit is obvious. If, on the other hand, the claim is regarded as an instance of an independent restitutionary claim—as it would if pure services were regarded as a benefit—the contract price would prima facie be irrelevant.[205]

However, the role of the contract in determining the valuation of the services may depend on the reason for the invalidity or unenforceability of the contract. For example, if the contract is void due to the incapacity of the defendant, the defendant had not capacity to consent to any of the terms of the contract, including the rate at which enrichments were to be valued and therefore this valuation should not be attributed to the defendant. This issue may take on increased significance where a public authority has acted ultra vires in entering into a particular transaction. Conversely, where the contract is unenforceable for want of formalities, this should not preclude reliance on the contractual price as evidence of the defendant's valuation of the benefit as, neither of these factors affect the defendant's consent or attribution of value.

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[202] *Callinan v Voluntary Health Insurance Board* (High Court, 22 April 1993), page 75 of the transcript.
[203] *Dublin Corporation v Building and Allied Trades Union* (High Court, 6 March 1996)
[204] See also *McCabe Builders (Dublin) Ltd v Sagamu Developments Ltd* [2009] IESC 31 [41].
[205] Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (n 18) 42. See also Garner, 'The Role of Subjective Benefit in the Law of Unjust Enrichment' (n 16) 56.

II. Interest

Money has a value separate to that of the liquidated sum paid to the state, as it also comprises the use value of that sum over time. Therefore, restitution of the principal sum exacted by the State from a citizen will not necessarily constitute full restitution.[206] Indeed, many of the most important restitution cases decided by the House of Lords have concerned claims for interest on sums of money that have already been repaid by the Revenue Commissioners.[207]

The receipt of money constitutes two different forms of enrichment: the principal value of the money and its use value. As noted by Goff J, in *BP Exploration Co (Libya) Ltd v Hunt (No 2)*, '[T]he fundamental principle is that interest is not awarded as a punishment, but simply because the plaintiff has been deprived of the use of the money which was due to him.'[208] Conversely, where the defendant obtains the use of money to which he was not entitled, he has been unjustly enriched by the use of that money, as he would have had to pay to obtain the use of a similar sum on the market.[209] The use value of money is relevant to restitution from public authorities for two reasons. First, most benefits received by the state from its citizens will be money, in the form of tax receipts. Second, the payment of taxes over prolonged periods may mean that substantial sums should be repaid in the form of interest where it emerges that the tax was wrongly levied.

There are two main bases on which interest may be repayable. First, specific statutory taxation codes may provide for the payment of interest on overpaid taxes. These provisions are discussed in Section A. Second, the law of restitution recognises a right to interest that arises on the basis of restitutionary principles, which reflects the use value of money over time and arises independently of any statutory rights to interest. It is considered in Section B.

A. Statutory Rights to Interest

In Ireland, section 22 of the Courts Act 1981 provides that a court may

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[206] See also *Tate v The Minister for Social Welfare* [1995] 1 IR 418 (HC) 448, where late social welfare payments were applied to the consumer price index.

[207] See *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL); *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561.

[208] *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, 845. See also *Boake Allen Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25, [2006] STC 606 [90], where Sedley LJ stated: 'In principle, if money has been unlawfully tied up the wrongdoer ought to compensate the person entitled to it for its temporary loss.'

[209] Edelman and Cassidy, *Interest Awards in Australia* (Lexis Nexis Butterworths, Chatswood 2003) 94. In Ireland, see *Goodman v Minister for Finance* [1999] 3 IR 356 (HC) 364; *Best v Wellcome Foundation Ltd.* (High Court, 8 March 1996).

order the payment by the person of interest at the rate per annum standing specified for the time being in section 26 of the Debtors (Ireland) Act, 1840, on the whole or any part of the sum in respect of the whole or any part of the period between the date when the cause of action accrued and the date of the judgment.[210]

This is mirrored by section 35A of the Senior Courts Act in England, which provides for an award of simple interest in respect of common law claims. In addition to this general statutory power to award interest, legislation frequently makes provision for the award of interest in the case of overpaid taxes. In Ireland, where a statute does not specifically provide for the payment of interest on a refund of tax, this will not be construed as excluding a right to interest at all events and interest may be awarded on the basis of a more general statutory provision. In *Navan Carpets Limited v S Ó Culacháin (Inspector of Taxes)*[211] a claim for recovery of overpaid tax was allowed by Costello J pursuant to a statutory right of repayment in section 307 of the Income Tax Act 1967.[212] Costello J rejected that the plaintiff had a right to interest under the 1967 Act but instead awarded interest pursuant to the general power to award interest in section 22 of the Courts Act 1981.[213]

Section 865A of the Taxes Consolidation Act 1997[214] provides for the payment of interest on sums repaid by the Revenue Commissioners pursuant to section 865. Section 865A distinguishes between sums charged as a result of a mistake on the part of the Revenue Commissioners and sums paid for other reasons. Where a repayment is due as a result of a mistake of the Revenue Commissioners, interest accrues on the sum to be repaid from the day after the end of the chargeable period for which the repayment was due or the date on which the tax was paid, whichever is later.[215] However, where the repayment arises for reasons other than a mistake by the Revenue Commissioners, interest begins to accrue ninety three days from the time a valid claim is made, [216] conferring a significant advantage on the state in

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[210] *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC) 190.
[211] *Navan Carpets Limited v S Ó Culacháin (Inspector of Taxes)* [1988] IR 164 (HC).
[212] Section 307 provided for a repayment of tax where losses incurred by him in the course of his employment reduce his liability to income tax, resulting in an overpayment of income tax.
[213] *Navan Carpets Limited v S Ó Culacháin (Inspector of Taxes)* [1988] IR 164 (HC) 171. Upheld on appeal: [1988] IR 164 (SC) 173-174.
[214] Inserted by section 17 of the Finance Act 2003.
[215] Section 865A(1). Where sums fall to be repayable following a statement of case to the High Court, pursuant to section 941 of the TCA 1997, those sums are repayable pursuant to section 865.
[216] Section 865A(2).

the form of an interest free loan. Any interest payable under section 865A is simple interest.[217]

Section 865A may need to be disapplied where a charge has been levied in breach of Community law. In such circumstances, the ECJ has held that compound interest was required to reverse the unjust enrichment.[218] However, it is not clear how this will affect statutory provisions that provide for the payment of simple interest. Considerable debate surrounds the question as to whether these statutory provisions can be modified in cases where a tax has been levied in breach of EU law—in particular, whether provisions providing for an award of simple interest can be disapplied or construed so as to permit an award of compound interest in line with the doctrine of conforming interpretation. This issue has not yet been considered in Ireland. However, in England, debate has centred upon section 78 of the Value Added Tax Act 1994 (VATA) and the courts have taken two approaches in trying to apply the law in a manner compatible with the requirements of EU law.

(1) Disapplication

The courts have been willing to disapply section 78 where necessary to provide an effective remedy. In *FJ Chalke Limited v The Commissioners for Her Majesty's Revenue & Customs* the claimants sought compound interest on overpayments of VAT. The principal sum and simple interest had already been returned to the claimants. Section 78 provided for the payment of simple interest only. The claimants contended that an award of compound interest was necessary to provide an effective remedy under Community law. Henderson J held that section 80 of the Act provided an exclusive regime for recovery of overpaid VAT.[219] Interest was payable at the rates specified in section 78, which provided for the payment of simple interest. He held that this was not altered by the fact that the principal sums of tax had been repaid as 'all of the interest claimed in the present cases is interest in respect of the original overpayments of VAT.'[220] Therefore, the recovery of interest was

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[217] Section 865A(3)(a).
[218] Joined cases C-397/98 and C-410/98 *Metallgesellschaft Ltd and Hoechst AG v Commissioners of Inland Revenue* [2001] ECR I-1727 [87]-[93].See also *John Wilkins (Motor Engineers) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2009] UKUT 175 (TCC) [54].See below at 109-110.
[219] *F J Chalke Limited, A C Barnes (Wokingham) Limited v The Commissioners for Her Majesty's Revenue & Customs* [2009] EWHC 952 (Ch) [68].
[220] *Ibid,* [71].

'ancillary to the claim for the overpaid tax, and it does not lose that character merely because the tax was paid in full before the claim for interest was made'.[221]

Henderson J held that section 78 was intended to provide a comprehensive entitlement to interest in respect of overpaid claims of VAT[222] and that the references to other sources of liability to pay interest in section 78 referred to statutory entitlements to pay interest and did not indicate a general common law right to interest.[223] However, Henderson J noted that the

> *San Giorgio* principle must now be regarded as entitling a claimant who has paid tax levied in breach of Community law not only to repayment of the tax itself, but also to reimbursement of all directly related benefits retained by the member state as a consequence of the unlawful charge.[224]

Thus, 'if an effective remedy requires that the member state should not profit from the unlawful charge, the claimant should in principle be entitled not only to repayment of the tax itself but also to interest' and this interest should be compound.[225]

Henderson J noted that the payment of compound interest was available at national law, so the question as to whether the right to compound interest was derived from Community law was largely academic. However, he expressed the view that

> the payment of compound interest is a requirement of Community law and should now be recognised as forming part of the San Giorgio principle. The precise manner in which compound interest should be paid is, no doubt, a matter for the national court on any view, and the House has now dealt with this in *Sempra*.[226]

He concluded that even though a payment of compound interest was not available on the basis of statute, such a payment was required by EU law, which overrode 'the otherwise exhaustive and exclusive statutory scheme for the payment of interest on overpaid VAT,

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[221] *Ibid*, [91].
[222] *Ibid*, [72]. A similar approach was taken by the High Court of Australia in relation to *The Commonwealth of Australia v SCI Operations Pty Limited* [1998] HCA 20, 192 CLR 285 [44] (Gaudron J), [85] and [101] (Kirby J).
[223] *Ibid*, [73].
[224] *Ibid*, [107].
[225] *Ibid*, [108].
[226] *Ibid*, [116].

where the overpayment arose from breach of directly effective provisions of Community law.'[227]

A preliminary reference has now been made to the CJEU on this point in the *Littlewoods* litigation.[228] In *Littlewoods,* Vos J considered whether the right to interest under section 78 precluded an award of interest under the common law. He held that, as a matter of statutory construction, common law claims for interest were excluded by the statutory scheme.[229] In considering whether section 78 should be disapplied in order to give the applicants an effective remedy, Vos J held that a preliminary reference was necessary to resolve this question. However, consistently with Henderson J in *F & J Chalke*, he expressed the provisional view that section 78 failed to conform with EU law and so it should be disapplied to the extent necessary to give effect to claims under the *Woolwich* principle.[230]

(2) Conforming Interpretation

The courts have relied on the doctrine of conforming interpretation in considering whether section 78 of the VATA could be construed to provide for an award of compound interest. In *John Wilkins (Motor Engineers) Limited v Revenue and Customs Commissioners,* [231] the Tax Court, drawing on Chadwick LJ's decision in *Sempra*, held that the proper approach to take was for a national court to

> look within its existing portfolio of remedies for one which reflects, and where there is more than one the one which best reflects, the Community law rights which the claimant asserts. If there is no national remedy which, as it stands, is adequate to reflect those rights, either existing remedies must be tailored to provide one, or a new remedy must be invented.[232]

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[227] *Ibid,* [124]. On appeal, the Court of Appeal held that, in view of the difficulties in relation to this matter, it would be necessary to make a preliminary reference to the ECJ. However, because the claim in the case at hand was statute-barred, it was not necessary to make the reference in that case: [2010] EWCA Civ 313 [41]. See also Williams, *Unjust Enrichment and Public Law* (Hart Publishing, Oxford 2010) 48.

[228] *Littlewoods Retail Ltd v Revenue and Customs Commissioners* [2010] EWHC 2771 (Ch).

[229] *Littlewoods Retail Limited v Revenue and Customs Commissioners* [2010] EWHC 1071 (Ch) [58]-[62]. See generally, Brown and Mullen, '*Littlewoods Ltd and Others v HMRC*: Compound Interest on Overpaid Interest on Overpaid VAT—Where Are We Now?' [2010] British Tax Review 475.

[230] *Ibid,* [90]-[92]. Brown and Mullen, '*Littlewoods Ltd and Others v HMRC*: Compound Interest on Overpaid Interest on Overpaid VAT—Where Are We Now?' (n 229) 484.

[231] *John Wilkins (Motor Engineers) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2009] UKUT 175 (TCC). See further Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentation SA* [1990] ECR I-4135; Case 14/83*Von Colson v Land Nordrhein-Wesfalen* [1984] ECR 1891.

[232] *John Wilkins (Motor Engineers) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2009] UKUT 175 (TCC) [67].

The Court held that section 78 did not provide for compound interest and based this conclusion on several considerations. First, the statutory scheme of which section 78 formed a part made no reference to compound interest or to the frequency of rests, which was an essential element of compound interest schemes.[233] Second, the *Marleasing* principle was confined to interpretation of national legislation enacted to give effect to Community law and did not extend to interpretation of purely domestic law. [234] Because the relevant Community law instrument did not provide for 'any requirement concerning repayment of overpaid VAT, let alone interest on VAT,' [235] the doctrine of conforming interpretation could not be invoked. Third, the Tax Court could not interpret section 78 as providing for compound interest. Payment of compound interest went 'against the grain of this legislation,' so that the approach contended for by the plaintiffs' 'would go beyond interpretation and pass into the realm of legislation.' [236] Fourth, English law provided a remedy that permitted the payment of compound interest in the form of a restitution claim in accordance with *Sempra Metals*, so that the claimants had 'a perfectly good remedy outside the statute.'[237] Brown and Mullan argue that the Tribunal in *John Wilikins* did not pay enough attention to the doctrine of conforming interpretation, contending that the Tax Court's 'timid approach in refusing to give a conforming interpretation is in stark contrast to the approach of the Court of Appeal in *Vodafone 2*.'[238] They argue that decisions on conforming interpretations of section 78 of the VATA are inconsistent with the more adventurous approach to conforming interpretations in other areas.[239] Certainly, the approach of the Court in *Wilkins* is at odds with the relaxation of the doctrine of conforming interpretation discussed in Chapter 2.

B. Common law jurisdiction to award interest

The role of interest within the law of restitution, and, in particular, the role of compound interest, is contentious. Traditionally, jurisdiction to award interest at common law was limited. Section 22 of the Courts Act 1981 provides for a general statutory jurisdiction to make an award of interest where repayment of a sum of money is ordered. In England, section 35A of the Senior Courts Act provides for an award of simple interest in respect of common law claims. Neither section 22 of the Courts Act, nor section 35A of the Senior

[233] *Ibid*, [99].
[234] *Ibid*, [104].
[235] *Ibid*, [99]-[100].
[236] *Ibid*, [125].
[237] *Ibid*, [127]-[129].
[238] Brown and Mullen, '*Littlewoods Ltd and Others v HMRC*: Compound Interest on Overpaid Interest on Overpaid VAT—Where Are We Now?' (n 229) 481, referring to *Vodafone 2 v HMRC* [2009] EWCA (Civ) 446, [2010] Ch 77.
[239] *Ibid*, 485.

Courts Act, empowers the court to make an award of compound interest.[240] In addition to the general statutory jurisdiction to award simple interest in sections 22 and 35A respectively, the courts have inherent jurisdiction to award compound interest in equity for money retained or expended in breach of fiduciary duty.[241] It was generally considered that there was no common law jurisdiction to award interest,[242] and that, where interest was to be awarded in the law of restitution, this award was confined to simple interest.

Two possible factors inhibited the courts from recognising a right to compound interest in restitutionary claims. First, commentators have argued that jurisdiction to award interest at common law was inhibited because restitution was originally considered to be based on implied contract, and was therefore subject to the rule in *La Pintada*, which provided that interest was not payable on the late payment of debts.[243] This theory was rejected by Lord Mance in *Sempra,* who held that

> the law's attitude to interest was shaped not by conceptual confusion, but by policy-driven concerns (however debatable) regarding interest which may well have had historical roots, and which find an echo to this day in modern legislation and Law Commission reports.[244]

Second, in early cases in which awards of interest were made in restitutionary claims, the courts considered that interest was to be awarded on the basis of restitutionary principles but that this power to award interest was derived from the general statutory powers outlined above.[245] This analysis limited the award of interest in two ways. First, the courts applied the

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[240] *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 (QBD) 990.
[241] *Westdeutsche* [1996] AC 669, 684; *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (1997) 217 ALR 365 (NSWCA); *Harrison v Mathieson* (1916) 30 DLR 150; *Wallersteiner v Moir* [1975] QB 373. See also Virgo, *The Principles of the Law of Restitution* (n 4) 26; Cobham, 'Calculating Judgment Interest after *Bank of America Canada v Mutual Trust Co*: Difficulties Compounded' (2004) 13 Dalhousie Journal of Legal Studies 65, 75-76.
[242] *London, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] AC 429 (HL) 440-441; *Westdeutsche* [1996] AC 669 (HL) 731; *The Commonwealth of Australia v SCI Operations Pty Limited* [1998] HCA 20, 192 CLR 285 [72] and [74]. However, the Australian courts have held that they have jurisdiction to award interest at common law independently of statute. See *Heydon v NRMA Ltd & Ors (No2)* (2001) 53 NSWLR 600 [14] (Mason P); *Lechmere Financial Corporation v Aspermont Ltd* [2003] FCA 1138 [56].
[243] *President of India v Pintada* [1985] 1 AC 104 (HL) 129; *East Cork Foods Limited v O'Dwyer Steel Company Limited* [1978] 1 IR 103 (HC) 109. See Lord Woolf's discussion of the relevant law in *Westdeutsche* [1996] AC 669 (HL) 730-735. See also, *Boake Allen Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25, [2006] STC 606 [164]; Edelman and Cassidy, *Interest Awards in Australia* (n 209) 93; Man Yip, 'The Use Value of Money in the Law of Unjust Enrichment' (2010) 30 Legal Studies 586, 589.
[244] *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [209].
[245] *State Bank of New South Wales Limited v Commissioner of Taxation* (1995) 62 FCR 371 (FCA); *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL); *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC).

limitations attendant upon the statutory right to interest. Second, in many cases the courts either ignored the possibility that there might be an independent right to compound interest or assumed that, because the general statutory power was confined to simple interest, to award compound interest would amount to a usurpation of the statutory function.

The first case in which a restitutionary claim for compound interest was advanced was *Westdeutsche Landesbank Girozentrale v Islington London Borough Council.*[246] In this case, the defendant bank conceded that there was no jurisdiction to award compound interest at common law. However, at first instance, Hobhouse J awarded compound interest on the basis that the bank had a continuing equitable proprietary interest in the money loaned to the defendant local authority pursuant to a void swaps agreement that could be traced into the local authority's possession[247] and the Court of Appeal upheld this determination.[248] However, the House of Lords considered that the bank had no continuing proprietary interest in the money and that equitable jurisdiction to award compound interest had not been engaged. This left the House of Lords to deal with three alternative approaches. First, it could recognise a common law power to award compound interest in restitution claims. Second, it could hold that equity's concurrent jurisdiction was capable of being extended to permit compound interest to be awarded in response to a common law restitution claim. Third, it could reject both of these alternatives and confirm the existing position in law.

The majority of the House of Lords opted for the third approach, holding that equity's jurisdiction to award compound interest was confined to equitable claims for an account of profits for breach of fiduciary duty or fraud.[249] This decision was not borne of a desire to maintain the status quo—the majority acknowledged that jurisdiction to award compound interest would be desirable[250]—but instead was underpinned by two considerations. First, it felt that the House would be

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[246] *Westdeutsche* [1996] AC 669 (HL).

[247] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 (QBD) 954.

[248] *Ibid*, 967 (CA).

[249] *Westdeutsche* [1996] AC 669 (HL) 684 and 702. See also *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [4]; Elliott, 'Rethinking Interest on Withheld and Misapplied Trust Money' [2001] Conveyancer 313; Burrows, *The Law of Restitution* (n 3) 22-23; *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 (CA) 994. See also *Black v Davies* [2004] EWHC 1464 (QB) [26].

[250] Stevens has noted that the House of Lords in *Westdeutsche,* save for Lord Lloyd, was of the 'overwhelming view' that compound interest should be awarded: Stevens, 'Simple Interest Only? Autonomous Unjust Enrichment and the Relationship between Equity and the Common Law' [1996] LMCLQ 441, 446.

usurping the function of Parliament if, by expanding the equitable rules for the award of compound interest, this House were now to hold that the court exercising its equitable jurisdiction in aid of the common law can award compound interest which the statutes have expressly not authorised the court to award in exercise of its common law jurisdiction.'[251]

Second, it considered that the award should not be made because the local authority had not had the opportunity to address arguments on this point at the hearing[252] and it would not be appropriate 'to take so momentous a course involving such widespread ramifications, on the back of such inadequate argument.'[253]

In contrast, the minority were willing to extend equity's jurisdiction to award compound interest in respect of common law claims. Lord Goff held that the equitable jurisdiction to award compound interest could be exercised in the case of personal claims at common law, as it was in equity, and that it could be exercised in relation to a personal claim in restitution.[254]

The conclusions of the majority in *Westdeutsche* are unfortunate, as there are sound reasons of principle in favour of awarding compound interest. Money not only comprises an inherent value but also the use value of that money over time.[255] This use value is commonly represented as interest. However, simple interest 'does not reflect the actual value of money.'[256] Commercial borrowing and lending provide for the payment of interest at compound rates.[257] Therefore, to award simple interest as a measure of use value is

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[251] *Westdeutsche* [1996] AC 669, 717 (Lord Browne-Wilkinson) and 718 (Lord Slynn). See also *Boake Allen Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25, [2006] STC 606 [85]-[88] (Lloyd LJ).

[252] *Ibid.*

[253] *Westdeutsche* [1996] AC 669 (HL) 739. See generally, Cope, 'Compound Interest and Restitution' (1996) 112 LQR 521.

[254] *Westdeutsche* [1996] AC 669 (HL) 696-697 and 722 (Lord Woolf). Edeleman and Cassidy have argued that the minority approach 'could have admitted a disgorgement remedy into the law of unjust enrichment... such disgorgement remedies have properly never been part of unjust enrichment and should have no place in that branch of the law': Edelman and Cassidy, *Interest Awards in Australia* (n 209) 104.

[255] *London, Chatham and Dover Railway Co v South Eastern Railway Co* [1893] AC 429 (HL) 437 (Lord Herschell); *Qantas Airways Ltd v Commissioner of Taxation (Cth)* (2001) 115 FCR 288 (FCA) [73]. In *Bank of America Canada v Mutual Trust Co* [2002] SCC 43, 211 DLR (4th) 285 [21], Major J noted: 'A dollar today is worth more than the same dollar tomorrow.'

[256] *Westdeutsche* [1994] 4 All ER 890 (QBD) 955; [1996] AC 669 (HL) 719. See also *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [183] (Lord Walker); *Bank of America Canada v Mutual Trust Co* [2002] SCC 43, 211 DLR (4th) 285 [44].

[257] *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [52]. Elliott, 'Rethinking Interest on Withheld and Misapplied Trust Money' (n 249) 332.

anomalous, and is divorced from economic reality and commercial practice.[258] Because compound interest reflects the true use value of money over time, only an award of compound interest can give full restitution.[259] Without it the restitutionary remedy is incomplete and incapable of doing full justice.[260]

There is little Irish authority on this point, but, in *Harris v Quigley,* Geoghegan J acknowledged that statutory rates of interest would not adequately compensate a taxpayer for the true time value of his money, noting that if statutory appeal mechanisms were invoked to their fullest extent in a tax dispute,

> if ultimately, the Appeal Commissioners' determination was upheld, the plaintiff would have been without the benefit of the monies which ought to have been repaid for a very considerable period. Such hardship would not, necessarily, be remedied by ultimate repayment with interest.[261]

The Irish courts have accepted that interest is necessary to give full restitution to plaintiffs, but have stopped short of permitting plaintiffs to recover compound interest in restitution claims. In *O'Rourke v Revenue Commissioners*, Keane J held that the plaintiff was entitled to interest on overpayments of income tax. The plaintiff was entitled to relief that reflected the extent to which the defendants had been unjustly enriched by the receipt of the overpayments, and the measure of that enrichment was the interest that would have accrued on the monies withheld by the Revenue Commissioners.[262] In *Bank of Ireland Trust Services Ltd v The Revenue Commissioners (No 2)* Kelly J rejected the plaintiff's claim that compound interest should be awarded. He considered that, in the absence of legislative intention that compound interest was to be available, he was not justified in making such an award.[263] He did not consider whether or not there was a common law jurisdiction to award interest.

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[258] *Sempra* [2005] EWCA Civ 389, [2006] QB 37 [43]; [2007] UKHL 34, [2008] 1 AC 561 [33], [53]; *Bank of America Canada v Mutual Trust Co* [2002] SCC 43, 211 DLR (4th) 285 [24]. See also Virgo, 'Compound Interest Made Simple' (2007) 66 CLJ 510, 512; Elliott, 'Rethinking Interest on Withheld and Misapplied Trust Money' (n 249) 332; Waldron, *The Law of Interest in Canada* (Carswell, Toronto 1992) 142; Man Yip, 'The Use Value of Money in the Law of Unjust Enrichment' (n 243) 592-593

[259] *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [112] (Lord Nicholls).

[260] *Westdeutsche* [1996] AC 669 (HL) 691 (Lord Goff); *Sempra* [2004] EWHC 2387 (Ch), [2004] STC 1178 [7]; [2005] EWCA Civ 389, [2006] QB 37 [43]; [2007] UKHL 34, [2008] 1 AC 561 [112].

[261] *Harris v Quigley* [2005] IESC 79, [2006] 1 IR 165 [3].

[262] *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC) 18. See also *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC) 190.

[263] *Bank of Ireland Trust Services Ltd v The Revenue Commissioners (No 2)* [2003] 3 IR 398 (HC) 405.

Kelly J's approach is unconvincing. It is unclear why a general statutory power to provide for simple interest *on a judgment sum* should preclude an award of compound interest as restitution of the use value of money. Courts are not obliged to hold that the existence of a provision empowering the court to award simple interest necessarily precludes the courts from making awards of compound interest. Indeed, in *Alberta (Minister of Public Works, Supply & Services) v Nilsson,* the Alberta Court of Appeal took the opposite approach to that of the English and Irish courts, holding that compound interest must be specifically excluded rather than specifically included.[264] Furthermore, it is unclear why legislation providing for *judgment interest* is applicable where the use value of money is sought as a *principal sum* in restitution. What is sought is not compound interest upon a judgment sum but the use value by which the defendant was enriched, which should be valued by reference to compound interest rates. As Henderson J noted in *F J Chalke Limited,* in *Sempra,* 'the claims for so-called interest were in reality nothing of the sort, but were rather claims for a principal sum measured by reference to loss of use of the prematurely paid tax.'[265] This point was obliquely acknowledged by Geoghegan J in *Harris v Quigley:*

> An attempt has been made in this case on behalf of the defendants to draw a distinction between a claim for refund of tax and a claim for interest. I cannot see any validity in the distinction provided that the statute when properly interpreted does not exclude a common law claim.[266]

As Hayton has noted, in such instances therefore, statutory provisions applicable to awards of interest on judgment sums cannot be considered to have precluded compound interest in restitutionary claims because there is no scope for them to apply.[267] It could be argued that, by a similar process of analysis, the Irish Courts could sidestep section 22 of the Courts Act so as to allow for a claim in compound interest.

Moreover, the approach adopted by Kelly J in *Bank of Ireland Trust Services (No 2)* is out of step with other jurisdictions, which have recognised that it is necessary to compound interest in restitution claims. Canada was the first jurisdiction to countenance a general

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[264] *Alberta (Minister of Public Works, Supply & Services) v Nilsson* [2002] ABCA 283, 220 DLR (4th) [168].
[265] *F J Chalke Limited, A C Barnes (Wokingham) Limited v The Commissioners for Her Majesty's Revenue & Customs* [2009] EWHC 952 (Ch) [86]-[88]. See also *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [11] and [33].
[266] *Harris v Quigley* [2005] IESC 79, [2006] 1 IR 165 [21].
[267] Hayton, 'Developing the Common Law Where Statute Has Spoken' (2008) 29 Company Lawyer 2, 3. See also Mitchell, 'Recovery of Compound Interest as Restitution or Damages' (2008) 71 MLR 271, 297-298; *F J Chalke Limited, A C Barnes (Wokingham) Limited v The Commissioners for Her Majesty's Revenue & Customs* [2009] EWHC 952 (Ch) [86]-[88].

common law right to compound interest. In *Bank of America Canada v Mutual Trust Co,* Major J noted that:

> Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the western world and is the standard practice of both the appellant and respondent.[268]

He further noted that if the respondent was only liable to pay simple interest to the appellant, while earning compound interest on the same sum, '[B]y breaching the contract, the respondent would have conferred on itself a profit which the contract envisaged for the appellant.'[269] In light of these considerations, Major J held that compound interest was available as a matter of common law on both a compensatory[270] and a restitutionary[271] basis.

However, although *Mutual Trust Co* is to be welcomed insofar as it permits compound interest in claims for restitution, it has given rise to considerable confusion in Canada for several reasons. First, because the case concerned Ontario state legislation, courts of other states have experienced difficulties in applying the decision outside its specific statutory context.[272] Second, the claim in *Mutual Trust Co* related to a claim for damages for breach of contract, rather than a claim for restitution. However, the comments made by Major J in relation to the artificiality of simple interest are equally applicable to simple interest in the context of restitution and so a similar approach should apply in a restitutionary context.[273] Third, although some cases have treated *Mutual Trust Co* as indicating 'the general tendency of courts to move towards full compensation of interest where appropriate,'[274] in many cases the courts have taken a restrictive approach to the *Mutual Trust* case and have not used it to establish a general right to compound interest in all cases.[275] Fourth, where the claim concerns restitution of overpaid tax, it appears that compound interest is not generally available in Canada unless wrongful conduct is alleged on the part of the state. In *Kingstreet*

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[268] *Bank of America Canada v Mutual Trust Co* [2002] SCC 43, 211 DLR (4th) 285 [24].
[269] *Ibid,* [60].
[270] *Ibid,* [45].
[271] *Ibid,* [60]-[61].
[272] See Cobham, 'Calculating Judgment Interest after *Bank of America Canada v Mutual Trust Co:* Difficulties Compounded' (n 241) 98. *Mutual Trust Co* concerned the interpretation of the Ontario Courts of Justice Act
[273] *Ibid,* 79 and 81; McInnes, 'Breach of Contract and Compound Interest' (2002) 118 LQR 516, 519.
[274] *Nubury Properties Ltd v Gunraj* (Ontario Superior Court of Justice, 03 April 2004) [5].
[275] See, for example, *Nadeau v Ba-Oose Inc* [2006] BCSC 1277, 56 CLR (3d) 105; *Nelson v Saskatchewan* [2003] SKQB 265, 235 Sask R 250 [175]-[178].

Investments Ltd v New Brunswick (Department of Finance) Bastarache J held that it would not be appropriate to award compound interest in a claim for overpaid tax, as 'the appellants did not allege any wrongful conduct on behalf of the Province that might warrant moral sanction.'[276]

A right to compound interest in claims for overpayments of tax has also been recognised in England. In *Sempra Metals,* the House of Lords revisited the question of whether compound interest should be payable on prematurely paid tax. The House of Lords accepted the criticisms that had been levelled against simple interest. Lord Hope noted that

> Simple interest is an artificial construct which has no relation to the way money is obtained or turned to account in the real world. It is an imperfect way of measuring the time value of what was received prematurely.[277]

In addition, he held that the decisions in *Westdeutsche* and in *La Pintada* were not applicable to the case at bar, as, in *Sempra*, the sum sought was in fact the value of the enrichment, rather than interest on an accrued sum.[278] As Lord Walker observed, 'income benefits are more accurately characterised as an integral part of the overall benefit obtained by a defendant who is unjustly enriched...'[279] However, courts should be careful not to simply establish that compound interest is only available where it is sought as the principal sum:

> It would be arbitrary to prohibit claims in unjust enrichment to recover the time value of money where the capital value of the money is also claimed, but to allow them where the capital value of the money has already been repaid, or is simply not claimed.[280]

The House of Lords in *Sempra* provided that *La Pintada* should be overruled,[281] thereby abolishing the rule that loss suffered as a result of late payment of a debt is irrecoverable.

However, two issues divided the House of Lords in *Sempra.* The first concerned the juridical basis on which compound interest would be available in respect of restitutionary claims. Lord Hope, Lord Nicholls, and Lord Scott thought that compound interest should be

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[276] *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1, (2007) 276 DLR (4th) 342, [2007] 1 SCR 3 [62].
[277] *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [33] and [52].
[278] *Ibid,* [7]-[8].
[279] *Ibid,* [178].
[280] Mitchell, 'Recovery of Compound Interest as Restitution or Damages' (n 267) 297. See also Williams, *Unjust Enrichment and Public Law* (n 227) 47.
[281] *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [16].

available at common law, rather than extending equitable jurisdiction to award compound interest.[282] Lord Walker and Lord Mance favoured extending equitable jurisdiction to award compound interest in common law claims.[283] Lord Mance considered that the advantages to be offered by such an approach were 'considerable':

> Using their discretion, courts will be able to keep equitable claims seeking to investigate and recover any actual benefit obtained by the use of money had and received within sensible bounds, and also to avoid detailed arguments about change of position where these would be likely to give rise to disproportionate expense to resolve.[284]

The approach of the majority it to be preferred, as a discretionary approach to the award of compound interest is likely to cause uncertainty. In *Westdeutsche*, this was one of the reasons advanced by Lord Lloyd for rejecting the arguments of the minority. He considered that a jurisdiction to award compound interest would cause uncertainty in commercial transactions and lessen the incentive to settle commercial disputes, as '[D]isputes which would otherwise be settled on the basis of simple interest would be fought in the hope of persuading the court that an award of compound interest was appropriate.'[285] This view has been echoed by Mitchell, who has argued that 'the discretionary approach envisaged by the minority [in *Sempra*] would produce more, rather than less, litigation, since parties would be unsure when claims would be recognised.'[286]

The second issue on which the court was divided was whether the plaintiff or the defendant bore the burden of proving or disproving the use value of the money. The majority—Lord Hope,[287] Lord Nicholls, and Lord Walker—characterised the enrichment received by the defendant as the *opportunity* to use the money. In other words, the majority were willing to presume that the defendant had received an enrichment by having the money at its disposal until this benefit was disproved by the defendant.[288] Lord Scott and Lord Mance held that the courts should not presume that the use value enriched the defendant but should instead consider 'whether the Revenue had derived any actual benefit from the

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[282] *Ibid,* [35] (Lord Hope), [100] (Lord Nicholls), [153] (Lord Scott).
[283] *Ibid,* [184]-[187] (Lord Walker),
[284] *Ibid,* [240].
[285] *Westdeutsche* [1996] AC 669 (HL) 741.
[286] Mitchell, 'Recovery of Compound Interest as Restitution or Damages' (n 267) 299.
[287] *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [33], [47]-[48] (Lord Hope).
[288] *Ibid,* [33] (Lord Hope), [102], [119]-[120] (Lord Nicholls),

premature receipt of Sempra's money.'[289] Lord Scott in particular held that restitution should not be available in respect of the 'wholly conceptual benefit of being an ability to use the money.'[290] The approach of the majority is preferable to that of the minority. First, the defendant is in a better position to establish how he used the money and therefore the onus of proving or disproving enrichment rests with the party best placed to provide that information.[291] Second, the majority's approach is consistent with that adopted in relation to establishing any other kind of enrichment; the court has regard to the objective value of the receipt, subject to any arguments relevant to subjective devaluation. Man Yip has argued that the *opportunity* to use money, rather than the use value itself, is an incontrovertible benefit:

> a defendant cannot realistically argue that he has not been enriched by the receipt of an opportunity to use money. The fact that the defendant is enriched does not mean that he is therefore required to make full restitution. Any prejudice to the defendant may be dealt with under the defence of change of position.[292]

Finally, it is clear from *Sempra* that the use value of money is capable of subjective devaluation. This point was acknowledged by the House of Lords in *Sempra,* which held that interest was payable on the principal sum at the rate at which the state would have been able to borrow the money, which was lower than rates of interest applicable to borrowing by private bodies.[293] The Canadian Supreme Court took a similar approach to subjective devaluation in *Ermineskin Indian Band & Nation v Canada*, where it held that, because the state could obtain funds at a rate of interest lower than that paid on the band's royalties, it was not enriched by the retention of the royalties payable to the plaintiffs in respect of their natural resources.[294]

The question of compound interest remains to be reconsidered in Ireland following these recent Canadian and English decisions. It is unclear whether the Irish courts will depart from the approach in *Bank of Ireland Trust Services (No 2).* The Irish courts should follow the approach in *Sempra* for several reasons. First, as discussed above, compound interest reflects the true use value of money over time. Therefore, only an award of compound

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[289] *Ibid,* [147] (Lord Scott) and [231]-[233] (Lord Nicholls). See Man Yip, 'The Use Value of Money in the Law of Unjust Enrichment' (n 243) 588.
[290] *Ibid,* [145]. Indeed Lord Scott considered that the Sempra's claim was more appropriately classed as damages for breach of statutory duty: [133]-[139].
[291] See also, Williams, *Unjust Enrichment and Public Law* (n 227) 46.
[292] Man Yip, 'The Use Value of Money in the Law of Unjust Enrichment' (n 243) 600.
[293] *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [49] (Lord Hope), [103] and [128] (Lord Nicholls).
[294] *Ermineskin Indian Band & Nation v Canada* [2009] SCC 9, [2009] 1 SCR 222, 302 DLR (4th) 577 [184].

interest can give full restitution.[295] As such, an award of compound interest simply reflects the gain obtained by the defendant from the use of the plaintiff's money. It is simply an element of the enrichment gained, rather than a 'supersizing' of the value of the plaintiff's award. [296] Compound interest reflects the gain received by the defendant and so will not generally be available in claims for compensatory damages. However, *Mutual Trust Co* raises the question in Canada, as to whether full *compensation* will require an award of compound interest. Whether the law develops in this way is not relevant to the law of restitution, as the right to compound interest in restitution is wholly distinct from any similar remedy in tort or in contract.

Second, public law considerations add a further imperative to allowing compound interest where restitution is sought by the state, as it is only by making an award of compound interest that the courts can strip the state of all benefits received as a result of unlawful taxation. Furthermore, constitutional law principles may also be invoked to justify an award of compound interest where restitution is sought from the state. An appeal to constitutional principles would be compatible with the current approach of the law of restitution, which in England has adapted to accommodate principles of EU law. The CJEU has held that the right to a full and effective remedy for breach of Community Law requires an award of compound interest in unjust enrichment claims, even if such a right would not be available under domestic law.[297] Indeed, it was on this basis that the High Court and the Court of Appeal in *Sempra* held that compound interest could be awarded for breach of community law, in spite of the injunction in *Westdeutsche* that compound interest was not available at common law.[298] The ECJ in *Metallgesellschaft* framed its answer in terms that reflected the fact that in the case before it, the interest sought by the plaintiff companies was sought as a principal sum. However, it should not matter whether the interest is sought as a principal sum— where, as in *Woolwich,* the principal sum has already been returned or, as in *Sempra*, offset against a valid tax liability—or as ancillary to the principal sum, since the principles that underpin the Court

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[295] *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [112] (Lord Nicholls).

[296] *F J Chalke Limited, A C Barnes (Wokingham) Limited v The Commissioners for Her Majesty's Revenue & Customs* [2009] EWHC 952 (Ch) [86]-[88]. See also *Sempra* [2007] UKHL 34, [2008] 1 AC 561 [11] and [33].

[297] *Joined cases C-397/98 and C-410/98 Metallgesellschaft Ltd and Others, Hoechst AG and Hoechst (UK) Ltd v Commissioners of Inland Revenue and HM Attorney General* [2001] ECR I-01727 [87] and [95]. In *Boake Allen v Revenue Commissioners,* Mummery LJ suggested that the right to compound interest should be available both as a matter of community and national law: *Boake Allen Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25, [2006] STC 606 [175]. The issue was not considered on appeal.

[298] *Sempra* [2004] EWHC 2387 (Ch); [2004] STC 1178 [27] and [2005] EWCA Civ 389, [2006] QB 37 [52]-[53].

of Justice's holding remain the same.[299] The extension of this principle to taxes exacted contrary to domestic law in *Sempra* is a welcome development. As noted by Lord Goff in *Woolwich,* 'it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under European law.'[300]

It is unclear whether this approach can also be extended to take account of constitutional principles. It has been argued in Chapter 2 that unlawfully exacted taxes constitute an unconstitutional expropriation of the individual's property.[301] Where the state has interfered with the property rights of an individual, such interference will normally constitute an unjust attack on the individual's property rights unless it is accompanied by compensation.[302] This constitutional principle reflects the common law presumption in favour of compensation for interference with property.[303] Interference with constitutional property rights is traditionally considered to require compensation rather than restitution. However, there is nothing to prevent a remedy for breach of constitutional rights from being restitutionary in nature, as was the case in *Murphy v Attorney General.*[304]

Furthermore, if public law principles and policies can shape the nature of restitutionary causes of action, as it did in *Murphy,*[305] there is no reason why they should not also shape the nature and the extent of the remedy awarded. In *Re Article 26 and of Part V of the Planning and Development Bill,* Keane J held that the market value of the property will normally constitute fair compensation.[306] Where the property involved is money, the value placed on money comprises both the money itself and the use value of the money. This is reflected in the fact that interest is compounded on commercial loans. Where full compensation is market value compensation, full compensation requires an award of compound interest.

However, two problems undermine this argument.[307] First, limitations upon use of property falling short of outright expropriation do not necessarily constitute an unjust attack

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[299] See Virgo, 'Compound Interest Made Simple' (n 258) 512; Mitchell, 'Compound Interest as Restitution or Damages' (n 267) 297.
[300] *Woolwich* [1993] AC 70, 177.
[301] See also *Daly v Revenue Commissioners* [1995] 3 IR 1 (HC).
[302] *Central Dublin Development Association* (1975) 109 ILTR 68 (HC) 89.
[303] In *Attorney General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL) 542.
[304] *Murphy v Attorney General* [1982] IR 241 (SC).
[305] Discussed in Chapter 6 at 242-245.
[306] *Planning and Development Bill* [2000] 2 IR 321 (SC) 350 and 352. Hereafter *Planning and Development Bill.* The same principle has been adopted in Canadian property jurisprudence: *Alberta (Minister of Public Works, Supply & Services) v Nilsson* [2002] ABCA 283, 220 DLR (4th) [47].
[307] I am grateful to Dr Rachael Walsh for drawing these matters to my attention.

upon property rights for which compensation must be made available.[308] Therefore, if the right to compound interest derives from the use value of the overpaid tax, compensation for restriction of this use may not be available as a matter of constitutional law. Second, although full compensation will normally equate to market value compensation, this is not always the case, and a sum falling short of market value compensation may be justified in some cases.[309] As such, the fact that simple interest falls short of 'market value' compensation is not necessarily incompatible with constitutional law. Therefore, the case for compound interest in claims for restitution of overpaid tax derives little support from Irish constitutional property rights jurisprudence.

Conclusions

Although the Irish courts have yet to consider the concept of enrichment in any detail, a number of conclusions may be drawn from this Chapter. First, like other jurisdictions, the Irish courts recognise that objective and subjective conceptions of value are relevant in considering whether the defendant has been enriched. In light of this recognition, the Irish courts are likely to adopt many of the tests developed in other jurisdictions to establish enrichment. Indeed, it appears that some tests, such as the test of free acceptance, and the test of accepted benefits, have already been accepted as a matter of Irish law. However, not all of the tests outlined in Part I are desirable as a matter of principle and the Irish courts' tendency to apply tests for enrichment without critical reflection as to whether these tests are consistent with how the Irish courts reconcile objective and subjective conceptions of value may give rise to a risk of incoherence in Irish jurisprudence.

Second, enrichments received by the state can be accommodated within the traditional approach to unjust enrichment. In many cases, the state will be enriched by the receipt of money by the state in the form of taxes or other charges. Therefore, the difficulties attendant upon establishing whether the defendant has been enriched by the receipt of property or services will rarely arise where the state is the defendant. Although the state may receive non-monetary benefits, such benefits are likely to arise in the context of commercial transactions, which do not attract the public policy concerns applicable to claims for recovery of overpaid charges.

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[308] *Central Dublin Development Association* (1975) 109 ILTR 69 (HC) 84; *O'Callaghan v Commissioners for Public Works* [1983] ILRM 391 (HC) 397-399; [1985] ILRM 364 (SC) 367.

[309] *Planning and Development Bill* [2000] 2 IR 321 (SC) 352. Walsh, *Private Property Rights in the Irish Constitution* (PhD Thesis, Trinity College Dublin) pages 260-264.

Third, the receipt of money by the state is not without its problems. As discussed in Part II of this Chapter, the right to compound interest on claims for restitution of overpaid tax has become increasingly controversial in recent years. This Chapter argued that the common law right to compound interest, recognised in *Sempra,* is to be welcomed for two reasons. First, compound interest is necessary to obtain full restitution from the defendant. This consideration is particularly important where restitution is sought from the state, as there is an important public interest in ensuring that the state is not enriched by unlawful receipts. Second, the right to compound interest is necessary to give a full and effective remedy for breach of European Community law, and may be required to ensure full compensation of an individual where his constitutional right to property has been infringed. Thus, an entitlement to compound interest may be supported in claims for recovery of unlawfully exacted taxes, irrespective of whether such a claim is based on restitutionary or compensatory principles.

Chapter 4: At the Expense of the Plaintiff

One of the 'essential preconditions' for establishing a claim in unjust enrichment is that the defendant's enrichment was obtained at the expense of the plaintiff.[1] This second limb of the four principled enquiries, outlined in Chapter 2, confers *locus standi* on a plaintiff[2] and 'serves to identify the person by or on whose behalf the payment was made and to whom repayment is due'.[3] This requirement has also been described as 'the equivalent of a causation requirement, linking in any given case this particular defendant with that particular plaintiff'[4] and justifies the restitutionary claim against the defendant.[5] The Irish courts have devoted little attention to this requirement. Therefore, it will be necessary to consider how the courts in England, Canada, and Australia have treated this requirement in order to identity the issues that must be addressed when considering whether an enrichment was at the expense of the plaintiff.

Part I of this Chapter considers the role that 'at the expense of the plaintiff' plays in the law of restitution. In particular, it demonstrates how the courts in England, Australia and Canada have reconciled the relationship between unjust enrichment and restitution and will consider whether Irish law recognises a direct quadration between the two concepts.

Feeney J has noted that

> 'The straightforward position of a claim for unjust enrichment would be a situation where a plaintiff could identify that the benefit gained by the defendant is the same as the loss suffered by him.'[6]

Many cases involving restitution from the state will involve such claims. The benefit most frequently received by the state is money, in the form of taxes and charges, and plaintiffs will

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[1] *Corporation of Dublin v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 483; *Criminal Assets Bureau v JWPL* [2007] IEHC 177 [3.3].

[2] Birks, *Unjust Enrichment* (2nd edn OUP, Oxford 2005) 73. See also Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (1991) 11 Oxford Journal of Legal Studies 481, 481; Tettenborn, *Law of Restitution in England and Ireland* (3rd edn Cavendish Publishing, London 2002) 18.

[3] *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 393.

[4] O'Dell, 'Restitution' in [1996] *Byrne and Binchy's Annual Review of Irish Law* 504. See also *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) [26]. Burrows has suggested that it is best not to describe this requirement in terms of privity: 'in order to avoid any conceivable confusion with the contractual doctrine of privity, it seems preferable to ask whether only the *direct provider* of a benefit is entitled to restitution': Burrows, *The Law of Restitution,* (3rd edn OUP, Oxford 2011) 69; O'Dell, 'Restitution' in [1997] *Byrne and Binchy's Annual Review of Irish Law* 615.

[5] Virgo, *The Principles of the Law of Restitution* (2nd edn OUP, Oxford 2006) 105.

[6] *Criminal Assets Bureau v JWPL* [2007] IEHC 177 [3.4]; Burrows, *The Law of Restitution* (n 4) 64; Edelman and Bant, *Unjust Enrichment in Australia* (OUP, Melbourne 2006) 123.

often be able to demonstrate that they paid money directly to the state. However, the requirement that the enrichment was conferred at the expense of the plaintiff raises two important questions. These are general to the law of restitution and apply to restitution from the executive.

First, it has been suggested that 'at the expense of the plaintiff' entails that the gain received by the defendant must correspond with a loss sustained by the plaintiff. Although this 'correspondence principle' has been rejected in England and Australia,[7] Canadian jurisprudence requires that the plaintiff suffered a deprivation corresponding to the defendant's enrichment.[8] Part II considers direct receipts. It investigates whether the correspondence principle is recognised in Irish law, and considers whether such a requirement is desirable as a matter of principle, particularly in the context of restitution from public authorities.

The second question concerns indirect receipts and possible exceptions to the general requirement of privity between the plaintiff and defendant. Professor Virgo identifies three such exceptions: claims to vindicate property rights, claims founded on wrongdoing, and interceptive subtractions, where the defendant intercepts a benefit that is en route to the plaintiff.[9] He acknowledges that the first two are not true exceptions to this privity requirement; they are founded upon causes of action unrelated to the principle against unjust enrichment. Claims to vindicate property rights are founded on the plaintiff's subsisting proprietary rights in the asset in question.[10] Claims founded on wrongdoing are founded on the wrong itself, which forms an independent and distinct cause of action.[11] In addition to interceptive subtractions, it is possible to identify a second genuine exception to the directness requirement, where a plaintiff is able to 'leapfrog' over the immediate enrichee to claim restitution from the ultimate recipient of the benefit.

These exceptions are important, as, in addition to direct receipts, the state may also receive enrichments indirectly from the ultimate taxpayer. For example, in VAT claims, or other cases of indirect taxation, the taxpayer who ultimately bore the burden of the tax did not

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[7] *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 395; *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 145; *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 73, 75. See below at 117-122.

[8] *Peter v Beblow* [1993] 1 SCR 980 (SCC) [6].

[9] Virgo, *The Principles of the Law of Restitution* (n 5) 107-108.

[10] See *Foskett v McKeown* [2001] 1 AC 102 (HL).

[11] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 [231]; Virgo, *The Principles of the Law of Restitution* (n 5) 107-108.

pay the money to the state directly; instead it may have passed through a chain of intermediary taxpayers. Part III considers cases of 'indirect enrichment' and consider whether the ultimate taxpayer is entitled to recovery in such situations.

I. Quadration: Unjust Enrichment and Restitution

Traditionally, it was considered that there was a direct quadration between 'restitution' and 'unjust enrichment': the only response to unjust enrichment was restitution and restitution responded only to unjust enrichment. According to this theory, the term 'at the expense of the plaintiff' had a dual role. [12] First, 'at the expense of the plaintiff' could signify that the enrichment was received from the plaintiff's assets. This was known as unjust enrichment by subtraction and we continue to understand unjust enrichment in this sense today. Second, 'at the expense of the plaintiff' could signify that the defendant obtained a benefit as a result of a breach of duty owed to the plaintiff. This was known as restitution for wrongs.[13]

In *Portman Building Society v Hamlyn Taylor Neck (a firm)*, Millett LJ held that '[w]hether the claim is for restitution for wrong or restitution for unjust enrichment by subtraction (as in the present case) such a claim is designed to reverse unjust enrichment.'[14] Other cases, such as Lord Steyn's speech in *Banque Financiere de la Cité v Parc (Battersea) Ltd*, by adopting the language of 'unjust enrichment by subtraction',[15] implicitly accept the quadration theory. Similarly, in *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd*, Mason CJ accepted that '[T]he requirement that the defendant be unjustly enriched "at the expense of" the plaintiff can mean that the enrichment is "by doing wrong to" or "by subtraction from" the plaintiff.'[16] The quadration principle was accepted as part of Irish law in *Criminal Assets Bureau v JWPL,* where Feeney J held that gains resulting from wrongs can also be said to have been made 'at the plaintiff's expense'.[17]

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[12] Birks, *An Introduction to the Law of Restitution* (Clarendon Press, Oxford 1985) 26.
[13] Maddaugh and McCamus, *The Law of Restitution* (2nd edn Canada Law Book, Aurora 2004) [3-200-20] 53; Mason and Carter, *Restitution Law in Australia* (Butterworths, Sydney 1995) 55.
Burrows, *The Law of Restitution* (2nd edn Butterworths, London 2002) 26. However, see now, Burrows, *The Law of Restitution* (n 4) 10-12.
[14] *Portman Building Society v Hamlyn Taylor Neck (a firm)* [1998] 4 All ER 202 (CA) 206.
[15] *Banque Financiere de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 226. Hereafter *BFC.*
[16] *Royal Insurance* (1994) 182 CLR 51 (HCA) 73.
[17] *JWPL* [2007] IEHC 177 [3.4]. Feeney J relied upon Goff and Jones, *The Law of Restitution* (Common Law Library, 7th edn Thomson Sweet and Maxwell, London 2007) [1.001].

Birks has recanted the quadration theory, arguing that '[U]njust enrichment triggers restitution, but, naturally, restitution is triggered by events other than the analytically distinct event called unjust enrichment.'[18] Many commentators have adopted the view that restitution can respond to events other than unjust enrichment,[19] although this acceptance is not universal.[20] There has been little judicial consideration of this development. However, in *Attorney General v Blake*, the House of Lords awarded restitutionary damages for breach of contract without engaging the language of unjust enrichment.[21] The restitutionary remedy responded directly to the wrong. Similarly, Lord Mance's analysis of unjust enrichment claims in *Sempra Metals* suggests that the courts are likely to reject the quadration thesis,[22] so that restitution is not confined to unjust enrichment claims.[23]

The matter is more clear-cut in Canadian law, as the second limb of the Canadian test of unjust enrichment—the requirement of 'corresponding deprivation'—precludes the dual role traditionally attributed to 'at the expense of the plaintiff' in other jurisdictions.[24] In *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* Bastarache J held that restitution for wrongdoing and restitution for unjust enrichment constituted two separate categories of restitution.[25] Similarly, in *Heward v Eli Lilly & Co*, Cullity J rejected the suggestion that the corresponding deprivation required under the Canadian test could derive from a wrong suffered by the plaintiff. He held that 'the loss must correspond to the enrichment in the sense that the latter was, in a general sense, derived from, or linked to, a loss suffered by the plaintiff.'[26]

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[18] Birks, 'Misnomer' in Cornish, Nolan, O'Sullivan, and Virgo (eds) *Restitution: Past, Present and Future* (Hart, Oxford 1998) 7; Birks, *Unjust Enrichment* (n 2) 11-16.

[19] Birks, 'Misnomer' (n18); Grantham and Rickett, 'Disgorgement for Unjust Enrichment?' (2003) 62 CLJ 159, 160 and 163; Virgo, *The Principles of the Law of Restitution* (n 5) 7-18; Smith 'The Province of the Law of Restitution' (1992) 71 Canadian Bar Review 672, 684; Smith, Chambers, McInnes, Neyers, and Pitel, *The Law of Restitution in Canada, Cases Notes And Materials,* (Edmond Montomgery Publications Ltd, Toronto 2004) 297. However, Webb has argued that it is not clear from Birks's new system of classification what events constitute unjust enrichment as opposed to wrongs or other causative events: Webb, 'What is Unjust Enrichment?' (2009) 29 Oxford Journal of Legal Studies 215, 217-220.

[20] Tettenborn, 'Misnomer—a Response to Professor Birks' in Cornish, Nolan, O'Sullivan and Virgo (eds) *Restitution: Past, Present and Future* (Hart, Oxford 1998) 33. McInnes, 'Restitution, Unjust Enrichment and the Perfect Quadration Thesis' [1999] RLR 118; Burrows, 'Quadrating Restitution and Unjust Enrichment: A Matter of Principle?' [2000] RLR 257. However, see Burrows, *The Law of Restitution* (n 4) 10-12.

[21] *Attorney General v Blake* [2001] 1 AC 268 (HL) 277-286.

[22] *Sempra Metals* [2007] UKHL 34, [2008] 1 AC 561 [231].

[23] Whether other responses are available against unjust enrichment will be considered in Chapter 8.

[24] Smith et al, *The Law of Restitution in Canada* (n 19) 298.

[25] *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1, (2007) 276 DLR (4th) 342, [2007] 1 SCR 3 [33].

[26] *Heward v Eli Lilly & Co* (2008) 295 DLR (4th) 175 [57]-[60].

Irish law should reject the quadration theory. Restitution, like damages or any other form of legal response, is a response to discrete causes of action and the nature of the restitutionary response may differ according to the event to which it seeks to respond. Therefore, there is no principled reason why the events to which it responds should be accommodated within the same legal framework. Furthermore, restitution for wrongs and restitution of unjust enrichment are founded upon different rationales and different principled bases. Attempting to accommodate both within the same principled structure may give rise to incoherence.

II. Direct Enrichments and the Correspondence Principle

The requirement that the unjust enrichment is received at the expense of the plaintiff demands that the enrichment came from the plaintiff or from the plaintiff's wealth.[27] This requirement protects lawful receipts and encourages 'transactional security by protecting those who are involved in permissible activities.'[28] The enrichment will not be recoverable where it accrues independently of any nexus with the plaintiff and was not derived at the plaintiff's expense. In *Re Byfield*,[29] a bank that had made a bank transfer in ignorance could not be subrogated to the rights of the creditors whose debts had been discharged by the payment. Even though the bank had been liable to make good the loss to the trustee in bankruptcy, there was no sufficient nexus between the bank's act and the benefit received by the creditors:

> the money was the bankrupt's own money, a credit balance, and was paid at her order to her mother.[30]

Similarly, in *Gibb v Maidstone and Tunbridge Wells NHS Trust*,[31] Treacy J rejected the plaintiff's claim that the defendant, her former employer, had been unjustly enriched by her failure to issue unfair dismissal proceedings within the limitation period. He held that, 'even if there were a benefit accruing to the Defendant, there has been no unjust enrichment at the expense of the Claimant in this respect. Any detriment lies at the door of the Claimant

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[27] *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 75; *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2002) 208 CLR 516 [25]-[26]; Edelman and Bant, *Unjust Enrichment in Australia* (n 6) 124.
[28] Virgo, *The Principles of the Law of Restitution,* (n 5) 107.
[29] *Re Byfield* [1982] 1 Ch 267 (Ch).
[30] *Ibid,* 276.
[31] *Rose Gibb v Maidstone and Tunbridge Wells NHS Trust* [2009] EWHC 862 (QB).

or her advisors.'[32] In *Australian Breeders Co-Operative Society Ltd v Jones*,[33] the Federal Court of Appeal held that tax savings enjoyed by the Investors to the scheme arose as a result of the fact that payments made under the scheme were tax deductable. The benefit were attributable to payments made by the Investors and so could not have been said to have been made at the expense of the financier of the venture.[34]

Canadian law also requires a causal connection between the enrichment and the deprivation.[35] In addition, the Canadian requirement of 'corresponding deprivation' requires that the plaintiff suffered a loss corresponding to the enrichment of the defendant.[36] Unjust enrichment in such cases is thus a 'zero-sum game' in Canada;[37] the plaintiff will only recover the enrichment to the extent that it reflects a loss suffered by him. This is best illustrated by adapting an example proffered by McInnes.[38] The plaintiff performs repairs to the defendant's car. The market value of the labour and materials is €500. However, the plaintiff's brother is a mechanic who provides his labour for free and so the cost of the repairs to the plaintiff is €250. The value of the car is increased by €2,000 as a result of the repairs. If the law of restitution requires correspondence between the plaintiff's loss and the defendant's gain, the plaintiff's recovery will be confined to the loss incurred by the plaintiff and so the plaintiff will recover €250. If the law of restitution does not require correspondence between the plaintiff's loss and the defendant's gain, the plaintiff can recover the sum by which the defendant gained. Depending on how enrichment is quantified, this could be the full market value of the repairs (€500) or the increase in the car's value following the repairs (€2,000).[39] The courts will take a 'straightforward economic approach' to detriment.[40] However, the concept of 'deprivation' is not confined to economic loss. For example, in *Clarkson v McCrossen Estate*[41] the plaintiff gave up her social life to care for her stepfather and this was

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[32] *Ibid,* [86]. See also *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) [26].
[33] *Australian Breeders Co-Operative Society Ltd v Jones* [1997] FCA 1405, (1997) 150 ALR 488.
[34] *Ibid,* 542. Discussed in Edelman and Bant, *Unjust Enrichment in Australia* (n 6) 139. See also, *Eighty-Second Vocation Pty Ltd v Parere Investments Pty Ltd* [2005] FCA 844, (2005) 144 FCR 88 [105]-[107].
[35] *Bulut v Walker-Fairen* [2010] ONSC 706 [10]-[11]; *Heward v Eli Lilly & Co* (2008) 295 DLR (4th) 175 (ONSC) [59].
[36] *Sharwood & Co v Municipal Financial Corp* (2001) 197 DLR (4th) 477 (ONCA) [16]; *Peter v Beblow* [1993] 1 SCR 980, 101 DLR (4th) 621 (SCC) [3]. See McInnnes, 'The Measure of Restitution' (2002) 52 University of Toronto Law Journal 163, 172. See also *Rathwell v Rathwell* [1978] 2 SCR 436 (SCC) 455; *Pettkus v Becker*[1980] 2 SCR 834, 117 DLR (3d) 257 (SCC) [38].
[37] Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (n 2) 483.
[38] McInnes, '"At the Plaintiff's Expense": Quantifying Restitutionary Relief' (1998) 57 CLJ 472.
[39] See Chapter 3.
[40] *Peter v Beblow* [1993] 1 SCR 980, 101 DLR (4th) 621 (SCC) [8].
[41] *Clarkson v McCrossen Estate* (1995) 122 DLR (4th) 239 (BCCA).

accepted to be a corresponding deprivation.[42] Often, where an enrichment has been made out, the courts will assume a corresponding deprivation as a matter of course.[43]

No other jurisdiction has accepted the correspondence principle, although the English courts' approach has not been consistent on this point. In *Kleinwort Benson Ltd v Birmingham City Council*, Saville LJ held that the expression 'at the payer's expense' did not justify

> the importation of concepts of loss or damage with their attendant concepts of mitigation, for these have nothing whatever to do with the reason why our law imposes an obligation on the payee to repay to the payer what he has no right to retain.[44]

The Court of Appeal held that hedging transactions entered into by the plaintiff, in order to reduce its exposure in swaps transactions with the defendant local authority, did not prevent the plaintiff from recovering from the defendant. Furthermore, Evans LJ rejected the defendant's contention that recovery was limited to the overall losses sustained by the plaintiff in the course of the transaction, and that the hedging contracts were too remote to be taken into consideration.[45] In *Re BHT (UK) Ltd,* Mr Kevin Garnett QC rejected that the payment of the book debts to a creditor was at the expense of the claimant because the debtor company had suffered no loss.[46] More recent decisions affirm that restitution looks to the defendant's gain,[47] leaving no scope for consideration of the plaintiff's loss.[48] In *Littlewoods Retail Limited v Revenue and Customs Commissioners,* Vos J held that a requirement to prove corresponding loss would make the law of restitution 'cumbersome and unwieldy'.[49]

The High Court of Australia has also held that 'at the expense of the plaintiff' indicates that the enrichment came from the plaintiff's wealth fund, rather than incorporating a loss requirement into the law of restitution,[50] and has strenuously rejected arguments in favour of introducing a correspondence principle. In *Mason v New South Wales,* Windeyer J

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[42] McInnnes, 'The Measure of Restitution' (n 36) 172.
[43] *Peter v Beblow* [1993] 1 SCR 980, 101 DLR (4th) 621 (SCC) [79]-[80]; *Sorochan v Sorochan* [1986] 2 SCR 38 (SCC) 45-46.
[44] *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380, 395 (CA).
[45] *Ibid,* 393.
[46] *Re BHT (UK) Ltd* [2004] EWHC 201 (Ch), [2004] BCC 301, [2004] 1 BCLC 569 [25]. See also, Edelman and Bant, *Unjust Enrichment in Australia* (n 6) 127.
[47] *Sempra Metals Ltd* [2007] UKHL 34, [2008] 1 AC 561 [30].
[48] *Amin v Amin* [2010] EWHC 528 (Ch).
[49] *Littlewoods Retail Limited v Revenue and Customs Commissioners* [2010] EWHC 1071 (Ch) [145]-[147].
[50] *Royal Insurance* (1994) 182 CLR 51, 75 (Mason CJ) and 90 (Brennan J).

held that '[T]he concept of impoverishment as a correlative of enrichment may have some place in some fields of continental law. It is foreign to our law.'[51] The High Court's refusal to embrace the correspondence principle has also led it to reject the passing on defence. [52]

The status of the correspondence principle in Irish law is unclear. In *East Cork Foods v O'Dwyer Steel,* Henchy J appeared to consider that loss to the plaintiff was a prerequisite to an unjust enrichment claim:

> It would be manifestly unconscionable for the first defendant to retain a profit made by it on the £20,000 *at the expense of the second defendant*. That the law will not allow a person to become unjustly enriched in such fiduciary circumstances... However, it would first have to be shown that *the second defendant made a loss and that the first defendant made a profit.* [53]

However, in *Criminal Assets Bureau v JWPL*, Feeney J explicitly rejected a requirement of correspondence between the plaintiff's loss and the defendant's gain:

> Whilst there does not have to be a direct equation between what the claimant has lost and what the defendant wrongdoer has gained it is certainly the case that, except in exceptional cases, that the gain must be capable of being identified as having been made at the claimant's expense.[54]

Feeney J's approach is to be preferred. It not clear that Henchy J considered himself to be establishing a requirement of corresponding loss and Feeney J's approach is consistent with the other jurisdictions that adopt 'at the expense of the plaintiff' as the second limb for the test for restitution for unjust enrichment.

This may, at first glance, appear to run contrary to established authority on *quantum meruit* claims, as, in cases where *quantum meruit* claims have been made, the Irish courts have confined the restitutionary award to the reasonable value of the services.[55] It has been argued that a truly gain-based remedy requires that the enrichment should be identified as the increase in value in the defendant's property attributable to the provision of the service.[56]

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[51] *Mason* (1959) 102 CLR 108 (HCA) 146. See also *Royal Insurance* (1994) 182 CLR 51 73 (HCA) 75.
[52] *Roxborough* [2001] HCA 68, (2002) 208 CLR 516 [23]-[24]; *Royal Insurance* (1994) 182 CLR 51 (HCA) 71-73.
[53] *East Cork Foods v O'Dwyer Steel* [1978] IR 103 (SC) 112. Emphasis added.
[54] *JWPL* [2007] IEHC 177 [3.6].
[55] *Linnie v Murphy* [2008] IEHC 362; *Mc Cabe Builders (Dublin) Ltd v Sagamu Developments Ltd* [2007] IEHC 391 [66]. Reversed on other grounds: [2009] IESC 31. See Chapter 3 at 94.
[56] Virgo, *The Principles of the Law of Restitution* (n 5) 98

However, the *quantum meruit* cases are consistent with the rejection of the correspondence principle: an award of the reasonable or market value of services rendered is in fact gain-based rather than reflective of the loss sustained by the plaintiff. An award that reflects the correspondence principle would be limited to the costs incurred in providing the service. This is particularly evident where the provision of the service entails a high profit margin. The reasonable value of the services reflects the defendant's gain as it represents the amount that the defendant saved by not having to procure the service elsewhere. It is also arguable that gains such as an appreciation in value of a house are too remote to be considered as having a causal nexus with the initial transfer.[57]

Academic opinion is divided as to whether the correspondence principle should be recognised. Supporters of the principle[58] argue that it is mandated by the Aristotelian conception of corrective justice:[59]

> The Aristotelian conception is premised upon a notion of correlativity. As a result of a single event, the plaintiff suffers a loss and the defendant reaps a gain... The same correlation recurs in the legal response to the triggering event: the plaintiff is entitled to recover her loss and the defendant is compelled to give up his gain. Moreover, the nexus forged by the triggering event uniquely identifies each party as the proper object of the other's remedial response.[60]

Two problems attend this analysis. First, as discussed in Chapter 2, it is not clear that corrective justice provides a satisfactory philosophical basis for the law of restitution. Second, although the rationale for restitution is at its strongest when a defendant has a gain and the plaintiff has suffered a loss,[61] '[I]t does not follow, however, that this or indeed any subject must be confined to the case in which it is most strongly underpinned'.[62] Irrespective of the philosophical arguments put forward by proponents of the correspondence principle, most jurisdictions have rejected this principle.[63]

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[57] See Chapter 3 at 87-94.
[58] McInnes, '"At the Plaintiff's Expense": Quantifying Restitutionary Relief' (n 38) 472; Smith et al, *The Law of Restitution in Canada* (n 19) 297.
[59] *Peel* [1992] 3 SCR 762; (1993) 98 DLR (4th) 140.
[60] McInnes, '"At the Plaintiff's Expense": Quantifying Restitutionary Relief' (n 38) 474-475.
[61] Birks, *Unjust Enrichment* (n 2) 81.
[62] *Ibid*. See also Burrows, *The Law of Restitution* (n 4) 64-65.
[63] Birks, *Unjust Enrichment* (n 2) 81-82.

Other commentators have argued that abandoning a correspondence principle may permit recovery of indirect gains unrelated to the initial receipt.[64] However, such concerns can be met by ensuring that rules on remoteness of gain are strictly construed.[65] For example, the outcome of the Court of Appeal decision in *Kleinwort Benson v Birmingham CC* could also be defended on the basis that the hedging transactions were too remote to be considered part of the disputed transaction. Furthermore, the correspondence principle is unlikely to cause problems where restitution is sought from public authorities. Most cases of unjust enrichment involve the receipt of money from the claimant to a public authority so that 'the benefit gained by the defendant will usually correspond with the loss suffered by the claimant.'[66] Where restitution reflects the use value of money, favourable government lending rates mean that that benefit of the use value obtained by the public authority is unlikely to be greater than the loss of use sustained by the plaintiff. As Vos J observed, in *Littlewoods*:

> it is nearly always the case that governments can borrow at lower rates than commercial or domestic taxpayers, so the enquiry would only infrequently affect the outcome.[67]

To some extent, the debate on the correspondence principle has become obscured by the elision of the correspondence principle with the passing on defence. Some commentators believe that acceptance of the correspondence principle necessarily entails acceptance of the passing on defence.[68] However, this has been disputed.[69] The passing on defence entails difficulties of proof and valuation that make its adoption undesirable, irrespective of whether the correspondence principle forms part of the law of restitution.[70] The passing on defence will be considered further in Chapter 8.

III. Exceptions to the Privity Principle: Interceptive Subtractions and Leapfrogging.

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[64] Grantham and Rickett, 'Disgorgement for Unjust Enrichment?' (n 19) 170-171.
[65] Edelman, 'The Meaning of Loss and Enrichment' in Chambers, Mitchell and Penner (eds) *Philosophical Foundations of the Law of Unjust Enrichment* (OUP, Oxford 2009); McInnes, '"At the Plaintiff's Expense": Quantifying Restitutionary Relief' (n 38) 479-480.
[66] Virgo, *The Principles of the Law of Restitution* (n 5) 113-114.
[67] *Littlewoods Retail Limited v Revenue and Customs Commissioners* [2010] EWHC 1071 (Ch) [146].
[68] Virgo, *The Principles of the Law of Restitution* (n 5) 113-114.
[69] McInnes, '"At the Plaintiff's Expense": Quantifying Restitutionary Relief' (n 38) 479.
[70] *Ibid,* 479.

Most cases in which restitution is sought from public authorities will involve direct receipts from the plaintiff to the state. However, some cases will involve indirect receipts. Section A considers cases where the defendant intercepted a benefit that was intended for the plaintiff. Section B considers cases where the plaintiff seeks to leapfrog the immediate recipient of the enrichment in order to obtain restitution from the ultimate recipient of the benefit.

A. Interceptive Subtraction

Interceptive subtractions involve situations where the defendant has intercepted a benefit that would otherwise have been received by the plaintiff:

> the enriching assets are never reduced to the ownership or possession of the claimant. They will have been on their way, in fact or law, to the claimant when the defendant intercepted them.[71]

It has been suggested that two requirements must be met before an interceptive subtraction has been made out.[72] First, it must be shown that, but for the defendant's interception, the enrichment would inevitably have been received by the plaintiff. Second, the defendant must not have earned the benefit. Such interceptions can be factual or legal. Legal interceptions include cases where it is legally certain that the plaintiff would have received enrichment but for the interception—for example where a debt is owed to the plaintiff and the defendant is paid by the third party, discharging the debt owed to the plaintiff.[73] A plaintiff will only be able to maintain a claim against an interceptor in cases where the liability owed by the third party to the plaintiff has been discharged, as, if the liability has not been discharged the defendant has not been enriched.[74] A factual interception is a case where it is factually inevitable that the plaintiff would have received the enrichment but for the defendant's

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[71] Birks, *Unjust Enrichment* (n 2) 75.

[72] Virgo, *The Principles of the Law of Restitution* (n 5) 109-110.

[73] However, many cases in which the defendant appropriated a payment intended to discharge a debt owed by a third party to the plaintiff will not constitute an interceptive subtraction, as the payment by the third party to the defendant will not have discharged the debt owed to the plaintiff. In such cases, the defendant is enriched, but his enrichment is not at the expense of the plaintiff, as the plaintiff will still have a claim in debt against the third party: Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (n 2) 488 and 492; Virgo, *The Principles of the Law of Restitution* (n 5) 109. Goff and Jones, *The Law of Restitution* (n 17) [1-046].

[74] Virgo, *The Principles of the Law of Restitution* (n 5) 109; Goff and Jones, *The Law of Restitution* (n 17) [1-046]; Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (n 2) 502; Birks, *Unjust Enrichment* (n 2) 77. However, Tettenborn considers that the established authority on this point does not impose such a limitation: Tettenborn, *Law of Restitution in England and Ireland* (n 2) 19.

interception. In such cases, the plaintiff is under a 'heavy onus'[75] to establish this factual inevitability.

However, it is unclear whether many common law jurisdictions recognise a general principle in favour of restitution for unjust enrichment by interceptive subtraction. Commentators have suggested that certain situations—such as attornment, usurpation of office, and subrogation—can be classified as examples of interceptive subtraction. However, it is unclear whether these are illustrations of a general rule in favour of interceptive subtractions,[76] or simply constitute exceptions to a general prohibition on interceptive subtraction.[77]

Where the defendant has usurped the fruits of the plaintiff's office, an action will lie in money had and received.[78] This is one of the clearest cases of true interceptive subtraction and is one of the most important subgroups of cases in the context of restitution from public authorities.[79] The acts of the *de facto* holder of an office are binding on the true office-holder. Therefore, receipt of money by the *de facto* office holder will discharge the liability owed to the true office holder.[80] The plaintiff loses a cause of action against the third party and so should gain a cause of action against the defendant. This cause of action is restitutionary in nature, as relief is confined to the amount that the defendant gained, rather than the amount that the claimant lost.[81] Furthermore, usurpation of office is a proprietary tort.[82] Therefore, it can be conceptualised as restitution for unjust enrichment or as restitution for wrongdoing.

Other proffered examples of indirect enrichment are attornment, account by a trustee or executor de son tort, and subrogation. It has been suggested that attornment is an example of restitution by interceptive subtraction.[83] However, attornment is not a true case of interceptive subtraction. First, it is neither legally or factually certain that the plaintiff would

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[75] Birks, *Unjust Enrichment* (n 2) 76.
[76] Birks, *Unjust Enrichment* (n 2) Chapter 4.
[77] Burrows, *The Law of Restitution* (n 4) 65-75. For a summary of the debate on this issue see O'Dell, 'Restitution' (n 4) 615.
[78] Goff and Jones, *The Law of Restitution* (n 17) [29-001]; *Asher v Wallis* (1707) 11 Mod 146; *Lyell v Kennedy* (1889) 14 App Cas 4371.
[79] McInnes, 'Interceptive Subtraction, Unjust Enrichment and Wrongs—A Reply to Professor Birks' (2003) 62 CLJ 697, 699.
[80] Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (n 2) 494.
[81] *King v Alston* (1848) 12 QB 971; Virgo, *The Principles of the Law of Restitution* (n 5) 111.
[82] Virgo, *The Principles of the Law of Restitution* (n 5) 112; O'Dell, 'Restitution' (n 4) 614-615. This category is not confined to the fruits of public office, but also extends to rents that have been wrongfully received. In such a case, the usurper of the rents will be required to account to the person who was entitled to received the rents: *Arris v Stukely* (1677) 2 Mod 260, 262; *Asher v Wallis* (1707) 11 Mod 146; *Shaw v Keighron* [1869] 3 IR Eq 574
[83] *Griffin v Weatherby* (1867-68) LR 3 QB 753, 758-759.

have received the wealth if the defendant had not intervened in cases of attornment.[84] Second, attornment is best explained as an example of vindication of property rights. Once the defendant has attorned to the plaintiff, equitable title vests in the plaintiff[85] and the transaction ceases to be interceptive, any claim brought by the plaintiff is a vindication of his property rights.[86] Indeed Smith argues that attornment 'is nothing but the consent of the defendant to hold for the plaintiff' and so is not truly restitutionary at all, whether under the unjust enrichment principle or as a means of vindicating property rights.[87] Restitutionary rights arise by operation of law rather than by virtue of consent, so a consent-based rationale for attornment will not fit within the unjust enrichment rubric.[88] Other possible examples of interceptive subtraction are cases in which a trustee or executor de son tort will be required to account to the proper administrator of the estate,[89] or where a will is rectified to prevent unjust enrichment of a defendant at the expense of the intended beneficiary.[90] This principle, developed in *Lister v Hodgson,*[91] was adopted by the Irish courts in *M'Mechan v Warburton.*[92] However, in Ireland, this development has, to a large extent, been overtaken by the more extensive relief exemplified in *Kelly v Cahill,* discussed below. Finally, subrogation may also prevent unjust enrichment.[93] However, none of these three situations are likely to arise in the context of restitution from public authorities.

Other Irish cases have allowed restitution, both personal and proprietary, where the enrichment was obtained by means of an interceptive subtraction.[94] *In re PMPA Insurance*

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[84] Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (n 2) 505-506.
[85] Goff and Jones, *The Law of Restitution* (n 17) [1-049] and [28-003]. Compare *Griffin v Weatherby* (1867-68) LR 3 QB 753, 758-759.
[86] Birks, *Unjust Enrichment* (n 2) 75.
[87] Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (n 2) 506.
[88] *Ibid.*
[89] *Jacob v Allen* (1703) 1 Salk 27, 28; *Yardley v Arnold* (1842) Car and M 424, 438; *Lamine v Dorrell* (1705) 2 Ld Raym 1216, 92 ER 303. See Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (n 2) 495. Birks has suggested that, where a trust arises where a settlor failed to comply with the formalities, the beneficiary's rights arise to prevent unjust enrichment of the trustee. Smith says that unjust enrichment cannot explain the trust that arises in such cases. 'It is not a remedy to return to the plaintiff that which the defendant has taken, for it is untrue to say that it was ever certain that the plaintiff would acquire the wealth.' Furthermore, such a trust cannot be described as restitutionary, as it gives effect to the testator's intentions, rather than simply preventing unjust enrichment by creating a trust in favour of the settlor's estate: Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (n 2) 512.
[90] Burrows, *The Law of Restitution,* (n 4) 83-84; Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (n 2) 515-519; O'Dell, 'Restitution' (n 4) 613-614.
[91] *Lister v Hodgson* L R 4 Eq 30.
[92] *M'Mechan v Warburton* [1896] 1 IR 435.
[93] *Re Byfield* [1982] 1 Ch 267 (Ch) 272; *BFC* [1999] 1 AC 221 (HL) 231-232. See also *Butler v Rice* [1910] 2 Ch 277 (Ch) 282-283. However, it has been suggested that *Butler v Rice* is explicable on a proprietary basis: Edelman and Bant, *Unjust Enrichment in Australia* (n 6) 140.
[94] O'Dell, 'Restitution' (n 4) 612.

Co Ltd[95] is a core example of restitution for unjust enrichment by interceptive subtraction.[96] The PMPA Insurance Company Ltd (the company) was closely connected to the Private Motorists Provident Society Ltd (the society). The company was in administration and the society was in liquidation. The administrator of the company had acted as receiver of the society for a period and had retained a portion of the funds of the society to defray expenses arising in the course of that period. Payments to the company had been intercepted by the society. Cheques payable to the company had been credited to the account of the society by mistake, and cheques, drawn in favour of the society and dishonoured, had been debited from the company's account. The administrator sought to offset the sum retained by the receiver against these payments. Lynch J held that the administrator was entitled to do so as these sums were held on trust for the company:[97]

> It was never intended by the owner or payer of these moneys that they should be paid to the society. ... In these circumstances, it seems to me that there is no sense in which such moneys could be regarded as assets of the society. The society have no right to the possession of the moneys, much less to their title or ownership. The moneys stand in the account or name of the society which holds them as trustee without any beneficial interest in them.[98]

In this case, the money had been en route to the company from third parties when it was intercepted by the society. This case does not fit within any of the exceptions to directness that are discussed above and can only be explained on the basis that Irish law recognises a principle of interceptive subtraction.[99]

In *Shanahan v Redmond*[100] the testator sought to remove the defendant as beneficiary under a life insurance policy by revoking the policy and replacing it with a new one naming the testator as beneficiary. He took all necessary steps to effect this but his instructions were not carried out. Carroll J applied the maxim 'equity looks on that as done which ought to

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[95] *In re PMPA Insurance Co Ltd* [1986] ILRM 524 (HC).
[96] See O'Dell, 'Restitution, Rectification, and Mitigation: Negligent Solicitors and Wills, Again' (2002) 65 MLR 360, 366.
[97] *In re PMPA Insurance Co Ltd* [1986] ILRM 524 (HC) 527.
[98] *Ibid,* 526-527.
[99] However, it is arguable that in the present case the proper defendant was the bank as if a bank is not entitled to debit a bank account it *cannot* do so*: Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QBD) 699. See, however, *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Ch) 283; Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (n 2) 501-502.
[100] *Shanahan v Redmond* (High Court, 21 June 1994)

have been done'[101] and held that the existing policy should be treated as if it were a substitute policy in which the testator was named as the sole beneficiary. O'Dell has argued that this case can be explained as a case of unjust enrichment by interceptive subtraction.[102] However, owing to the unusual circumstances of the case, it is unclear whether it is a true example of interceptive subtraction. In *Shanahan*, the donor and the beneficiary were one and the same person, so that the benefit was returned to the estate of the testator rather than to a third party. However, it is clear from the application of the equitable maxim in that case that the will was rectified to benefit the testator *qua* beneficiary, so that *Shanahan* may be characterised as a case of interception of a benefit from a third party to the plaintiff.

In *Behan v Bank of Ireland,*[103] the plaintiff was a beneficiary under a 'Reduced Interest Scheme for Farmers in Severe Financial Distress', under which he received credits to reflect the reduced rate of interest payable by him. The defendant appropriated these credits and applied them to loans owed by Mr Behan to the bank. Morris J held that the money was recoverable by Mr Behan as money had and received, as the bank was not entitled to apply the money in this way. Similarly, in *HKN Invest OY v Incotrade PVT Ltd*, Costello J held that money received by the promoter of a company under pre-incorporation contracts was held on trust by him for the benefit of the company.[104] In *Shield Life Insurance Company Limited v Ulster Bank Limited*, Costello P held that a bank that receives a cheque on behalf of a person who is not entitled to it will be liable to the true owner of the cheque 'either as damages for conversion or under the cognate cause of action, based historically on *assumpsit*, for money had and received.'[105] In such a case, the 'true owner' is not the person from whom the enrichment was received directly but the payee from whom the proceeds of the cheque were intercepted. This liability has been abrogated by section 4 of the Cheques Act, 1959. It provides that a bank will not be liable where it credits the sum to a customer's account, having received the payment in good faith and without negligence. This defence is analogous to the change of position defence.

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[101] It has been argued that this maxim was an inappropriate basis on which to found liability: Delany, *Equity and the Law of Trusts in Ireland* (5th edn Roundhall, Dublin 2011) 37-38; O'Dell, 'Insurance Payments (Mis)directed, Equitable Maxims (Mis)used, and Restitution Doctrines Missed' [1995] LMCLQ 197, 199-200.

[102] O'Dell, 'Insurance Payments (Mis)directed, Equitable Maxims (Mis)used, and Restitution Doctrines Missed' (n 101) 201-202.

[103] *Behan v Bank of Ireland* (High Court, 15 August 1997). On appeal, the Supreme Court affirmed the outcome of the case, but on the basis that the bank, having represented to the Revenue Commissioners that the money had been paid to the plaintiff, was 'estopped from saying that it was entitled to recoup itself of that amount because a larger sum owed by the plaintiff to the bank was waived in the course of previous settlement negotiations': *Behan v Bank of Ireland* [1998] 2 ILRM 507 (SC) 521.

[104] *HKN Invest OY v Incotrade PVT Ltd* [1993] 3 IR 152 (HC) 163.

[105] *Shield Life Insurance Company Limited v Ulster Bank Limited* [1995] 3 IR 225 (HC) 262.

In *Kelly v Cahill*,[106] the testator devised his property to his widow and his brother as joint tenants for life with remainder in trust for his nephew. The testator subsequently changed his mind and sought to leave all his property to his wife absolutely. In order to avoid inheritance tax, the testator transferred his property to the joint names of himself and his wife. However, his solicitor omitted certain lands that formed part of the testator's estate, which would therefore pass to his nephew on the death of the testator's wife. Barron J held that a New Model Constructive Trust arose to prevent the unjust enrichment of the nephew at the widow's expense,[107] notwithstanding that the property was directly received from the testator's estate rather than from the widow's wealth fund. If the testator's intentions had been carried out correctly, the property was certain to have been received by the widow. O'Dell has suggested that many of these cases can only be satisfactorily explained by a general principle permitting restitution for unjust enrichment by interceptive subtraction and argues that '[S]ince the theory of interceptive subtraction is supported by a principle which explains a significant body of Irish authority, it ought to be expressly adopted as a matter of Irish law'.[108]

Three conclusions can be drawn in relation to interceptive subtraction. First, the Irish courts clearly recognise the principle of interceptive subtraction, even if they have not explicitly acknowledged that that is what they are doing. Second, the approach of the Irish courts is to be preferred to that of other jurisdictions. Although the arguments for and against permitting restitution for unjust enrichment by interceptive subtraction are 'finely balanced',[109] the principle of interceptive subtraction entails significant practical benefits. Recognising interceptive subtraction would avoid an unnecessary multiplicity of proceedings.[110] In addition, failure to recognise a general principle of interceptive subtraction has given rise to numerous exceptions to direct subtraction, many of which involve the 'drawing of some fine distinctions.'[111] Third, the principle of interceptive subtraction can apply in the context of restitution from public authorities. For example, where a taxing authority had a power to seize receivables under a taxing statute that ultimately turned out to

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[106] *Kelly v Cahill* [2001] 1 IR 56 (HC). See O'Dell, 'Restitution' [2001] *Byrne and Binchy's Annual Review of Irish Law* 502.
[107] *Kelly v Cahill* [2001] 1 IR 56 (HC) 62. Compare *Hill v Van Erp* (1997) 188 CLR 159 (HCA) 226-227.
[108] O'Dell, 'Restitution' (n 4) 616.
[109] Burrows, *The Law of Restitution,* (2nd edn Butterworths, London 2002) 34.
[110] *Official Custodian for Charities v Mackey (No 2)* [1985] 1 WLR 1308 (Ch)1315. See Virgo, *The Principles of the Law of Restitution,* (n 5) 109. See however, Smith, 'Three-Party Restitution: A Critique of Birks's Theory of Interceptive Subtraction' (n 2) 491.
[111] Burrows, *The Law of Restitution,* (n 109) 34.

be invalid, the enrichment gained by the taxing authority would have been received as a result of interceptive subtraction.

B. Leapfrogging

'Leapfrogging' describes a situation where a plaintiff seeks to recover from a remote, as opposed to the immediate, recipient. For example, if P pays T by mistake, prompting T to give a gift of money to his son D, can P recover directly from D? This issue is particularly contentious where an immediate recipient collects revenue on behalf of the state, for example, where retailers collect indirect taxes, such as VAT revenues from customers, and pay them to the State. Where the immediate recipient can rely on a defence of change of position or ministerial receipt to a restitutionary claim,[112] can the plaintiff leapfrog the immediate recipient and recover from the ultimate recipient of the money?

There has been little judicial consideration of whether a remote enrichee can be liable to the plaintiff in restitution.[113] There is no authoritative statement to the effect that the enrichment should be received by the defendant directly from the plaintiff. In *Kleinwort Benson v Birmingham City Council,* Morritt LJ appeared to consider that the immediate source of the enrichment should come from the plaintiff.[114] However, Edelman and Bant have argued that:

> there is a difference between saying ... that the immediate or direct source of an unjust enrichment must be the plaintiff's assets and saying that the plaintiff must be the direct payor or providers of the enrichment....it is clear that Morritt LJ meant the former.[115]

This analysis appears to be borne out by Morritt LJ's subsequent comments in *Khan v Permayer,* where he accepted that the plaintiff could recover directly from the defendant, notwithstanding that the defendant was not the immediate recipient.[116]

Some cases have permitted recovery from the remote enrichee. In *Lipkin Gorman*, the House of Lords decided the case, ostensibly on the basis of the unjust enrichment principle, and permitted the plaintiff to recover from the casino, notwithstanding its position as a

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[112] See Chapter 7.
[113] Birks, *Unjust Enrichment* (n 2) 89.
[114] *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 400.
[115] Edelman and Bant, *Unjust Enrichment in Australia* (n 6) 125.
[116] *Khan v Permayer* [2001] BPIR 95 (CA) [40].

remote recipient.[117] The House of Lords overcame difficulties in identifying the defendant casino as the ultimate recipient by adopting the rules of identification developed by the law of tracing.[118] In *Banque Financiere de la Cite SA v Parc (Battersea) Ltd*,[119] the House of Lords allowed recovery from a remote recipient. The interposition of the immediate recipient was a mere formality designed to circumvent disclosure requirements under Swiss federal banking regulations, and did not prevent the conclusion that the group had been enriched at the expense of the plaintiff.[120] However, it should be noted that the immediate recipient's receipt was not truly independent from the remote recipient's receipt and so this case is not a core case of leapfrogging. In the same case, Lord Hoffmann considered that leapfrogging was permissible because the money could be traced to the company.[121] Although this is consistent with *Lipkin Gorman*, it is unclear on what basis the plaintiff could have traced the money.

In *Khan v Permayer*, the plaintiff owned a restaurant with his business partner. The partners had assigned a debt to the defendant, who was the owner of the property. The defendant subsequently accepted a 12% dividend in the voluntary arrangement entered into by the plaintiff and his business partner. Subsequently the restaurant was sold to a third party, although the plaintiff and his partner continued to work in the restaurant. In order to procure the defendant's agreement to an assignment, the purchaser agreed to settle the debt owed by the plaintiff and his partner, who repaid the purchaser out of the wages they earned from working in the restaurant. However, the obligations owed by the partners had been discharged following the defendant's participation in the voluntary arrangement. The plaintiff sought restitution of half of the amount paid over by the purchaser. Morritt LJ held that the plaintiff could recover directly from the defendant, notwithstanding that the defendant was not the immediate recipient:

> It appears to me that *Parc Battersea* does establish that a payment made by a third party under a mistaken belief which gives rise to unjust enrichment of the defendant may be recoverable by the person at whose ultimate expense it was paid if that person is also acting under the same mistake as the third party.[122]

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[117] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).
[118] *Ibid,* 559-560 (Lord Templeman), 573-574 (Lord Goff). See also *BFC* [1999] 1 AC 221, 235 (Lord Hoffmann); Smith, *The Law of Tracing* (OUP, Oxford, 1996); O'Dell, 'Tracing' (1999) 6 Dublin University Law Journal 131; *In re Irish Shipping* [1986] ILRM 518 (HC) 521-522.
[119] *BFC* [1999] 1 AC 221.
[120] *Ibid,* 227 (Lord Steyn) and 239 (Lord Hutton).
[121] *Ibid,* 235.
[122] *Khan v Permayer* [2001] BPIR 95 (CA) [40].

The Australian courts have also permitted leapfrogging. In *Spangaro v Corporate Investment Australia Funds Management Ltd*,[123] the custodian of an investment scheme had transferred property to the defendant investment manager of the scheme in breach of trust. Finklestein J held that the money could be recovered directly from the defendant. He relied on *Lipkin Gorman v Karpnale* as authority for the proposition that money could be recovered from third parties in an action for money had and received and was not confined to proprietary claims.[124] Therefore, *Lipkin Gorman, Parc, Spangaro* and *Khan* support the view that leapfrogging will be permissible in cases in which the intermediate recipient was not simply a mere conduit for the defendant and that, where there are several intermediate recipients, difficulties in identifying the ultimate recipient may be overcome by adopting the rules of identification developed in the law of tracing.

There are several restrictions on leapfrogging. First, Birks notes that '[M]any remote recipients will be bona fide purchasers from the immediate enrichee and will therefore have a defence.'[125] Second, where the remote recipient received the enrichment from the immediate recipient as discharge of a debt owed to him, he will not be considered to have been enriched at the expense of the plaintiff. In *Woodchester Investments plc v O'Driscoll*, the fourth defendant had entered into a fraudulent transaction with the plaintiff. Some of the proceeds of the transaction had been paid to the first, third and fifth defendants. Barron J held that these defendants had not been unjustly enriched at the expense of the plaintiff. The proceeds of the fraud paid to them had been paid in discharge of debts owed to them by the fourth defendant and so they were not principals to the fraudulent transaction.[126] Third, where a plaintiff has entered into a contract with the immediate enrichee, he cannot recover from a remote enrichee where this would subvert his contractual relationship with the immediate enrichee.[127] To do so would undermine the risk allocation provided for by the contract

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[123] *Spangaro v Corporate Investment Australia Funds Management Ltd* [2003] FCA 1025, 54 ATR 241.
[124] *Ibid,* [50]. See also Birks, *Unjust Enrichment* (n 2) 95. However, if it is accepted that *Lipkin Gorman* is more appropriately characterised as a proprietary claim rather than one in unjust enrichment, it is not clear that *Lipkin Gorman* is authority for permitting leapfrogging the absence of a proprietary interest.
[125] Birks, *Unjust Enrichment* (n 2) 89.
[126] *Woodchester Investments plc v O'Driscoll* (High Court, 27 July 1995).
[127] *MacDonald, Dickens & Macklin (a firm) v Costello* [2011] EWCA Civ 930, [2011] 3 WLR 1341 [22] and [30]-[33]. See also, Birks, *Unjust Enrichment* (n 2) 90.

between the plaintiff and immediate enrichee[128] and would also subvert the insolvency regime.[129]

It is particularly desirable that leapfrogging is permitted where the remote recipient from whom restitution is sought is the state. This issue is most likely to arise in cases involving a 'turnover tax' such as VAT, where tax is paid by the ultimate consumer to a retailer who, in turn, pays the money to the state. In such cases, there is a risk that plaintiffs would be denied recovery where a jurisdiction recognises the passing on defence but refuses to allow the plaintiff to leapfrog the intermediate recipient. For example, in *R v M Geller Inc*,[130] the plaintiff sought restitution of excise tax paid pursuant to a mistake. The tax had been paid by a third party, Nu-Way Lambskin Processors Ltd, which had, in turn, recouped the payments from the plaintiff. The Supreme Court of Canada dismissed the plaintiff's claim for restitution of the tax. Nu-Way was the immediate payor of the tax and, as such, 'it was the sole person entitled to a refund.'[131] In the instant case, Nu-Way's claim had been dismissed on grounds of statutory delay. Even if the claim had not been dismissed, the defendant might have been entitled to rely on the passing on defence, as Nu-Way had passed on the charges to its customers. Furthermore, the plaintiff would be unlikely to be able to recover the sum from the immediate recipient as it would almost certainly have a defence in change of position or ministerial receipt. Thus, a prohibition on leapfrogging, combined with the passing on defence creates a lacuna in which the State will able to defeat claims from both the immediate and ultimate payors and thus retain the enrichment. [132]

This issue has recently been considered in England in *Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners*.[133] Henderson J was called on to consider whether an ultimate consumer could bring a direct claim against the Revenue

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[128] *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161 (HL) 166 (Lord Goff).

[129] Birks, *Unjust Enrichment* (n 2) 90, citing *Brown and Davis v Galbraith* [1972] 1 WLR 997 (CA). The same principle has been applied in Canada: *Furncan Marine Ltd v The MV Woodlands* (1994) 81 FTR 278 (FCC) [31]-[32]. Tettenborn also suggests that there is nothing in principle to prevent an enrichment from being at the expense of two different parties, so that the enrichee is liable to both parties, however, recovery to a second claimant would be limited by the change of position defence: Tettenborn, *Law of Restitution in England and Ireland* (n 2) 19-20.
However, denying leapfrogging in this manner would prevent double recovery from the one plaintiff in a more principled manner. His approach has not met with judicial approbation: *Pan Ocean Shipping Co Ltd v Creditcorp Ltd (The Trident Beauty)* [1994] 1 WLR 161 (HL) 171-172; Birks, *Unjust Enrichment* (n 2) 92.

[130] *R v M Geller Inc* [1963] SCR 629, 41 DLR (2d) 367 (SCC).

[131] *Ibid,* [9]. See also *Seaspan International Ltd v R* [2001] FCT 937, [2001] GTC 3600 (FCC); *9007-7876 Québec Inc v Henry Sztern & Associates Inc* [2001] RJQ 180 (Québec SC) [25]-[34].

[132] Rose, 'Passing On' in Birks (ed) *Laundering and Tracing* (Clarendon Press, Oxford 1995) 278.

[133] *Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners* [2012] EWHC 458 (Ch).

Commissioners in respect of VAT that was not due. Henderson J held that a direct claim by the ultimate taxpayer could be maintained. He rejected the claimants' suggestion that the penultimate taxpayers should be treated as mere conduits for the payment of the tax, holding that

> [I]t needs to be clearly understood that the liability of the supplier to pay and account for output tax is a primary one, and in legal terms the taxable person is the supplier, not the customer. Nor is there any relationship of agency, or anything resembling agency, between them.[134]

Nor was Henderson J willing to hold that 'leapfrogging' would be generally available in all restitution claims.[135] However, he was willing to hold that the present list of exceptions to the direct enrichment requirement were not exhaustive. It was open to the court to allow recovery from remote recipients provided it was guided by:

> a) the need for a close causal connection between the payment by the claimant and the enrichment of the indirect recipient;
>
> b) the need to avoid any risk of double recovery, often coupled with a suggested requirement that the claimant should first be required to exhaust his remedies against the direct recipient;
>
> c) the need to avoid any conflict with contracts between the parties, and in particular to prevent "leapfrogging" over an immediate contractual counterparty in a way which would undermine the contract; and
>
> d) the need to confine the remedy to disgorgement of undue enrichment, and not to allow it to encroach into the territory of compensation or damages.[136]

In the circumstances of the case before him, Henderson J held that there was 'no convincing answer to the common sense proposition that the enrichment of HMRC was ...at the expense of the claimants'.[137]

Thus, it can be seen that, although the English courts have not explicitly endorsed a general principle permitting recovery from remote recipients, it is clear that they will take a

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[134] *Ibid* at [50].
[135] *Ibid* at [67].
[136] *Ibid* at [68].
[137] *Ibid* at [73].

pragmatic approach to recognising exceptions to the present rule against such recovery. This can be contrasted with the approach of the Irish courts, which seem to be more willing to permit recovery as a general rule. Furthermore, *Investment Trusts* highlights the importance of allowing indirect taxpayers to recovery directly from taxing authorities, as, if not, there is a risk that such authorities would remain unjustly enriched by the unlawful receipt of taxes.

Conclusion

A number of conclusions may be drawn from this chapter. First, although the Irish courts appear to have accepted the quadration theory, this acceptance is based on scant authority. This acceptance of the quadration theory sets Ireland apart from other common law jurisdictions, such as Canada, Australia, and in England, which have all rejected the quadration thesis. Furthermore, the Irish courts have not undertaken any principled analysis as to whether acceptance of the quadration theory is desirable as a matter of principle. Therefore, further judicial consideration of this matter by the Irish courts would be most welcome.

Second, the status of the correspondence principle in Irish law is unclear. Although, in *East Cork Foods,* Henchy J appeared to consider that there must be a relationship between the defendant's gain and the plaintiff's loss, this comment was a rather opaque remark, which was made without any principled analysis as to whether such an approach was desirable. In contrast, in *Criminal Assets Bureau v JWPL*, Feeney J expressly considered and rejected the correspondence principle. It is both likely and desirable that the Irish courts follow the approach taken in Australia and in England, where the correspondence principle has been rejected. As discussed in Part II, no convincing reason has been proffered for limiting the plaintiff's recovery to the sum that he lost, when the law of restitution looks to reverse the defendant's unjustly obtained gain.

Third, the Irish courts have taken a broad approach to the phrase 'at the expense of the plaintiff,' and have accepted that interceptive subtractions can constitute an unjust enrichment. It would be best to continue this approach and to permit leapfrogging. This approach is consistent with the limited line of authority in Australia and in England that permits leapfrogging. It is also a particularly desirable approach in the context of restitution from public authorities, as it is important to ensure that the state does not retain any gain that it made as a result of unlawfully exacted taxes.

Chapter 5: Traditional Unjust Factors

Unjust factors available in restitution claims against public authorities can be divided into two categories. First, the plaintiff can rely on unjust factors specific to public authorities. These will be considered in Chapter 6. Second, the plaintiff can rely on traditional, intention-oriented, causes of action that are general to the law of restitution. This Chapter considers mistake and compulsion, two traditional unjust factors that have been relied upon against public authorities to recover unlawfully exacted payments. It argues that the case law from Canada, England, Ireland, and Australia demonstrates that traditional consent-oriented unjust factors can be relied upon to obtain restitution from the state. Furthermore, in each jurisdiction, courts have ensured that the unjust factors can respond to claims from the state by limiting restrictions traditionally associated with such causes of action. However, different jurisdictions have taken different approaches in how they have modified traditional unjust factors in restitution claims against the state and so it is necessary to highlight some points of contrast throughout the chapter.

Part I considers mistake claims against the state. It discusses traditional restrictions on the mistake cause of action, such as the rule that monies paid pursuant to a mistake of law are irrecoverable. The status of this mistake of law rule is unclear in Ireland, although it has been abolished in England, Canada and Australia. Part I draws on cases from these jurisdictions to demonstrate the case for the abolition of the rule. It also considers the conceptual problems that have presented themselves upon the abolition of the mistake of law rule in the jurisdictions considered.

Part II considers duress and duress *colore officii*, both of which can be classed under a general ground of compulsion. This general principle comprises two bases for recovery: duress *colore officii* and duress. There are few decided cases on compulsion in Irish law, although many Irish cases on restitution from the state recognise the compelled nature of tax payments. Therefore, in addition to Irish decisions on duress and duress *colore* officii, Part II refers to English, Australian, and Canadian decisions for two reasons. First, these decisions make explicit what is assumed in Irish cases, as they set out principled analysis for duress-based grounds of recovery. Second, these decisions provide an interesting point of contrast to Irish cases, particularly in relation to the continuing development of the compulsion causes of

action. Many of the jurisdictions considered have adopted expansive conceptions of duress and duress *colore officii* where restitution is sought from the state. Moreover, Part II demonstrates that judges are moving from limited specific causes of action, such as duress and duress *colore officii,* to a more flexible general principle, so that the line between the two has become increasingly blurred.

I. Mistake

Where a plaintiff confers a benefit on a defendant as a result of mistake, his intention to benefit the defendant is vitiated.[1] In *Kleinwort Benson,* Lord Hope noted that where the plaintiff has made a mistake, 'the benefit which has been received was an unintended benefit.'[2] However, as noted in *David Securities,* although lack of voluntariness manifests itself through mistake, it should not be considered as an unjust factor separate from mistake.[3] This Part considers the law of restitution for mistake. Section A outlines the traditional restrictions on restitution for mistake in general, and the mistake of law rule in particular. It considers the development of the mistake of law rule and its abolition in England, Canada and Australia. The status of the rule is unclear in Ireland. Section A considers two separate lines of Irish case law, one of which treats the mistake of law rule as abolished, the other treating the rule as extant.

Commentators have argued that, in establishing a mistake, it is not sufficient simply to have regard to what the plaintiff thought;[4] it is also necessary to demonstrate that the plaintiff's belief as to the circumstances in which he conferred the benefit was false.[5] To this end, Smith has proposed the following formula for establishing mistake:

> ...the plaintiff must demonstrate that at the time of the enrichment: (i) the plaintiff believed something, call it A; but (ii) A was false, that is "not-A" (~A) was the case;

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[1] See McInnes, 'Mistaken Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance'* (1996) 22 Monash University Law Review 209, 217.

[2] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 408. Hereafter *Kleinwort Benson.* See *Kelly v Solari* (1841) 9 M & W 54, 59(Court of Exchequer).

[3] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 378-379. Hereafter *David Securities.* See also, Birks, 'Modernising the Law of Restitution' (1993)109 LQR 164, 167. Compare, Sturm, 'An Examination of Mistaken Payments: *Hydro Electric Commission of Township of Nepean v Ontario Hydro'* (1983) 21 Alberta Law Review 544, 552.

[4] Smith, 'Restitution for Mistake of Law' [1999] 7 RLR 148, 150.

[5] Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies 538, 540. Smith, 'Restitution for Mistake of Law' (n 4) 150.

and (iii) the dissonance between reality and false belief was causally relevant. The logic of the claim fails if any of these is missing.[6]

Sheehan requires not only that the plaintiff's view of the circumstances is incorrect, but that this view 'can be proven to be incorrect at the time that it is acted upon'.[7] This definition of mistake was rejected by the House of Lords in *Kleinwort Benson.*[8] Although this issue may appear to be a question of mere semantics, different conceptions of mistake can have different impacts upon our understanding of the law, particularly upon the impact of the declaratory theory of the law. Section B analyses the conceptual problems that have presented themselves upon the abolition of the mistake of law rule. It considers to what extent ignorance, a state of doubt, and a retrospective change in the law can constitute a mistake for the purposes of the law of restitution. Section C considers whether mistake is available concurrently with other unjust factors.

A. Traditional Restrictions on Mistake

(i) Actionable forms of mistake

Courts have traditionally taken a restrictive approach in defining what constitutes an actionable mistake. Early cases only permitted recovery for liability mistakes[9] and for fundamental mistakes.[10] More recent cases, however, have adopted a broader test of causative mistake. In *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd*, Goff J held, following a review of the relevant authorities,[11] that recovery was not confined to cases where the payor mistakenly believed that he was liable to pay the payee, concluding that 'provided the plaintiff's mistake is "vital" or "material", which I understand to mean that the

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[6] Smith, 'Restitution for Mistake of Law' (n 4) 149.

[7] Sheehan, 'What is a Mistake?' (n 5) 547.

[8] *Kleinwort Benson* [1999] 2 AC 349 (HL). See also *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [23] (Lord Hoffmann). Hereafter *DMG.* This issue is discussed in further detail below at 162-165.

[9] *Kelly v Solari* (1841) 9 M & W 54 (Exchequer) 59. See also *Aiken v Short* (1856) 1 Hurl & N 210 (Exchequer) 215. The Canadian courts also restricted recovery to liability mistakes: *Royal Bank v R* [1931] 2 DLR 685 [14] (Manitoba King's Bench). Beatson and Bishop argued that one benefit of a test of liability mistake was that 'in most instances [the recipient] will have the means of knowing whether he is owed anything by [the payor]: the mistake concerns the state of his accounts' and so the payee would be likely to know that he has the 'means of knowing that he is not entitled to the payment before he relies on the payment': Beatson and Bishop, 'Mistaken Payments in the Law of Restitution' (1986) 36 University of Toronto Law Journal 149, 163 and 173. In Ireland, see *Naas UDC v The Great Southern and Western Rly Co* [1915] 2 IR 14 (CA); *The National Bank Ltd v O'Connor and Bowmaker (Ireland) Ltd* [1969] 103 ILTR 73 (HC).

[10] *Morgan v Ashcroft* [1938] 1 KB 49 (CA); *Norwich Union Fire Insurance Society Ltd v WMH Price Ltd* [1934] AC 455 (PC) 461-462 and 463; *The National Bank Ltd v O'Connor and Bowmaker (Ireland) Ltd* [1969] 103 ILTR 73 (HC); *ABB Power Generation Ltd v Chapple* [2001] WASCA 412, 25 WAR 158 [17].

[11] *Kelly v Solari* (1841) 9 M & W 54, 59; *Aiken v Short* (1856) 1 Hurl & N 210, 215; *Kerrison v Glyn, Mills, Currie & Co* (1911) 81 LJKB 465; *Kleinwort, Sons & Co v Dunlop Rubber Co* (1907) 97 LT 263; *RE Jones Ltd v Waring and Gillow Ltd* [1926] AC 670 (HL).

mistake caused the plaintiff to pay the money, the money is prima facie recoverable'.[12] This approach has been approved in subsequent English cases,[13] which take a broad approach to the test for mistake, eschewing any 'nice analysis as to the precise nature of the mistake'.[14] Similarly, the Australian courts have also adopted a general test of 'causative mistake,'[15] rejecting both the 'liability' and 'fundamental' tests for mistake.[16]

It is unclear what test the Irish courts have adopted for actionable mistake, as the question has rarely been considered in Irish law. In *Nolan v Enniscorthy UDC*, it was held that money paid under a material mistake of fact was recoverable.[17] Although reference to material fact suggests a causation requirement, 'material fact' is defined in *Nolan* as one which, if true, 'would have rendered the party under mistake liable to pay the money, and not merely as to a fact which, if true, would have rendered it desirable that he should pay it.'[18] Therefore, *Nolan* suggests that a test of liability mistake prevailed in Ireland. In *The National Bank Ltd v O'Connor and Bowmaker (Ireland) Ltd*, Budd J required the plaintiff to establish that the mistake was fundamental *and* one as to a fact, 'which if true, would make the payer either liable or under a duty to pay the money.'[19] However, in the recent case of *Donal Rigney Limited v Empresa de Construcoes Amandio Carvalho SA*,[20] Laffoy J, in the context of an application to restrain the presentation of a winding up application, applied the decision of Goff J in *Barclays Bank Ltd v WJ Simms Son*, holding that money paid pursuant to a mistake of fact was recoverable. Although Laffoy J's acceptance of the *Simms* decision was confined to mistakes of fact, her judgment may indicate a willingness to apply Goff J's judgment in other contexts.

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[12] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QBD) 692.
[13] *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 227 (Lord Steyn); *Dextra Bank v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) [28]; *DMG* [2006] UKHL 49, [2007] 1 AC 558 [60] (Lord Hope); *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656 (Comm), [2010] 1 Lloyd's Rep 631 [78].
[14] *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249 (Ch) 1272. See also *DMG* [2006] UKHL 49, [2007] 1 AC 558 [143] (Lord Walker); *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch) [261].
[15] See, for example, *David Securities* (1992) 175 CLR 353 (HCA) 378 and 395; *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 67. Hereafter *Royal Insurance.* See also, *Lamesa Holdings BV v Commissioner of Taxation* (1999) 92 FCR 210 [88], [108]; *Torrens Aloha Pty Ltd v Citibank NA* (1997) 65 FCR 39, 50; *Riessen v South Australia* [2001] SASC 71, 79 SASR 82 [27]-[31].
[16] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 376-378. See also *Hookway v Racing Victoria Ltd* [2005] VSCA 310 [20].
[17] *Nolan v Enniscorthy Urban District Council* [1955] 89 ILTR 12, 14 (Circuit Court).
[18] *Ibid,* 14.
[19] *The National Bank Ltd v O'Connor and Bowmaker (Ireland) Ltd* [1969] 103 ILTR 73 (HC) 94.
[20] *Donal Rigney Limited v Empresa de Construcoes Amandio Carvalho SA* [2009] IEHC 572.

The adoption of a 'causative mistake' test for mistakes is to be preferred to the 'fundamental' and 'liability' mistake tests for several reasons. First, extending the definition of actionable mistake is in keeping with the general trend of the law of restitution, which involves 'a significant liberalisation of the conditions of liability that are then balanced by expansive defences such as change of position.'[21] Second, as noted by McInnes, mistakes have the same effect of vitiating the plaintiff's intention whether they are liability or non-liability mistakes.[22]

However, a test of 'causative mistake' may cause problems where the plaintiff relies on concurrently available causes of action, particularly where a taxpayer seeks to rely on duress and mistake claims concurrently. As Bryan has noted:

> Causative approaches in the law often necessitate an inquiry as to whether the mistake or other invalidating factor was the sole or major cause of the payment. Measurement of how effective a mistake is in combination with other factors will inevitably be imprecise.[23]

This issue is dependent on the test of causation adopted by a jurisdiction in relation to mistake. Where a test of causal mistake is adopted, a plaintiff must establish that the mistake caused him to make the payment to succeed in a claim for restitution for mistake.[24] If the payment was made for reasons other than mistake and those reasons do not themselves ground a cause of action, the money will be irrecoverable. Thus, in *Maskell v Horner* Pickford LJ held that the plaintiff could not recover on the basis of mistake; he had not paid as a result of a mistaken belief that the money was due but, rather, had paid to avoid litigation on the matter.[25]

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[21] Grantham and Rickett, 'A Normative Account of Defences to Restitutionary Liability' (2008) 67 CLJ 92, 93. See also *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 385; Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*' (1993) 15 Sydney Law Review 461, 474; *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Company Ltd* [2008] WASCA 119 [19]-[20]; Birks, 'Modernising the Law of Restitution' (n 3) 165.

[22] McInnes, 'Mistaken Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance'* (n 1) 214.

[23] Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*' (n 21) 473.

[24] *Dextra Bank v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) [28]; *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656 (Comm), [2010] 1 Lloyd's Rep 631 [65]

[25] *Maskell v Horner* [1915] 3 KB 106 (CA) 117-118 (Lord Reading CJ) and 126 (Pickford LJ).

Following the decision in *Barclays Bank Ltd v WJ Simms* that recovery would lie for mistake where the mistake caused the payor to make the payment,[26] it is generally accepted that the appropriate test of causation is a 'but for' test. In *Nurdin & Peacock Plc v DB Ramsden & Co Ltd,* Neuberger J held that:

> [i]t seems to me that the correct question for the court to ask itself when considering whether money was paid under a mistake of law (and is therefore prima facie recoverable) would at least normally be whether the payment would have occurred if the payer had not made the alleged mistake... if there was a mistake, and particularly if it related directly and closely to the payment and to the relationship between payer and payee, and, above all, if the mistake had not been made there would have been no payment, then the payment in question is prima facie recoverable.[27]

Similarly, in *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI*, Flaux J also stated that the test of causation envisaged in *Simms* was a 'but for' test. However, he noted that 'in cases of inducement in misrepresentation, it may not matter if there were other reasons for payment, provided that the mistake was an effective cause'.[28] Therefore, it may be that, where taxpayers make a spontaneous mistake, for example in making a self-assessment for VAT, they will have to establish that, but for the mistake, they would not have made the payment. However, where the mistake was induced by a public authority as a result of a misrepresentation, as occurred in the *Health Amendment Bill* case, the lower standard of 'effective cause' will be applicable. Furthermore, where a public authority has made a demand for the payment of a certain sum, that demand should be taken as a representation that the sum is lawfully owing. Finally, it should be noted that, in *FII,* Henderson J cautioned that a 'but for' test of causation

> cannot itself be used as a test to define the types of loss which are recoverable, and thus to bring within the scope of the law of restitution the same types of consequential loss as a claimant suing in contract or tort (or, I would add, for breach of statutory duty) might hope to recover.[29]

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[26] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QBD) 695.
[27] *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249 (Ch) 1272. See also *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 227 (Lord Steyn).
[28] *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656 (Comm), [2010] 1 Lloyd's Rep 631 [78].
[29] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch) [64]-[65].

(ii) Further Restrictions on Mistake: The Mistake of Law Rule

Development of the mistake of law rule

In addition to restrictive definitions of what constituted an actionable mistake, restitution for mistake was also inhibited by further restrictions. The most notorious of these was the rule that recovery was precluded where the mistake was a mistake of law. This rule had a particular significance in the context of restitution from public authorities—where money had been paid pursuant to an invalid statutory provision or on a misconstruction of a valid statute—as it would preclude recovery in such cases. The rule was established in *Bilbie v Lumley*, where Lord Ellenborough CJ explained that it was founded on the maxim *ignorantia juris non excusat:*

> Every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.[30]

The rule quickly gained a foothold in England[31] and beyond.[32] In *Rogers v Ingham* James LJ went so far as to hold that although cases based on mistake of law 'must have continually occurred, and yet no case has been produced in which a suit of this kind has succeeded.'[33]

The rule was the subject of considerable criticism,[34] viewed as a 'dangerous doctrine'[35] and 'something of an embarrassment to the common law.'[36] However, before we examine these criticisms in detail, it should be acknowledged that 'there are problems with mistakes of law which do not arise with mistakes of fact'[37] and there were sound reasons of policy for adopting the mistake of law rule.[38] First, while facts are 'empirically demonstrable',[39] it is considerably more difficult to establish the correctness of a particular proposition of law. In *Kleinwort Benson,* Lord Goff suggested that one of the fears driving

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[30] *Bilbie v Lumley* (1802) 2 East 469, 471. See also *Glasgow Corp v Lord Advocate* 1959 SC 203, 233 (Court of Session). In Canada in *AJ Seversen Inc v Qualicum Beach (Village)* [1980] 3 WWR 375, 19 MPLR 39 [24].

[31] *Rogers v Ingham* 3 ChD 351 (CA) 355.

[32] *Ottawa Electric Railway v Ottawa (City)* [1934] 4 DLR 731 (SCC) [9]; *O'Loghlen v O'Callaghan* (1874) IR 8 CL 116 (QBD Ireland); *Casey v Irish Sailors and Soldiers Land Trust* [1937] IR 208 (SC).

[33] *Rogers v Ingham* 3 ChD 351 (CA) 355.

[34] Van de Mosselaer, 'Recovery of Money Paid under a Mistake of Law: *Air Canada v British Columbia*' (1991) 55 Saskatchewan Law Review 331, 331; McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law: *Ignorantia Juris* in the Supreme Court of Canada' (1983) 17 University of British Columbia Law Review 233, 233; Birks, 'Mistakes of Law' (2000) 53 Current Legal Problems 205, 206.

[35] *Brisbane v Dacres* (1813) 5 Taunt 143, 159 (Gibbs J, dissenting)(Court of Common Pleas).

[36] McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law: *Ignorantia Juris* in the Supreme Court of Canada' (n 34) 233.

[37] Birks, 'Mistakes of Law' (n 34) 214.

[38] See, *Kleinwort Benson* [1999] 2 AC 349 (HL) 371; Smith, 'Restitution for Mistake of Law' (n 4) 148.

[39] Sheehan, 'What is a Mistake?' (n 5) 545.

the establishment of the mistake of law prohibition was 'that it would be easy to assert a mistake of law, which could not easily be refuted, and that this might be done in almost any case'.[40]

Second, many decisions in which the mistake of law bar was relied upon to deny relief evince a concern to maintain security of receipt and a judicial desire to prevent the wholesale opening up of completed transactions.[41] Security of receipts takes on particular relevance where restitution is sought from public bodies for mistake of law. The mistaken view of the law may affect a large number of potential plaintiffs,[42] whereas mistakes of fact are often specific to a particular plaintiff. This phenomenon led Brennan J to observe in *David Securities*:

> To admit mistake of law as a ground for restitution in any case in which a mistake of fact would ground such a remedy would render many payments insecure even in cases where both parties expected the payment to be final: the uncertainty of the law and the overruling of decisions by later cases or on appeal would infect many payments with a provisional quality incompatible with orderly commerce.[43]

In *Nepean Hydro-Electric Commission v Ontario Hydro*, Estey J cited the need to maintain '[C]ertainty in commerce and in public transactions' as a basis for retaining the mistake of law rule.[44] However, as Dickson J observed in his dissenting judgment: 'Certainty in commerce and in public transactions would seem to be better served by the non-recognition of a rule which sows confusion and which has so little to recommend it.'[45]

However, in spite of the legitimate concerns that the rule served to address, the shortcomings of the rule were numerous and serious. First, the rule was not well founded as a matter of law, as the court in *Bilbie v Lumley* overlooked an established line of authority that

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[40] *Kleinwort Benson* [1999] 2 AC 349 (HL) 371. See also Birks, 'Mistakes of Law' (n 34) 215.
[41] *Brisbane v Dacres* (1813) 5 Taunt 143, 152-153; *Rogers v Ingham* 3 ChD 351 (CA) 356-357 (James LJ) and 357-358 (Mellish LJ). See also *Glasgow Corp v Lord Advocate* 1959 SC 203, 233; *Nepean Hydro-Electric Commission v Ontario Hydro* [1982] 1 SCR 347, 132 DLR (3d) 193 (SCC) [49].
[42] *Glasgow Corp v Lord Advocate* 1959 SC 203, 233 (Lord President Clyde)(Court of Session). See also Wells, 'Restitution from the Crown: Private Rights and Public Interest' (1994) 16 Adelaide Law Review 191, 193.
[43] *David Securities* (1992) 175 CLR 353 (HCA) 394.
[44] *Nepean Hydro-Electric Commission v Ontario Hydro* [1982] 1 SCR 347, 132 DLR (3d) 193 (SCC) [49].
[45] *Ibid,* [89]. See also Van de Mosselaer, 'Recovery of Money Paid Under a Mistake of Law: *Air Canada v British Columbia*' (n 34) 339; Beatson and Bishop, 'Mistaken Payments in the Law of Restitution' (n 9) 175; Sturm, 'An Examination of Mistaken Payments: *Hydro Electric Commission of Township of Nepean v Ontario Hydro*' (n 3) 552; Spencer 'Restitution of Monies Paid Pursuant to a Mistake of Law' (2004) 12 Irish Student Law Review 153, 160.

permitted recovery for mistakes of law as well as mistakes of fact.[46] Second, Lord Ellenborough CJ should not have relied on the *ignorantia juris non excusat* maxim as a rationale for the rule, as that maxim is 'a statement of the general applicability of rules of law and operates to preclude individuals from seeking to excuse themselves from criminal or other liability.'[47] As such, it has 'no relevance to the case of a man seeking to recover back money paid by him in misapprehension of his legal rights'.[48] In *Kleinwort Benson*, while Lord Hope noted that '[A]nyone who was familiar with the debate which had been going on among the civilian lawyers for centuries would have recognised the use of the maxim in this context as a legitimate part of the argument',[49] he accepted that

> there is now wide support for the view that the maxim is out of place in this field and that it cannot serve as the foundation for the rule barring recovery of moneys paid under a mistake.[50]

Public policy would be more faithfully served by permitting recovery of unlawful payments made to public authorities,[51] as to refuse recovery of unlawfully exacted taxes would itself run contrary to public policy. Furthermore, it has been questioned why the maxim should apply to the plaintiff conferring the enrichment but not to the defendant:

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[46] See, for example, *Farmer v Arundel* (1772) 2 Wm Bl 824, 825; *Lansdowne v Lansdowne* (1730) 2 Jacob & Walker 205; *Bize v Dickason* (1786) 1 Durn & E 285. The existence of this line of pre-existing authority was discussed in *Kleinwort Benson* [1999] 2 AC 349 (HL) 369 (Lord Goff). See also, *Re Magarey Farlam Lawyers Trust Accounts (No 3)* [2007] SASC 9, 96 SASR 337 [165]; Pannam, 'The Recovery of Unconstitutional Taxes in Australia and the United States' (1964) 42 Texas Law Review 777, 780; Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*' (n 21) 463; McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law: *Ignorantia Juris* in the Supreme Court of Canada' (n 34) 238. Similarly, in *Nepean Hydro-Electric Commission v Ontario Hydro* [1982] 1 SCR 347, 132 DLR (3d) 193 (SCC) [80], Dickson J noted that, prior to *Bilbie v Lumley,* no distinction was drawn between mistakes of law and mistakes of fact.

[47] *Nepean Hydro-Electric Commission v Ontario Hydro* [1982] 1 SCR 347, 132 DLR (3d) 193 (SCC) [82].

[48] *Ibid,* [77]. See also McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law: *Ignorantia Juris* in the Supreme Court of Canada' (n 34) 233; Pannam, 'The Recovery of Unconstitutional Taxes in Austalia and the United States' (n 46) 781; Zimmermann and Meier, 'Judicial Development of the Law, *Error Juris*, and the Law of Unjustified Enrichment—a View from Germany' (1999) 115 LQR 556, 557.

[49] *Kleinwort Benson* [1999] 2 AC 349 (HL) 405-406.

[50] *Ibid,* 406.

[51] Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*' (n 21) 465; McInnes, 'Towards Recovery for Payments Made under a Mistake of Law: *Air Canada v British Columbia*' (1989-1990) 11 Advocates' Quarterly 493, 497.

> if the payor is presumed to know the law, it would seem to follow that the payee should likewise be presumed to have full knowledge. For the payee to retain the money would be fraudulent.[52]

Third, a mistake about the relevant law is just as likely to negate intention as a mistake about the relevant facts. If the key issue underpinning unjust factors is the plaintiff's voluntariness, it should be irrelevant whether the mistake negating this voluntariness is one of law or of fact. [53] In *Woolwich Equitable Building Society v Inland Revenue Commissioners* Lord Jauncey questioned the continued existence of the mistake of law bar on this basis:

> Voluntary to my mind suggests that the payer being aware of all relevant circumstances including the true state of the law or perhaps having a doubt but not caring which way that doubt is resolved consciously makes a decision to pay. Indeed, I very much doubt whether in all cases the distinction between mistake of fact and of law can be justified any longer.[54]

Fourth, in response to the perceived unfairness of the rule, but ultimately adding to its deficiencies, the courts developed many techniques and exceptions to avoid it. [55] The number of exceptions to which the rule was subject was itself indicative of the perceived shortcomings of the rule.[56] Although the exceptions were intended to mitigate the perceived harshness of the rule, McCamus has noted that 'the exceptions themselves establish an elaborate cluster of artificial distinctions and vague standards for relief which have created an unusually chaotic body of jurisprudence.'[57]

The first of these techniques was the courts' tendency to recharacterise mistakes of law as mistakes of fact to avoid the operation of the mistake of law rule. The most audacious example of this is to be found in *George (Porky) Jacobs Enterprises Ltd (Plaintiff) Appellant v City of Regina.* The plaintiff sought to recover money that had been paid on the basis that

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[52] Van de Mosselaer, 'Recovery of Money Paid Under a Mistake of Law: *Air Canada v British Columbia*' (n 34) 340. See also, Sturm, 'An Examination of Mistaken Payments: *Hydro Electric Commission of Township of Nepean v Ontario Hydro*' (n 3) 553.

[53] Virgo, *Principles of the Law of Restitution* (2nd edn OUP, Oxford 2006) 143.

[54] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL) 192. Hereafter *Woolwich*.

[55] Virgo, *Principles of the Law of Restitution* (n 53) 140-141; McInnes, 'Mistaken Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance*' (n 1) 214.

[56] *Kleinwort Benson* [1999] 2 AC 349 (HL) 372 (Lord Goff) and 407 (Lord Hope); *David Securities* (1992) 175 CLR 353 (HCA) 374.

[57] McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law: *Ignorantia Juris* in the Supreme Court of Canada' (n 34) 235.

the relevant bylaws imposed charges on a 'per day' basis when, on the correct interpretation of the legislation, the charge was an annual charge. The Supreme Court of Canada held that the mistake in question was 'one as to the fact of the existence of the bylaws and not one of interpretation of bylaws that in any way purported to stipulate for a per day fee.'[58] This characterisation of the mistake as one of fact appears to have been accepted without demur in *Eadie v Township of Brantford*.[59] However, a similar argument received short shrift when relied upon in the Irish High Court in *Dolan v Neligan*. Kenny J rejected an argument to the effect that the error made by the plaintiff was an error as to the existence of a particular taxing provision and, as such, was a mistake of fact.[60] Although it has been argued that the 'result in *Jacobs* is merely a reflection of the impossibility of making any clear distinction between mistakes of fact and law',[61] this approach is 'highly dubious'.[62] Recovery was not based on the application of legal principle but rather on judicial willingness to artificially recharacterise mistakes of law as mistakes of fact, to avoid the application of the rule.

A second means of avoiding the rule was to distinguish between mistakes as to the 'general law' and mistakes as to 'private rights'. This exception was developed by Lord Westbury in *Cooper v Phibbs*. He held:

> It is said, '*Ignorantia juris haud excusat;*' but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake.[63]

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[58] *George (Porky) Jacobs Enterprises Ltd (Plaintiff) Appellant v City of Regina* [1964] SCR 326, 44 DLR (2d) 179 (SCC) [16].

[59] *Eadie v Township of Brantford* [1967] SCR 573, 63 DLR (2d) 561 (SCC) [19]. However, in *Eadie* the Supreme Court ultimately found for the plaintiff on the basis of compulsion. See below at 171-174.

[60] *Dolan v Neligan* [1967] IR 247 (HC) 258-259.

[61] Van de Mosselaer, 'Recovery of Money Paid Under a Mistake of Law: *Air Canada v British Columbia*' (n 34).

[62] Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' [1993] 6 British Tax Review 442, 446.

[63] *Cooper v Phibbs* LR 2 HL 149. See also *Solle v Butcher* [1950] 1 KB 671 (CA) 695; *MacKenzie v Royal Bank of Canada* [1934] AC 468 (PC) 476: Van de Mosselaer, 'Recovery of Money Paid Under a Mistake of Law: *Air Canada v British Columbia*' (n 34) 337; Spencer 'Restitution of Monies Paid Pursuant to a Mistake of Law' (n 45) 157.

This approach was adopted in *Re Casey's Drogheda Co Ltd,* where Barton J suggested that the plaintiff trustees had not acted in a mistake of law where they had paid away a sum of money away in a misapprehension as to the beneficiaries' legal rights.[64]

A final exception, and one that has been of particular relevance where restitution is sought from the state,[65] is that the plaintiff will be entitled to recover if the parties are not *in pari delicto.* This exception was developed in *Kiriri Cotton v Dewani.* The plaintiff sought recovery of key money paid to the defendant, in violation of the Uganda Rent Restriction Ordinance 1949. Lord Denning, speaking for the Privy Council, held that the plaintiff was entitled to recover the money, notwithstanding that it had been paid pursuant to a mistake of law, as the parties were not *in pari delicto*:

> It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. *Ignorantia juris neminem excusat.* Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back.... If there is something more in addition to a mistake of law—if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake—then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other - it being imposed on him specially for the protection of the other then they are not *in pari delicto* and the money can be recovered back... Likewise, if the responsibility for the mistake lies more on the one than the other—because he has misled the other when he ought to know better—then again they are not *in pari delicto* and the money can be recovered back.[66]

This exception is particularly appropriate in the context of restitution from public authorities. As Wilson J argued in *Air Canada*, the state should bear the onus of ensuring the constitutionality of taxing legislation.[67] Therefore, where a taxpayer has paid taxes in

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[64] *Re Casey's Drogheda Brewery Co Ltd* [1911] 45 ILTR 280 (Ch) 281-282.
[65] Burrows, 'Public Authorities, Ultra Vires and Restitution' in Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press, Oxford 1991) 50.
[66] *Kiriri Cotton Co Ltd v Dewani* [1960] 1 AC 192 (PC) 204.
[67] *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC) [11]. Hereafter *Air Canada.* See also *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [55]. Hereafter *Kingstreet.*

response to an unlawful demand, the state can be held to bear greater responsibility for the mistake.[68]

The *in pari delicto* exception has enjoyed varying degrees of success in different jurisdictions. Although the operation of the exception in this context was accepted by the Canadian Supreme Court in *Eadie,* in *Nepean Hydro-Electric Commission v Ontario Hydro*, Estey J held that the exception was confined to recovery of money under illegal contracts and 'does not...form the basis for any broad rule supporting the recovery of moneys paid under mistake of law other than in the case where the recovery is sought while the contract is executory.'[69] In contrast, the exception has achieved considerable prominence in Irish law and the Irish courts' willingness to permit the operation of this exception may explain their failure to conclusively abolish the mistake of law rule.[70] The adoption of the *in pari delicto* exception in Ireland is generally attributed to the decision of Kenny J in *Dolan v Neligan.* However, in the earlier case of *Nugent v Wilson*, Gibson J held that a payment made under a mistake of law was repayable on this basis. The payment had been made contrary to section 35 of the Land Law (Ireland) Act 1896, which was intended for the protection of tenants and so 'arrears paid in violation of the section without valid consideration can be recovered back'.[71] In *Dolan v Neligan,* Kenny J expressly applied the *in pari delicto* exception developed in *Kiriri Cotton,* holding that:

> money paid by one person because of a mistake of law can be recovered by him if the cause of the mistake were statements about the law made to him by the party receiving the money, or if the parties were not on equal terms at the time when the payment was made.[72]

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[68] McKenna, 'Mistake of Law between Statutory Bodies and Private Citizens' (1979) 37 University of Toronto Faculty Law Review 223, 224 and see 230-232; Burrows, 'Public Authorities, Ultra Vires and Restitution' (n 65) 51; Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 62) 446-447.

[69] *Nepean Hydro-Electric Commission v Ontario Hydro* [1982] 1 SCR 347, 132 DLR (3d) 193 (SCC) [38].

[70] See Burrows, 'Public Authorities, Ultra Vires and Restitution' (n 65) 52; Hill, 'Restitution from Public Authorities and the Treasury's Position: *Woolwich Equitable Building Society v IRC*' (1993) 56 MLR 856, 860.

[71] *Nugent v Wilson* [1908] 42 ILTR 248, 249. However, in that case no recovery was permitted, as the landlord would not have signed the contract without payment of the disputed sum.

[72] *Dolan v Neligan* [1967] IR 247 (HC) 260. On appeal, it was held that the plaintiff had a statutory right to recovery and his claim based on mistake was not considered: [1967] IR 247 (SC).

This approach was approved in subsequent cases.[73] In *Rogers v Louth County Council* the Supreme Court approved the approach of Kenny J in *Dolan*. Griffin J held that the parties were not *in pari delicto* because the defendants

> had the power, if they thought fit, to withhold permission for the redemption of the annuity; they were prepared to allow the plaintiff to redeem it but only on the conditions imposed by them, which included exacting a payment in excess of that permitted by the statute.[74]

The approach taken by the Irish courts appears to stem, not only from an assumption that the state should be taken to know the law, but also from the judicial desire to hold the state to more rigorous standards of conduct.[75] The approach in *Rogers* and in *Dolan* can be compared to *Sebel Products Ltd v Commissioners of Customs and Excise*, where Vaisey J held that, although it was open to the defendants to rely on the mistake of law bar, 'the defence is one which ought to be used with great discretion', because, *inter alia,* 'the defendants being an emanation of the Crown, which is the source and fountain of justice, are in my opinion bound to maintain the highest standards of probity and fair dealing, comparable to those which the courts, which derive their authority from the same source and fountain, impose on the officers under their control.'[76] Similarly, in *R v Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd*, Lord Bridge concluded from a survey of a number of authorities that:

> the retention of moneys known to have been paid under a mistake at law, although it is a course permitted to an ordinary litigant, is not regarded by the courts as a "high-minded thing" to do, but rather as a "shabby thing" or a "dirty trick" and hence is a course which the court will not allow one of its own officers, such as a trustee in bankruptcy, to take.[77]

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[73] *In the Matter of the Thomondgate No 1 Area Compulsory Purchase Order, 1975* [1984] ILRM 366 (HC) 368-369; *East Cork Foods Limited v O'Dwyer Steel Company Limited* [1978] 1 IR 103 (SC) 108; *Carey v Ryan* [1982] 1 IR 179 (SC) 186.

[74] *Rogers v Louth County Council* [1981] IR 265 (SC) 271. This reasoning would appear to support a claim for *duress colore officii*, without relying on the questionable application of the *in pari delicto* exception in this case. See further, Chapter 6.

[75] See McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law: *Ignorantia Juris* in the Supreme Court of Canada' (n 34) 244; Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 62) 446. See Chapter 2 at 38-39.

[76] See also *Woolwich* [1993] AC 70 (CA) 87-90 (Glidewell LJ).

[77] *R v Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd* [1988] AC 858 (HL) 876-877.

Although this is to some extent different to the *in pari delicto* defence, as it looks to the higher standards of probity demanded from public authorities, in general, both approaches come from the same premise, namely the special position of the state, demonstrating that the special position of the state requires a restrictive approach to the mistake of law bar.

Abolition of the mistake of law rule

Although some judges had expressed the view that the mistake of law bar was too established to be abolished judicially,[78] most jurisdictions have now succumbed to the weight of criticism and have abolished it, clearing the way for claims to recover unlawfully exacted tax on the basis of mistake.

The dissenting judgment of Dickson J in *Nepean* marked the beginning of the end for the mistake of law rule in Canada. Although the majority decision in that case proceeded on the assumption that the mistake of law rule was valid, Dickson J reviewed the operation of the rule, its exceptions, and the academic criticisms of the rule. He concluded that the rule should be abolished, as it served no useful purpose and no real basis for its existence could be found.[79] He held that '[O]nce a doctrine of restitution or unjust enrichment is recognized, the distinction as to mistake of law and mistake of fact becomes simply meaningless.'[80] The rule was ultimately abolished by the Supreme Court of Canada in *Air Canada*. LaForest J noted that Dickson J's judgment in *Nepean* revealed the mistake of law rule to be:

> built on inadequate foundations, lacking in clarity (the distinction between a mistake of fact and mistake of law can best be described as a fluttering, shadowy will-o'-the-wisp), and whose harshness has led to a luxuriant growth of exceptions.[81]

He concluded that 'the distinction between mistake of fact and mistake of law should play no part in the law of restitution.'[82]

In *David Securities*, a majority of the High Court of Australia considered that many of the cases commonly relied upon as authority for the mistake of law rule were explicable on

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[78] *Woolwich* [1993] AC 70 (CA) 135 (Ralph Gibson LJ); [1993] AC 70 (HL) 154 (Lord Keith); *Casey and Others v Irish Sailors and Soldiers Land Trust* [1937] IR 208 (SC) 221-222.
[79] *Nepean Hydro-Electric Commission v Ontario Hydro* [1982] 1 SCR 347, 132 DLR (3d) 193 (SCC) [100].
[80] *Ibid,* [98]. See also *Kleinwort Benson* [1999] 2 AC 349 (HL) 406-407 (Lord Hope); *David Securities* (1992) 175 CLR 353 (HCA) 375; McInnes, 'Towards Recovery for Payments Made under a Mistake of Law: *Air Canada v British Columbia*' (n 51) 500.
[81] *Air Canada* [1989] 1 SCR 1161, 59 DLR (4th) 161 [79].
[82] *Ibid,* [82]. See also, *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342 [39].

the narrower principle of 'voluntary submission to an honest claim.'[83] This analysis and the volume of academic criticism of the rule, led the High Court of Australia to hold that 'the rule precluding recovery of moneys paid under a mistake of law should be held not to form part of the law in Australia.'[84] Although the abolition of the rule is to be welcomed, it is unfortunate that the High Court recharacterised cases founded on the mistake of law rule[85] as cases of voluntary submission. Bryan has noted that 'any overfacile rationalisation of such cases on the basis of "voluntary submission" amounts to a deliberate falsification of the explicit reasoning adopted by the court.'[86] Furthermore, overturning the rule by denying its existence means that the Court failed to address directly the principled justifications for abolishing the rule.

In *Kleinwort Benson,* the House of Lords reconsidered the mistake of law rule. Lord Goff identified three major criticisms of the rule:

> First, the rule allows the payee to retain a payment which would not have been made to him but for the payer's mistake, whereas justice appears to demand that money so paid should be repaid unless there are special circumstances justifying its retention. Second, the distinction drawn between mistakes of fact (which can ground recovery) and mistakes of law (which cannot) produces results which appear to be capricious... these exceptions and qualifications are heterogeneous and in truth betray an anxiety to escape from the confines of a rule perceived to be capable of injustice; and that, as a result, the law appeared to be arbitrary in its effect. Third, as a result of the difficulty in some cases of drawing the distinction between mistakes of fact and law, and the temptation for judges to manipulate that distinction in order to achieve practical justice in particular cases, the rule became uncertain and unpredictable in its application.[87]

Lord Goff also noted that concerns as to security of receipt could now be met by the defence of change of position, concluding that:

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[83] *David Securities* (1992) 175 CLR 353 (HCA) 372-374.
[84] *Ibid,* 376.
[85] The High Court of Australia reinterpreted *Bilbie v Lumley* (1802) 2 East 469, *Brisbane v Dacres* (1813) 5 Taunt 143, and *Werrin v The Commonwealth* (1938) 59 CLR 150 in this manner.
[86] Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*' (n 21) 475. See also Burrows, 'Restitution for Mistake of Law in Australia' (1993) 13 Oxford Journal of Legal Studies 584, 586.
[87] *Kleinwort Benson* [1999] 2 AC 349 (HL) 372.

> ... a blanket rule of non-recovery, irrespective of the justice of the case, cannot sensibly survive in a rubric of the law based on the principle of unjust enrichment; and because recognition of a defence of change of position demonstrates that this must be proved in fact if it is to justify retention, in whole or in part, of money which would otherwise be repayable on the ground that the payee was unjustly enriched by its receipt. The combined effect is not only that the mistake of law rule can no longer be allowed to survive, but also that the law must evolve appropriate defences which can, together with the defence of change of position, provide protection where appropriate for recipients of money paid under a mistake of law in those cases in which justice or policy does not require them to refund the money.[88]

The approach adopted in *Kleinwort Benson* is to be preferred to that in *David Securities* insofar as it tackles the case for the abolition of the rule head on. However, some commentators have argued that the majority in *Kleinwort Benson*, by permitting retrospective changes in the law to constitute mistakes,[89] 'conceptualise[d] mistake of law in so abstract a manner as to denude it of the unjust quality supposed to be necessary to found a *prima facie* restitutionary claim.' [90] This issue is discussed in Section B.

Mistake of law in Ireland

The status of mistake of law in Irish law is unclear. Although there is an established line of authority that holds that money paid pursuant to a mistake of fact is not recoverable, other cases suggest that the courts no longer distinguish between mistakes of fact and law.

Early cases establish that money paid pursuant to a mistake of law is not recoverable. In *Naas UDC v The Great Southern and Western Rly Co*, money paid by the local authority to the defendant on the basis of a mistaken application of an exemption from rates was held to be irrecoverable on that basis.[91] Similarly, in *Casey and Others v Irish Sailors and Soldiers Land Trust*, Murnaghan J refused to allow recovery of money paid pursuant to a mistake of law, stating that it is 'well settled law that when money has been wrongfully paid under a

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[88] *Ibid*, 373.
[89] Discussed below at 162-165.
[90] Convery, 'Lord Goff's Swansong: Restitution, Mistake of Law, and the Retrospective Effect of Judicial Decisions' (1999) 3 Edinburgh Law Review 202, 213; Hedley, 'Restitution—Mistake of Law—Reform in Haste, Repent at Leisure' (1999) 58 CLJ 21, 25.
[91] *Naas UDC v The Great Southern and Western Rly Co* [1915] 2 IR 14, 27-28. On appeal, the Irish Court of Appeal was also willing to refuse recovery on the basis. See also *O'Loghlen v O'Callaghan* (1874) IR 8 CL 116, 120; *Byrne v The Revenue Commissioners* [1935] 1 IR 664, 670 (Irish Court of Appeal).

mistake of law no action lies to recover the amount so paid.'[92] Murnaghan J also rejected arguments in favour of abrogating the rule, stating that the rule was 'founded upon principles of convenience as well as justice' and had been 'so long and so firmly established that it cannot be called into question.'[93]

However, later cases indicate a judicial willingness to reconsider the rule. In *Dublin Corporation v Trinity College Dublin*, Hamilton J held that overpayments of municipal rates were recoverable by the university, notwithstanding that the money had been paid under a mistake of law.[94] Hamilton J held that the payment came within the *in pari delicto* exception, as the corporation was primarily responsible for the mistake.[95] However, he also considered that '[W]here money is paid, *whether under a mistake of fact or law*, justice requires that such money should be recoverable if the law so permits.'[96] In *Pine Valley Developments Limited v The Minister for the Environment*, Henchy J, considering whether the vendor of the property had been unjustly enriched by receipt of a purchase price that reflected the grant of outline planning permission that was subsequently withdrawn, held that such money would be recoverable under a mistake of law 'no less than if it had been paid under a mistake of fact'.[97] In *O'Rourke v Revenue Commissioners*, Keane J held that taxes paid under a mistake of law were irrecoverable prior to the development in the *Woolwich* principle, suggesting that he did not recognise a separate ground of recovery for mistake of law.[98] However, the same judge, giving the decision of the Supreme Court, in the *Bricklayers Hall* identified both mistakes of fact or of law, as a basis for restitution.[99]

Although these *dicta* suggest that the mistake of law rule has been abrogated in Ireland, they are not conclusive for two reasons. First, considerable difficulties attend the manner in which the courts have approached the question. Hamilton J's comments in the *Trinity College Dublin* case are qualified by the phrase 'if the law so permits', so that he cannot be taken to have proposed a new right of recovery for mistakes of law. At best, his

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[92] *Casey and Others v Irish Sailors and Soldiers Land Trust* [1937] IR 208 (SC) 221.
[93] *Ibid*, 221-222.
[94] *Dublin Corporation v The Provost Fellows and Scholars of the College of the Holy and Undivided Trinity of Queen Elizabeth Near Dublin* [1985] ILRM 283 (HC). The decision was reversed on appeal, on the basis that the rating exemptions enjoyed by the college did not extend to all its peripheral properties and so there had been no overpayment of rates. As a result, the Supreme Court did not consider any possible restitutionary causes of action on appeal: [1985] ILRM 283 (SC).
[95] See above at 145-146.
[96] *Dublin Corporation v The Provost Fellows and Scholars of the College of the Holy and Undivided Trinity of Queen Elizabeth Near Dublin* [1985] ILRM 283 (HC) 286. Emphasis added.
[97] *Pine Valley Developments Limited v Minister for the Environment* [1987] 1 IR 23 (SC) 42.
[98] *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC) 10.
[99] *Corporation of Dublin v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 484.

comments can be read as suggesting that there is no principled basis for a distinction between mistakes of fact and mistakes of law. Keane J's observations in *O'Rourke* and the *Bricklayers Hall* case are also confusing. The affirmation of the prior existence of the mistake of law rule in *O'Rourke* is made without reference to cases such as *Pine Valley* and *Dublin Corporation v Trinity College Dublin*. Subsequently, in the *Bricklayers' Hall*, Keane J does not expressly abolish the rule but simply assumes that it no longer applies.

Keane J's comment in *O'Rourke* that monies paid under mistake of law are recoverable pursuant to the *Woolwich* principle has also caused confusion regarding the relationship between the *Woolwich* principle and mistaken payments. He held that:

> In the present case the money was clearly paid under a mistake of law, without any protest by the plaintiff and in circumstances where there was no specific element of compulsion or duress. In such circumstances, it would, until the recent decision of the House of Lords in *Woolwich Building Society v Inland Revenue Commissioners*, have been the received wisdom in Ireland and in England that such monies were irrecoverable.[100]

Subsequently, in *Goodman v Minister for Finance*, Laffoy J interpreted *O'Rourke* as authority for the proposition that taxes paid pursuant to a mistake of law are recoverable as of right:

> The rationale of the decision of Keane J was that the tax in question was paid to the Revenue Commissioners under a mistake of law and was recoverable as a matter of right and the plaintiff was entitled to interest on it as part of the measure of his damages.[101]

Second, subsequent cases appear to maintain the distinction between mistakes of fact and mistakes of law. However, these authorities in turn cannot be read as strong authority for retention of the bar. In *Duff v Minister for Agriculture*,[102] two judges of the Supreme Court treated the mistake of law bar as extant. However, this determination is undermined by three considerations. First, the plaintiffs claimed that they had a legitimate expectation that they would be considered for a milk quota upon which they had relied by carrying out improvements to their farms. Thus, the case was not concerned with restitution, but with

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[100] *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC) 10. Internal citations omitted.
[101] *Goodman v Minister for Finance* [1999] 3 IR 356 (HC) 379.
[102] *Duff v The Minister for Agriculture (No 2)* [1997] 2 IR 22 (SC).

compensation for frustration of legitimate expectations. [103] Moreover, the money expended on the plaintiffs' farms did not constitute a benefit to the defendant and so the defendant was not unjustly enriched.[104] Recovery of the money for mistake of law could therefore have never been at issue. Therefore *Duff,* if *Duff* is indeed authority for anything, should only be read as laying down a principle in favour of compensation where the defendant has made a mistake of law.

Second, both judges who referred to mistake of law were willing to permit recovery, notwithstanding that the money had been spent on the farms pursuant to a mistake of law. O'Flaherty J held, by analogy with recovery for monies paid under a mistake of law where the parties are not *in pari delicto*, that the plaintiffs were entitled to compensation for the consequences of the defendant's mistaken interpretation of European law. Barrington J was willing to permit damages to compensate the plaintiffs for the loss suffered as a result of the defendant's mistake of law.[105]

Third, *Duff* has been the subject of judicial disapproval. In *Glencar Exploration plc v Mayo County Council (No 2)* Fennelly J expressly stated that *Duff* should not be taken to have departed from the general principles laid down in *Pine Valley*:

> I believe that the considered statements of the law made in *Pine Valley Developments v The Minister for Environment* remain the law, despite apparent inconsistency with some dicta in the majority judgments in *Duff v Minister for Agriculture (No 2)* which appear to treat liability for damages as automatically flowing from a mistake of law said to have been made by a minister. *Pine Valley v The Minister for Environment*, though fully considered and applied in the High Court judgment of Murphy J in that case, does not figure at any point in the judgments of the Supreme Court. I do not believe that it can have been intended to depart from such an important principle as that laid down in *Pine Valley*.[106]

Although this disapproval does not expressly consider the comments made in *Pine Valley* regarding restitution for mistake of law, it is clear that *Duff* rests on shaky foundations and should not be regarded as strong authority for the maintenance of the distinction between

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[103] For example, in *Maher v Minister for Agriculture*, Denham J treated the decision in *Duff* as allowing compensation for mistake of law: *Maher v Minister for Agriculture* [2001] 2 IR 139 (SC) 217.
[104] See also, Spencer, 'Restitution of Monies Paid Pursuant to a Mistake of Law' (n 45) 166-168.
[105] *Duff v The Minister for Agriculture (No 2)* [1997] 2 IR 22 (HC) 91.
[106] *Glencar Exploration plc v Mayo County Council (No 2)* [2002] 1 IR 84 (SC) 150. Internal citations omitted.

mistakes of fact and mistakes of law, particularly where there are other Supreme Court *dicta*, in *Pine Valley* and in the *Bricklayers' Hall*, suggesting that the distinction should not be maintained.

Recent decisions have further propagated the confusion. In *Re Article 26 and the Health (Amendment)(No 2) Bill 2004*, the Supreme Court held that a material consideration in considering whether recovery was available of taxes paid without lawful authority was whether the money had been paid pursuant to a mistake of law.[107] However, the Court did not indicate what relevance it ascribed to the nature of the plaintiff's mistake and no clear guidance can be derived from the *Health Amendment Bill* case as to whether it considered that characterisation of a mistake as a mistake of law would bar a plaintiff from recovery. In *Harris v Quigley*, Geoghegan J commented that '[U]ntil some recent caselaw it was assumed that money paid under a mistake of law was not recoverable by action subject to the exception of money exacted *colore officii*'.[108] This suggests that, like Keane J in the *Bricklayers' Hall*, he considers the rule to have been abolished.

Thus, two conflicting lines of cases have developed in relation to the mistake of law rule. The first—which includes Henchy J's judgment in *Pine Valley*, Keane J's judgment in the *Bricklayers Hall* case, and Geoghegan J's judgment in *Harris v Quigley*—treats the mistake of law bar as having been abolished, yet no case has explicitly abolished the rule or overruled any of the earlier cases in which it was applied. The second line of authority—which includes the judgments of Barrington and O'Flaherty JJ in *Duff* and the Supreme Court decision in the *Health Amendment Bill* case—continues to distinguish between mistakes of fact and mistakes of law, without indicating the significance of this distinction for the law of restitution. This conflict has led Spencer to suggest that the mistake of law rule should be abrogated by the legislature.[109]

However, rather than waiting for legislative change, the courts should take the next available opportunity to formally abolish the mistake of law rule and should do so for several reasons. First, it is clear from the confused state of Irish law that the rule is no longer so entrenched as to require legislative abolition. Second, the shortcomings of the rule that have been elaborated in other jurisdictions also apply to the rule as it has been developed in

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[107] *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105 [72]. Hereafter *Health Amendment Bill*.
[108] *Harris v Quigley* [2005] IESC 79, [2006] 1 IR 165 [19].
[109] Spencer 'Restitution of Monies Paid Pursuant to a Mistake of Law' (n 45) 171.

Ireland. Third, the exceptions and artificial distinctions, discussed above, that have led to the abolition of the rule in every other jurisdiction, will continue to bedevil the law of restitution in Ireland until the rule is abolished, leading to yet further incoherence in the law. Fourth, the mistake of law bar has been held to be contrary to the principles of Community law, as it is 'liable to prejudice effective protection of the rights conferred on the traders in question by Community law.'[110] Thus, even if the mistake of law rule continues to operate in this jurisdiction, it must be disapplied where taxes are levied contrary to Community law. This would give rise to anomalous treatment between different types of legislative invalidity and so the rule should be abolished, irrespective of why the taxes turn out not to have been payable.

Because it is not clear whether the mistake of law rule continues to be a feature of Irish law, it remains necessary to consider the appropriate characterisation of the mistake of law rule. It is not clear whether the rule should be characterised as a general bar on restitution, or as a further restriction on what constitutes an actionable mistake. The approach of the Irish courts has been mixed on this issue. In *Rogers v Louth County Council*, Griffin J took the latter approach, holding that:

> The general rule is usually stated to be that, where money is paid under the influence of a mistake of fact, an action will lie to recover it; but that, to entitle a plaintiff to recover, the mistake upon which he has acted must be one of fact and not of law.[111]

However, in *Harris v Quigley* Geoghegan J appears to view duress *colore officii* as an exception to the mistake of law bar:

> Until some recent caselaw it was assumed that money paid under a mistake of law was not recoverable by action subject to the exception of money exacted colore officii as explained by Kenny J in his High Court judgment in *Dolan v Neligan*.[112]

The rule should be characterised as a restriction on the actionable forms of mistake for three reasons. First, it has been held that the 'bar' does not apply to other grounds of

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[110] Case C-212/94 *FMC plc, FMC (Meat) Ltd and others v Intervention Board for Agricultural Produce and Ministry of Agriculture, Fisheries and Food* [1996] ECR I-00389 [72]. See Jones, *Restitution and European Community Law* (Mansfield Press, London 2000) 14-15.
[111] *Rogers v Louth County Council* [1981] IR 265 (SC) 270.
[112] *Harris v Quigley* [2005] IESC 79, [2006] 1 IR 165 [19].

restitution.[113] In *Nolan v Enniscorthy UDC*, the plaintiffs sought restitution of overpaid property rates. The court held that the money was recoverable as money paid as result of compulsion arising from the inequality of the parties' positions, notwithstanding that it had been paid as a result of a mistake of law.[114] Similarly, although *Eadie v Township of Brantford* muddles the causes of action of compulsion and mistake,[115] in *Nepean Hydro-Electric Commission v Ontario Hydro,* Estey J held that 'the presence of mistake of law in the parties to the transaction was superfluous as the entitlement to recovery arose on the finding of payment under practical compulsion.'[116] The fact that the 'bar' does not operate where other grounds of restitution are relied upon suggests that the mistake of law bar was not a bar at all. Rather, mistake of law was not recognised as being an actionable mistake.

Second, prior to the abolition of the mistake of law rule, the courts in several jurisdictions treated mistake of law as a restriction on the actionable forms of mistake. In *Woolwich,* in the Court of Appeal, Butler-Sloss and Glidewell LJJ considered that any general right of recovery was subject to a limitation that money was not recoverable where paid under a mistake of law,[117] even though Glidewell LJ acknowledged that 'it is illogical that a general restitutionary principle should be subject to these limitations.'[118] However, in the same case, Ralph Gibson LJ gave a preferable interpretation of the doctrine:

> The rule of mistake of law, as I understand it, is not that a mistake of law bars recovery if a right of recovery exists independently of the mistake: the rule is that, if the only ground of claim is mistake and the mistake is a mistake of law, the law gives no right of recovery.[119]

This approach was also taken by Lord Goff on appeal, who held that the 'rule can have no application where the remedy arises not from error on the part of the taxpayer, but from the unlawful nature of the demand by the revenue.'[120] This led Hobhouse J in *Westdeutsche* to

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[113] *Casey and Others v Irish Sailors and Soldiers Land Trust* [1937] IR 208 (SC) 221-222; *Eadie v Township of Brantford* [1967] SCR 573, 63 DLR (2d) 561 (SCC). See also Virgo, *Principles of the Law of Restitution* (n 53) 140.
[114] *Nolan v Enniscorthy Urban District Council* [1955] 89 ILTR 12 (HC).
[115] *Eadie v Township of Brantford* [1967] SCR 573, 63 DLR (2d) 561 (SCC).
[116] *Nepean Hydro-Electric Commission v Ontario Hydro* [1982] 1 SCR 347, 132 DLR (3d) 193 (SCC) [45].
[117] *Woolwich* [1993] AC 70 (CA) 100 (Glidewell LJ), 140-141 (Butler-Sloss LJ).
[118] *Ibid,* 101.
[119] *Ibid,* 121.
[120] *Woolwich* [1993] AC 70 (HL) 176. See also Lord Slynn's comments at 205.

hold that the 'essence of mistake of law is that it does not provide a basis of recovery: it is not that, without more, it provides a defence to a claim for money had and received.'[121]

Third, treating mistake of law as a 'bar' has given rise to considerable conceptual confusion. This is evident from much of the Canadian commentary on mistake of law. In *Eadie v Township of Brantford* the plaintiff recovered the money on the basis that it was paid by compulsion.[122] However, many commentators interpreted this decision as holding that that compulsion forms an exception to the mistake of law bar, when in fact it is an independent cause of action.[123] Evidence of further confusion is to be found in the Irish case of *Ringsend Property Limited v Donatex Limited.* Kelly J treated *Kleinwort Benson* as establishing a general defence of mistake of law, which was relied upon in *Donatex* as a defence to a claim for recovery of money pursuant to the terms of a contract entered into between the parties.[124] This interpretation of *Kleinwort Benson* is wholly incorrect. In *Kleinwort Benson,* mistake of law was recognised to be a cause of action rather than a defence to a contractual claim. Furthermore, restitution is subsidiary to contract, so that it was inappropriate to rely on the 'defence' established in *Kleinwort Benson* while the contract between the two parties to the action was extant in *Donatex*. Thus, characterising mistake of law as a bar or defence, rather than as a restriction on the forms of actionable mistake, has the potential to disrupt the law of restitution and to sow considerable confusion.

B. Further Problems in Defining Mistake

Although recovery is now permitted for mistakes of law, the wider conception of mistake adopted by the English, Canadian, and Australian courts raises further questions as to what does and does not constitute mistake. Abolition of the mistake of law rule has thus brought other problems to the fore.[125] In addition, many commentators have expressed concerns regarding what they consider to be artificial constructions of mistake in cases such as *Kleinwort Benson* and *DMG.*[126] Mistake, like most other unjust factors, turns on vitiated

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[121] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 (QBD) 933.

[122] *Eadie v Township of Brantford* [1967] SCR 573, 63 DLR (2d) 561 (SCC).

[123] See Sturm, 'An Examination of Mistaken Payments: *Hydro Electric Commission of Township of Nepean v Ontario Hydro*' (n 3) 546; Spencer 'Restitution of Monies Paid Pursuant to a Mistake of Law' (n 45) 156-157; Posluns, 'Mistakes and Compulsions: A Reappraisal of *Eadie v Township of Brantford*' (1981-1982) 3 Advocates' Quarterly 342, 345. See also *Harris v Quigley* [2005] IESC 79, [2006] 1 IR 165 [19].

[124] *Ringsend Property Limited v Donatex Limited* [2009] IEHC 568.

[125] Birks, 'Modernising the Law of Restitution' (n 3) 166.

[126] Goymour, 'Premature Tax Payments and Unjust Enrichment' (2007) 66 CLJ 24, 26-27; Virgo, '*Deutsche Morgan Grenfell:* Restitution of Tax Paid by Mistake' [2004] British Tax Review 8, 10. Similarly, Williams has argued that in *F J Chalke Limited v Revenue & Customs Commissioners* [2009] EWHC 952 (Ch), Henderson J

consent. Once this is understood, it should be accepted that once the mistake is causative, this will be sufficient to ground relief; it should not matter how the mistake arose. Mistakes can be divided into spontaneous, or 'self-induced', mistakes, mistakes induced by the recipient of the enrichment, mistakes induced by a third party, and ignorance.

(i) Self-induced mistake

The courts take a restrictive approach to self-induced mistakes. Although the courts have held that the plaintiff's negligence will not preclude him from relying on mistake,[127] the courts are less willing to permit recovery where the plaintiff conferred the enrichment as a result of a misprediction. Birks explains the distinction between mistakes and mispredictions as follows:

> A misprediction is the formation and adoption of a belief as to the future which can only be falsified by evidence which comes into existence subsequently. Such mispredictions of the future, which become mistakes as the story rolls on, have to be distinguished from decisions taken on data which is already false. [128]

He argues that where a decision can only be falsified at a future time, there is no impairment of the plaintiff's belief and so the plaintiff's intention to make the payment is not vitiated. [129] This approach has met with general judicial approval. In *Dextra Bank v Bank of Jamaica*, the Privy Council confirmed that 'a misprediction does not... provide the basis for a claim to recover money as having been paid under a mistake of fact.'[130] Similarly, in *Re Magarey Farlam Lawyers Trust Accounts (No 3)*, the South Australia Supreme Court accepted that a claim for restitution could not be founded on a misprediction.[131] In *Royal Bank of Ireland v Pentony*,[132] the Irish Supreme Court took a similar approach. The plaintiff bank honoured a cheque drawn on the defendant's account. It anticipated that the defendant would receive £1,132 Land Bonds, which would leave the defendant's account with sufficient funds to honour the cheque. However, a lesser sum of bonds was received than had been anticipated by the bank and it sought to recover the excess paid out by it in honouring the cheque. The Supreme Court held that the money was irrecoverable. Meredith J considered that the money

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extended the concept of mistake too far: Williams, *Unjust Enrichment and Public Law* (Hart Publishing, Oxford 2010) 110.

[127] *Kelly v Solari* (1841) 9 M & W 54, 59.

[128] Birks, 'Mistakes of Law' (n 34) 224.

[129] *Ibid.* See also McInnes, 'Mistaken Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance*' (n 1) 219.

[130] *Dextra Bank v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) [29].

[131] *Re Magarey Farlam Lawyers Trust Accounts (No 3)* [2007] SASC 9, 96 SASR 337 [171].

[132] *Royal Bank of Ireland v Pentony* [1941] 1 IR 523 (SC).

had been paid on the basis of a misprediction rather than on the basis of a mistake and so was irrecoverable:

> ...[the plaintiffs] did not honour the cheque on a mutual mistake of fact, as they allege, but because they relied, with a certain want of that business-like caution which, as a rule, characterises bank action, on the supposition and belief that the whole £1,132 Land Bonds would be received in a few days... That is not the sort of mistake of fact that will support an action of this kind.[133]

The courts' approach to mispredictions can also be rationalised in terms of risk assumption, as well as in terms of vitiation of intention. Where a plaintiff confers a benefit in anticipation of a certain event taking place, or failing to take place, that plaintiff can be considered to have taken the risk that the predicted event will not take place and so should not be entitled to recover.

Greater confusion surrounds the question as to whether a state of doubt is compatible with mistake. If the validity of a law imposing a charge is contested, and the plaintiff, being aware of the dispute in relation to the provision's validity, pays the charge, is the plaintiff entitled to recover the money? Are the plaintiff's doubts regarding the validity of the charging provision sufficient to deny him restitution? Some commentators have argued that '[D]oubt excludes mistake, because mistake is a positive belief that happens to be wrong.'[134] In *Kleinwort Benson,* Lord Hope suggested that '[A] person who pays when in doubt takes the risk that he may be wrong'[135] and so could not be said to have made a mistake. However, Lord Hoffmann noted in *Deutsche Morgan Grenfell* that:

> This was a very compressed remark in the course of a discussion of other matters and I do not think that Lord Hope could have meant that a state of doubt was actually inconsistent with making a mistake. Contestants in quiz shows may have doubts about the answer ("it sounds like Haydn, but then it may be Mozart") but if they then give the wrong answer, they have made a mistake.[136]

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[133] *Ibid,* 533. See also, Burrows, 'The English Law of Restitution: A Ten-Year Review' in Neyers, McInnes and Pitel (eds), *Understanding Unjust Enrichment* (Hart Publishing, Oregon 2004) 17.
[134] Smith, 'Public Justice and Private Justice: Restitution after *Kingstreet*' (2008) 46 Canadian Business Law Journal 11, 14.
[135] *Kleinwort Benson* [1999] 2 AC 349 (HL) 410.
[136] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [26].

Lord Hope took the opportunity in *Deutsche Morgan Grenfell* to revise his views on the relationship between mistake and doubt, reformulating them in terms of causation and risk-allocation:

> the payer's reason for making the payment despite his doubt will have a part to play in resolving the issue as to whether the payer, who would not have made the payment had he known the true state of the facts or the law at the time of the payment, should bear the risk or can recover on the ground that he was mistaken.[137]

However, Lord Brown disapproved of such an approach, holding the question of whether money was paid under a mistake of law should not 'turn on the degree of conviction or optimism which the parties hold upon the legal issue dividing them.'[138] This is correct. As noted by Lord Hoffmann, mistakes should be about the conclusions that plaintiffs reach, not the process by which they reached their decisions. A state of doubt is no longer relevant once a plaintiff has reached a conclusion. I may be uncertain as to a particular state of affairs, for example that a particular piece of legislation is valid. However, once I reach a conclusion that the legislation is valid, I am just as much mistaken as the person who never entertained any doubts as to the validity of the legislation. In *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI*, Flaux J sought to resolve these conflicting dicta in *DMG*. He held that a claimant will be entitled to recover money paid pursuant to a mistake of law, even where he had doubts as to whether the payment was lawfully due, provided that he concluded that 'it was more likely than not that he was liable to pay'. [139] He held that 'a case where the payer makes the payment thinking that it is more likely than not that he is not liable to pay ... cannot properly be described as a case of mistake at all.'[140]

(ii) Mistakes induced by the recipient of the enrichment

Mistakes induced by misrepresentation will also be recoverable. The courts have traditionally taken a more permissive approach in relation to mistakes induced by the recipient, particularly in the context of restitution from public authorities. This is evident from cases in which the *in pari delicto* exception to the mistake of law rule has been invoked. For example, to the extent that the plaintiff in *Dolan v Neligan* had been informed that the

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[137] *Ibid,* [65]. See also Burrows, 'Restitution in Respect of Mistakenly Paid Tax' (2005) 121 LQR 540, 546; Virgo, '*Deutsche Morgan Grenfell:* Restitution of Mistaken Tax Payments: Back to Basics' [2007] British Tax Review 27, 29.

[138] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [169].

[139] *Marine Trade SA v Pioneer Freight Futures Co Ltd BVI* [2009] EWHC 2656 (Comm), [2010] 1 Lloyd's Rep 631 [76].

[140] *Ibid,* [77].

rate of duty payable on perry was that applicable to spirits, he had paid as a result of the defendant's misrepresentation.[141] Similarly, in *Carey v Ryan*. Henchy J held that money paid as a result of fraud becomes impressed with a constructive trust for the benefit of the payor.[142] However, he also held that the money was recoverable on the basis of the *in pari delicto* exception to the mistake of law bar.[143] In both cases, the money was recoverable notwithstanding that it was paid as a result of a mistake of law; where the defendant's misrepresentation had induced the plaintiff's mistake, he was not *in pari delicto* with the plaintiff. This exception has been relied upon where restitution is sought from the state, as, where a taxpayer has paid taxes in response to an unlawful demand, the state is considered to bear greater responsibility for the mistake.[144] In *Hollis v Atherton Shire Council*, a mistake claim succeeded where money was paid on the basis of the authority's misrepresentation.[145] Similarly, the charges for residential care exacted from elderly people in breach of the terms of the Health Act 1970 could be regarded as having been exacted by virtue of a misrepresentation, particularly if, as suggested above, the state's demand for the money is viewed as an implicit representation that the money is due.[146] Although the *Health Amendment Bill* case is one in which the state continued to levy charges when it knew it had no legislative authority to do so, there does not appear to be any requirement that the recipient should be aware of the correct state of events.[147]

(iii) Mistakes induced by a third party

Mistakes induced by third parties are recoverable. This proposition is uncontroversial in cases where has been a simple representation by a third party.[148] In *Byrne v Rudd,* the plaintiff sought to recover premiums paid under a contract that he had been induced to enter on the basis of a fraudulent misrepresentation that the he would, upon payment of the first premium payable under the policy, be entitled to obtain an immediate unsecured loan. The defendant argued that the money was irrecoverable as money paid under a mistake of law, as

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[141] See above at 145-147.
[142] *Carey v Ryan* [1982] 1 IR 179 (SC) 185.
[143] *Ibid,* 186.
[144] McKenna, 'Mistake of Law Between Statutory Bodies and Private Citizens' (n 68) 224 and see further at 230-232; Burrows, 'Public Authorities, Ultra Vires and Restitution' (n 65) 51; Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 62) 446-447.
[145] *Hollis v Atherton Shire Council* [2003] QSC 147.
[146] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105. See above at 145-146.
[147] See, for example, *Scottish Equitable Plc v Derby* [2001] All ER 818 (CA).
[148] *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QBD); *The National Bank Ltd v O'Connor and Bowmaker (Ireland) Ltd* [1969] 103 ILTR 73 (HC).

the plaintiff was unaware that the Friendly Societies Act 1896 precluded registered societies from making loans to members of less than one year's standing. Sir James Campbell LC, in the Irish Court of Appeal, considered it to be an 'elementary principle of law, that a defendant will not be allowed to retain money which has been procured for and received by him through the fraud of his agent'.[149]

(iv) Mistakes and Retrospective Changes in the Law

Mistakes may also comprise a generally held, mistaken belief in the validity of a particular law. Therefore, it is necessary to consider whether a retroactive change in the law renders the payor retrospectively mistaken. In *Kleinwort Benson*, Lord Goff held that the effect of the declaratory theory of law was that the law changed with retrospective effect.[150] Thus, a plaintiff who paid under the law as it appeared to be, prior to a judicial decision overruling that view of the law, will have paid as a result of a mistake of law. Whether a payor in this position had paid pursuant to an actionable mistake for the purposes of the law of restitution was a matter that divided the House of Lords in *Kleinwort Benson*. Lord Goff, Lord Hope and Lord Hoffmann considered that the retrospective change in the law rendered the plaintiff retrospectively mistaken.[151]Lord Lloyd and Lord Browne-Wilkinson disagreed. Lord Browne-Wilkinson held that, although the effect of declaratory theory was to change the law retrospectively, this did not render a party who paid subject to the law as it was considered to be at the time, retrospectively mistaken:

> although the decision in *Hazell* is retrospective in its effect, retrospection cannot falsify history: if at the date of each payment it was settled law that local authorities had capacity to enter into swap contracts, the bank were not labouring under any mistake of law at that date.[152]

Australian judges also acknowledge that judges change the law[153] and have adopted an approach similar to that of the majority in *Kleinwort Benson*. *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* concerned a retrospective amendment to taxation provisions. The majority considered that the retrospective amendment conferred a

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[149] *Byrne v Rudd* [1920] 2 IR 12 (Irish Court of Appeal) 23. See also *The National Bank Ltd v O'Connor and Bowmaker (Ireland) Ltd* [1969] 103 ILTR 73 (HC).

[150] *Kleinwort Benson* [1999] 2 AC 349 (HL) 378. See also *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680 [7]; *Barbour v University of British Columbia* [2010] BCCA 63, 316 DLR (4th) 354 [14].

[151] *Kleinwort Benson* [1999] 2 AC 349 (HL) 377-378 (Lord Goff), 399 (Lord Hoffmann).

[152] *Ibid,* 358. See also Lord Lloyd's comments at 393.

[153] *Dietrich v The Queen* (1992) 177 CLR 292 (HCA) 319-320 (Brennan J), 329 (Deane J); *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 (HCA) 167-172 (Toohey J).

statutory entitlement to payments made under the previous legislation.[154] Mason CJ was also willing to hold that the amendment inserted by section 2(4) of the Taxation Acts Amendment Act 1987 rendered the plaintiffs retrospectively mistaken. However, in *Torrens Aloha Pty Ltd v Citibank NA*, Sackville J held:

> In my opinion, the fact that judicial law-making operates retrospectively does not mean that a person is or should be free to rely on the novel principle or doctrine to establish rights in relation to events or transactions occurring in the distant past, free from the constraints that would otherwise be imposed by statutes of limitations. The authorities do not support any such contention.[155]

He concluded that the declaratory theory did not entail that the accrual of a cause of action could not be postponed to the date on which the courts determined a new cause of action to exist.[156] This reflects the minority approach in *Kleinwort Benson* but is arguably directly contrary to Mason CJ's comments in *Royal Insurance.*

There has been little express consideration of the issue in Canada. However, in *AJ Seversen Inc v Qualicum Beach (Village)* Bouck J held that:

> ... money paid pursuant to a municipal by-law or resolution is handed over at a time when the by-law or resolution is presumed to be the law. If the by-law or resolution is subsequently set aside, the change has a retroactive effect. This does not mean the earlier payment was made under a mistake of law, because no one is presumed to know the law might change in the future.[157]

The approach taken by the majority in *Kleinwort Benson* and by Mason CJ in *Royal Insurance* has been criticised.[158] Commentators have argued that, because the 'mistake' operates retrospectively, it cannot have the effect of vitiating the plaintiff's consent at the

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[154] *Royal Insurance* (1994) 182 CLR 51 (HCA) 90-91.
[155] *Torrens Aloha Pty Ltd v Citibank NA* (1997) 72 FCR 581 (FCA) 595.
[156] *Ibid,* 597.
[157] *AJ Seversen Inc v Qualicum Beach (Village)* [1980] 3 WWR 375, 19 MPLR 39 (BCSC) [29]. The judge ultimately found for the plaintiff on the basis of a practical compulsion and the mistake issue was not addressed on appeal: *AJ Seversen Inc v Qualicum Beach (Village)* (1982) 135 DLR (3d) 122 (BCCA).
[158] Virgo, *Principles of the Law of Restitution* (n 53) 167; Merralls, 'Recovery of Taxes after the *Royal Insurance* Case' in McInnes (ed) *Restitution: Developments in Unjust Enrichment* (LBC Information Services, Sydney 1996) 118; Smith, 'Restitution for Mistake of Law' (n 4) 154. See also Pannam, 'The Recovery of Unconstitutional Taxes in Australia and the United States' (n 46) 800; Birks, 'Mistakes of Law' (n 34) 223; Mitchell, 'Retrospective Mistakes of Law' (1999) 10 Kings College Law Journal 121, 125-126.

time of the payment;[159] the core feature of the cause of action, the vitiation of the intention to benefit, is absent. Birks in particular has argued that, where the plaintiff pays under a settled understanding of the law that is subsequently overruled, he is not mistaken but rather has mispredicted what the House of Lords would hold.[160] Sheehan's conception of mistake requires that 'the view that one takes can be proven to be incorrect at the time that it is acted upon.'[161] Retrospective change in the law does not render the payor mistaken because the payor could not have established the true state of the law at the time he acted upon his belief and so does not clash with declaratory theory.

In *DMG*, Lord Hoffmann defended the majority approach in *Kleinwort Benson,* arguing that it was an inevitable consequence of the fact that judges retrospectively change the law and that the criticisms of the outcome in that case

> seems to me, with respect, to muddle two different questions. One is whether judges change the law or merely declare what it has always been. The answer to this question is clear enough. To say that they never change the law is a fiction and to base any practical decision upon such a fiction would indeed be abstract juridical correctitude. But the other question is whether a judicial decision changes the law retrospectively and here the answer is equally clear. It does. ... So the main question in the *Kleinwort Benson* case was whether a person whose understanding of the law (however reasonable and widely shared at the time) is falsified by a subsequent decision of the courts should, for the purposes of the law of unjust enrichment, be treated as having made a mistake. The majority view in the *Kleinwort Benson* case was that he should. The effect of the later judgment is that, contrary to his opinion at the time, the money was not owing. It is therefore fair that he should recover it. It may be that this involves extending the concept of a mistake to compensate for the absence of a more general *condictio indebiti* and perhaps it would make objectors feel better if one said that because the law was now deemed to have been different at the relevant date, he

[159] Mitchell, 'Mistaken Tax Payments: *Deutsche Morgan Grenfell v IRC'* (Case Comment) [2007] RLR 123, 127; McInnes, 'Mistaken Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance'* (n 1) 218; Beatson, 'Unlawful Statutes and Mistake of Law: Is there a Smile on the Face of Schrödinger's Cat?" in Burrows and Rogers (eds) *Mapping the Law: Essays in Honour of Peter Birks* (OUP, Oxford 2006) 179.
[160] Birks, 'Mistakes of Law' (n 34). See also Beatson, 'Unlawful Statutes and Mistake of Law: Is there a Smile on the Face of Schrödinger's Cat?" (n 159) 179; Birks, 'Modernising the Law of Restitution' (n 3) 166.
[161] Sheehan, 'What is a Mistake?' (n 5) 547.

was deemed to have made a mistake. But the reasoning is based upon practical considerations of fairness and not abstract juridical correctitude.[162]

This issue has not proven contentious in Ireland. The declaratory theory of judicial adjudication has been accepted as a matter of Irish law.[163] *In Re Flightlease (Ireland) Ltd* Clarke J held that the declaratory theory had the effect of retrospectively changing the law:

> decisions as to the common law declare the law as it was at the time of the events giving rise to the proceedings in which the issue arises. A radical change in the common law has, therefore, the potential to have a retrospective effect which would not, in the ordinary way, arise in the event of a statutory amendment.[164]

In a restitutionary context, *Rogers v Louth County Council* takes a similar approach to that adopted by the majority in *Kleinwort Benson.* In 1969, the local authority calculated the redemption price of an annuity charged on a cottage by reference to a formula that was generally accepted to be the appropriate means of calculating redemption prices. However, the formula was subsequently held to have been invalid.[165] The Supreme Court allowed recovery of the money as a sum paid under a mistake of law where the parties were not *in pari delicto*. This decision indicates that the Irish courts consider that a declaration as to the law renders a plaintiff retrospectively mistaken. However, this decision is based on the *in pari delicto* exception to the mistake of law rule and so the courts did not consider the more destabilising effects that would be attendant on a similar approach in circumstances where the mistake of law rule was abolished.

This issue takes on an added constitutional dimension in Irish law. Article 15.4.2° provides:

> Every law enacted by the Oireachtas which is in any respect repugnant to this Constitution or to any provision thereof, shall, but to the extent only of such repugnancy, be invalid.

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[162] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [23]. Internal citations omitted.

[163] *Attorney General v O'Brien* [1936] 1 IR 263 (CCA) 271. See also *The State (Duggan) v Tapley* [1952] 1 IR 62 (SC) 85.

[164] *Re Flightlease (Ireland) Ltd* [2006] IEHC 193. Thus, Spencer's claim that 'the effect of a change in the law due to a judicial decision should have the same effect as if the law were altered by legislation' should be regarded as mistaken: Spencer 'Restitution of Monies Paid Pursuant to a Mistake of Law' (n 45) 166.

[165] *Meade v Cork County Council* (Supreme Court, 31 July 1974).

The effect of this provision is that legislation that is repugnant to the Constitution is void from the date of its enactment. In addition, Article 50.1 provides that legislation that offends the Constitution did not survive the coming into force of the Constitution.[166] The effect of a declaration of unconstitutionality was considered by the Supreme Court in *Murphy v Attorney General.*[167] A majority of the Supreme Court,[168] held that a legislative provision that is repugnant to the Constitution is to be 'deemed null and void from the moment of its purported enactment'[169] The effect of voidness is that the law had no legal effect at any time following its enactment, or, in the case of pre-1937 statutes, ceased to have legal effect upon the coming into operation of the Constitution. Therefore, any plaintiff who has made payments to a public authority pursuant to legislation which is subsequently held to be unconstitutional has paid pursuant to a mistake of law. He has paid money pursuant to a statute that does not exist. The Irish courts have not yet considered how this analysis can be accommodated within the doctrine of recovery for mistake of law. This is not surprising, as the Irish courts have not yet conclusively determined the mistake of law rule to have been abolished. Although the unconstitutionally exacted taxes in *Murphy* were held to be *prima facie* recoverable, they were recoverable on the basis of duress *colore officii* and the Supreme Court declined to consider a claim based on mistake, whether of fact or of law.[170]

It is likely that the Irish courts will take an approach comparable to that of the majority in *Kleinwort Benson* for several reasons. First, the Irish courts have been astute to note that issues of stability can be accommodated within broadly drawn defences. Thus, in *Murphy* the courts addressed concerns based on fiscal disruption by permitting the State to rely on a generous change of position defence.[171] Second, the courts have proven themselves to be unwilling to allow judicial techniques to deny the effect of a declaration of unconstitutionality. This is evident from the Supreme Court's unwillingness to adopt a doctrine of prospective overruling to operate where legislation has been held to be unconstitutional.[172] Thus, a reinterpretation of the effect of retrospective invalidity in the

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[166] In *Murphy v Attorney General* [1982] IR 241 (SC) 307, Henchy held that a declaration of inconsistency with the constitution under Article 50.1 of the Constitution 'amounts to a judicial death certificate, with the date of death stated as the date when the Constitution came into operation.'

[167] *Ibid.*

[168] *Ibid,* 299. O'Higgins CJ dissenting.

[169] *Ibid,* 309 (Henchy J), 330-331 (Griffin J), 332-333 (Kenny J). See also *A v The Governor of Arbour Hill Prison* [2006] IESC 169, [2006] 4 IR 88 [75].

[170] *Murphy* [1982] IR 241 (SC).

[171] See Chapter 8 at 299-302.

[172] See *Murphy v Attorney General* [1982] IR 241 (SC) 308. Although Canada has recognised a limited doctrine of prospective overruling, the suggestion has not met with favourable reaction in England, Australia or in

context of restitution for mistake is unlikely to receive a favourable response from the Irish courts, particularly where this reinterpretation has been rejected in other jurisdictions. It should be noted that, in *A v The Governor of Arbour Hill Prison*, the Supreme Court held that the courts had a general discretion to refuse relief from the consequences of an unconstitutional statute[173] and so, from this decision, it may be possible to detect a change in judicial attitudes to the retrospective effect of a declaration of constitutional invalidity. However, it could be argued that there is a considerable difference between a judicial willingness to refuse relief from the consequences of an unconstitutional statute, as in *A*, and an approach that directly contradicts the doctrine of retrospective invalidity.

(v) Ignorance

The final category of mistake is ignorance, although there is considerable debate as to whether it constitutes a form of mistake. Some commentators have argued that the concept of mistake requires a positive but incorrect belief. Thus, in cases of ignorance, where the plaintiff does not hold any positive belief but is simply unaware of the transfer, there is no vitiated intention to transfer the benefit. Such instances cannot constitute mistakes and must be explicable on other grounds.[174] Although this view was adopted in earlier cases,[175] recent cases have taken the contrary view and consider mistake to include cases where the plaintiff was unaware of the transfer. In *David Securities*, a majority of the High Court of Australia held that 'mistake not only signifies a positive belief in the existence of something which does not exist but also may include "sheer ignorance of something relevant to the transaction in hand"'.[176] Lord Hope affirmed this proposition as a matter of English law in *Kleinwort*

Ireland. See *Re Language Rights Under s 23 of Manitoba Act, 1870 and s 133 of Constitution Act, 1867* [1985] 1 SCR 721 (SCC); *Re Eurig Estate* [1998] 2 SCR 565 (SCC); *Kleinwort Benson* [1999] 2 AC 349 (HL) 379; *R v Governor of Brockhill Prison, Ex parte Evans (No 2)* [2001] 2 AC 19 (HL) 48; *Ha v New South Wales* (1997) 189 CLR 465 (HCA) 504; *Residual Assco Group v Spalvins* (2000) 202 CLR 629 (HCA) [59]-[66]. See also Arden, 'Prospective Overruling' (2004) 120 LQR 7, 7-8; Bennion, 'Consequences of an Overrule' [2001] Public Law 450, 454; Hogan and Whyte, *Kelly: The Irish Constitution* (4th edn Butterworths, Dublin 2003) 904-906.

[173] *A v The Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88 [87] and [122]. See Chapter 6.

[174] Virgo, *Principles of the Law of Restitution* (n 53) 139; Sheehan, 'What is a Mistake?' (n 5) 541-545.

[175] In *Kelly v Solari* (1841) 9 M & W 54, 58, Lord Abinger CB stated that the knowledge that disentitles a party from recovering must exist in the mind of the payer at the time of payment and that he had stated the rule too widely when he had told the jury in the case that 'if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them.' See also *Nolan v Enniscorthy Urban District Council* [1955] 89 ILTR 12, 14. Similarly, in *South Australia Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 CLR 65 (HCA) 73-74, the High Court of Australia considered that the plaintiffs were not mistaken but had 'entertained no belief as to the existence or non-existence of facts as such which turned out to be mistaken.' See also *Mayer v Mayer Estate* (1993) 76 BCLR (2d) 330 [37].

[176] *David Securities* (1992) 175 CLR 353 (HCA) 369, quoting Winfield, 'Mistake of Law' (1943) 59 LQR 327. See also *Hookway v Racing Victoria Ltd* [2005] VSCA 310 [21].

Benson.[177] Irish cases likewise indicate that the plaintiff need not hold a positive belief. In *Nolan v Enniscorthy UDC*, Fawsitt J held:

> The mistake may consist in the payer never having known the real facts, or in his forgetfulness of facts of which he once had full knowledge.[178]

This view is straightforward and is in keeping with the general trend of the courts, which no longer distinguish between different grounds of mistake. Furthermore, mistake concerns a lack of intention to confer the enrichment. If ignorance is understood as a strong form of vitiated intention, or an absence of intention, there is little difficulty in accommodating it within mistake. Sheehan has sought to reconcile the approach in *Kleinwort Benson* and *Nolan* with the view that mistake requires the existence of a positive belief. He accepts that such beliefs need not be consciously held and can simply be tacit, unconscious assumptions on which the payor bases his decision making processes. Specifically, he argues that ignorance of the existence of a statute would not prevent a plaintiff from being mistaken on other matters:

> David Securities was totally ignorant of the statute that rendered part of its contract invalid. They were not mistaken as to its existence. However, that did not prevent them from being mistaken about other matters. The total ignorance of David Securities about the statute led them to believe that all the clauses of their contract were valid.[179]

C. Concurrently available causes of action

Finally, it is necessary to consider the relationship of mistake with other unjust factors. There are two contexts in which this issue is relevant. First, there is a question, discussed in *DMG,* whether mistake can be relied upon concurrently with the *Woolwich* principle or another 'public law' cause of action. This issue is considered in Chapter 6. Second, this section considers whether a mistake can be relied upon in conjunction with other concurrently available causes, such as duress or failure of consideration.

The English courts have held that the availability of a cause of action based on the *Woolwich* principle will not preclude a claim in mistake.[180] Similarly, in *O'Rourke*, Keane J

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[177] *Kleinwort Benson* [1999] 2 AC 349 (HL) 410.
[178] *Nolan v Enniscorthy Urban District Council* [1955] 89 ILTR 12, 14.
[179] Sheehan, 'What is a Mistake?' (n 5) 543. See also Virgo, *Principles of the Law of Restitution* (n 53) 145.
[180] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [18]. See also Lord Hope at [46]. This issue is discussed in more detail in Chapter 6.

considered that overpaid taxes were recoverable pursuant to the *Woolwich* principle, notwithstanding that they had been paid under a mistake of law.[181] However, although the principle of concurrent liability means that, in theory, causes of action will be available concurrently,[182] practical considerations may mean that it is not feasible or desirable for plaintiffs to rely on mistake concurrently with other restitutionary causes of action. In *Test Claimants in the FII Group Litigation* Henderson J suggested that, from a practical point of view, litigants would be more likely to rely on mistake than on the *Woolwich* principle:

> Where mistake is present, however, a restitutionary claim based on the mistake is likely to cover all the ground that a *Woolwich* claim could cover, but also has the potential to extend considerably further.[183]

However, the change of position defence has been held to be unavailable to the state in relation to *Woolwich* claims but remains available in mistake claims.[184] Similarly, the English legislature has taken steps to remove the more favourable limitation periods enjoyed by mistake claims in the context of overpaid taxes.[185] In light of these recent developments, it seems likely that this trend in favour of mistake will be reversed, so that plaintiffs will be more likely to rely on *Woolwich* principle to avoid any potential application of the change of position defence.

Another question that arises is whether mistake and duress may be relied upon concurrently in the context of restitution from public authorities. It is arguable that the two causes of action are unlikely to be made out on the same facts. If the plaintiff makes a mistake of law, believing that the money is lawfully due, it is unlikely that he can also rely on compulsion as a cause of action. This is a question of causation. If the test is one of 'but for' causation, the duress and mistake cannot be relied upon concurrently, as, if mistake and compulsion are both operative, even if the plaintiff had made a mistake, he would have made the payment anyway as a result of the compulsion, and vice versa.[186] If the plaintiff believed

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[181] *O'Rourke v The Revenue Commissioners* [1996] 2 IR 1 (HC) 11. See also Beatson, 'Finessing Substantive "Public Law" Principles into "Private Law" Relations' [1997] Acta Juridica 1, 16.

[182] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [51] (Lord Hope); *Kennedy v Allied Irish Banks plc* [1998] 2 IR 48 (SC) 56; *Pat O'Donnell & Co Ltd v Truck and Machinery Sales Ltd* [1998] 4 IR 191 (SC) 199. See also *Carey v Independent Newspapers* [2004] 3 IR 52 (HC) 75; Burrows, 'Restitution in Respect of Mistakenly Paid Tax' (n 137) 542.

[183] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch) [260]. Hereafter *FII Group Litigation*.

[184] See Chapter 8 at 301-303.

[185] See sections 320 and 321 of the Finance Act 2004 (UK). Discussed in Chapter 7.

[186] See above at 136-137.

that the money was due, it is unlikely that the pressure exacted by the public authority caused him to make the payment. As Dickson J noted in *Nepean Hydro-Electric Commission v Ontario Hydro*:

> Money paid under a mistake of law (or fact for that matter) would rarely be paid under protest; the parties under a mutual mistake of law assume that the money is, in law, due and owing.[187]

However, the approach adopted in early Canadian cases, such as *Eadie* and *Porky Jacobs,* suggests that mistake and duress are available concurrently.[188] If the test adopted in a jurisdiction is one of contributing cause, this problem disappears. If the importance of ensuring that the state should not be unjustly enriched at the expense of the taxpayer requires that all causes of action should be available concurrently, then it is arguable that a test of 'contributing cause' should apply to mistake claims against the state, to enable a plaintiff to rely on duress and mistake concurrently.

II. Compulsion

In *Woolwich,* Lord Browne-Wilkinson posited two bases on which he considered unlawfully exacted taxes to be recoverable:

> One stream is founded on the concept that money paid under an ultra vires demand for a tax or other impost has been paid without consideration. The other stream is based on the notion that such payments have been made under compulsion, the relative positions and powers of the two parties being unequal.[189]

The first stream, which permits recovery for failure, or absence of, consideration, is considered in Chapter 6. In elaborating upon the second stream, payments made under compulsion, Lord Browne-Wilkinson held that the right to recovery recognised in earlier

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[187] *Nepean Hydro-Electric Commission v Ontario Hydro* [1982] 1 SCR 347, 132 DLR (3d) 193 (SCC) [96].
[188] See Crawford, 'Restitution: Mistake of Law and Practical Compulsion' (1967) 17 University of Toronto Law Journal 344, 345-346; Posluns, 'Mistakes and Compulsions: A Reappraisal of *Eadie v Township of Brantford*' (n 123) 356.
[189] *Woolwich* [1993] AC 70 (HL) 197.

cases[190] was 'based on the fact that the payer and payee were not on an equal footing and it was this inequality which gave rise to the right to recovery.' In his opinion:

> the *colore officii* cases are merely examples of a wider principle, viz. that where the parties are on an unequal footing so that money is paid by way of tax or other impost in pursuance of a demand by some public officer, these moneys are recoverable since the citizen is, in practice, unable to resist the payment save at the risk of breaking the law or exposing himself to penalties or other disadvantages.[191]

Thus, Lord Browne-Wilkinson's compulsion principle comprises two established bases for recovery. The first is duress *colore officii*, a cause of action specific to public bodies and officials. This doctrine, and its development in Irish law, is considered in Section A. The second basis is a wider principle of duress, which is considered in Section B. Section C considers the relationship between these grounds and considers whether both should be subsumed within a general unjust factor of 'duress' or 'compulsion'. In particular, Section C demonstrates that judges are moving from limited specific causes of action to a more flexible general principle. It follows that, whilst historically, these were two distinct claims, more recently the line between the two has become increasingly blurred. Section C also considers whether there is a continued role for these bases in the context of restitution from public authorities in light of adoption of the *Woolwich* principle.

A. Duress Colore Officii

The most commonly adopted definition of duress *colore officii*[192] is that adopted in by Windeyer J *Mason v New South Wales*:

> Extortion by colour of office occurs when a public officer demands and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty.[193]

However, although there is considerable support in Ireland,[194] England,[195] Canada,[196] and Australia[197] for the proposition that money demanded *colore officii* is recoverable as money

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[190] Lord Browne-Wilkinson referred to *Morgan v Palmer* 2 B & C 729 and to *Steele v Williams* (1853) 8 Ex 625.

[191] *Woolwich* [1993] AC 70 (HL) 199.

[192] Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 62) 448. *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL) 155.

[193] *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 140-141. *Qantas Airways Ltd v Commissioner of Taxation (Cth)* (2001) 115 FCR 288 (FCA) 71. This definition was approved by Henchy J in *Murphy v Attorney General* [1982] IR 241 (SC) 316.

had and received,[198] it is not clear how the doctrine of duress *colore officii* operates or what its requirements are. This is partly due to the 'obscure'[199] and 'ambiguous'[200] nature of the phrase. In *Mason,* Windeyer J held that '[T]he phrase "colour of office" is an old one, carrying a stale odour of mediaeval complaints of corruption and abuse of power by officials.'[201] Similarly, in *Woolwich,* Glidewell LJ described the phrase as 'at best vague and at worst almost meaningless at the present day.'[202] Commentators have noted its propensity to cause confusion and have suggested that it is 'best avoided wherever possible'.[203]

In most jurisdictions, duress *colore officii* requires that a payment is demanded in return for the performance of a public duty. It is not sufficient that the person making the demand holds an official position where the demand has been made in the absence of the withholding of an entitlement.[204] In this regard, duress *colore officii* is a narrowly defined cause of action.[205] As a result, it has been suggested that duress colore *officii* is not applicable to claims for restitution of overpaid taxes, 'because the Revenue does not demand money in return for the performance of a public duty by the Revenue.'[206] Although early Irish cases require that the payment was made to secure a withheld entitlement,[207] this requirement has been relaxed in later cases. For example, in *Murphy,* Henchy J held that the taxes overpaid by the plaintiffs were recoverable as money exacted *colore officii*, notwithstanding that they had not been demanded to secure a withheld entitlement. In Australia, a similar relaxation of the duress *colore officii* requirements is attributed to the decision of Mason CJ in *Royal*

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[194] *Dolan v Neligan* [1967] IR 247 (HC) 254; *Rogers v Louth County Council* [1981] IR 265 (SC) 271; *Murphy v Attorney General* [1982] IR 241 (SC) 317.
[195] *Morgan v Palmer* 2 B & C 729; *Steele v Williams* 8 Ex 625; *Maskell v Horner* [1915] 3 KB 106 (CA); *T&J Brocklebank Ltd v R* [1925] 1 KB 52 (CA) 67 (Scrutton LJ); *R&W Paul Ltd v Wheat Commission* [1937] AC 139 (HL) 160.
[196] *Hooker v Gurnett* (1858) 16 UCQB 180; *Beaver Lamb & Shearling Co v R* [1960] SCR 505 (SCC); *AJ Seversen Inc v Qualicum Beach (Village)* [1980] 3 WWR 375, 19 MPLR 39 (BCSC) [36].
[197] *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 (HCA) 263; *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 140-141; *Aerolineas Argentinas and Others v Federal Airports Corporation* (1995) 63 FCR 100 (FCA) 118.
[198] *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 140-141.
[199] *Dolan v Neligan* [1967] IR 247 (HC) 254.
[200] *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 (HCA) 301 (Isaacs J). See Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2011) 500.
[201] *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 139.
[202] *Woolwich* [1993] AC 70 (CA) 80.
[203] Burrows, *The Law of Restitution* (2nd edn Butterworths, London 2002) 436. See also Burrows, 'Public authorities, Ultra Vires and Restitution', in Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press, Oxford 1991) 45; Birks, 'Restitution from Public Authorities' (1980) *Current Legal Problems* 191, 199.
[204] *Mason* (1959) 102 CLR 108 (HCA) 118 (McTiernen J) and 139-140 (Windeyer J); *Woolwich* [1993] AC 70 (CA) 80 (Glidewell LJ). See also Lord Jauncey's comments in *Woolwich* [1993] AC 70 (HL) 179.
[205] *Woolwich* [1993] AC 70 (CA) 139 (Butler-Sloss LJ).
[206] Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 62) 448
[207] *Dolan v Neligan* [1967] IR 247 (HC) 257; *Rogers v Louth County Council* [1981] IR 265 (SC) 271.

Insurance.[208] Some early Australian cases suggest that payments demanded in the absence of a statutory authority will be considered to have been made *colore officii*.[209] Some have suggested that, where a demand is made *colore officii,* it is presumed that payment of the sum demanded is not voluntary.[210] The threat is implicit in the fact that it is being made by a public official.[211] It is not necessary to show bad faith on the part of the recipient. In *Murphy,* Henchy J held that tax payments were recoverable, subject to defences, as money exacted *colore officii*, notwithstanding that he also held that the state had received the money in good faith.[212]

Although early duress *colore officii* cases suggest that the plaintiff must make the payment under protest,[213] most jurisdictions have held that there is no such requirement. In *Mason,* Windeyer J held that 'there is no magic in a protest; for a protest may accompany a voluntary payment or be absent from one compelled.'[214] Although the presence or absence of a protest will not be conclusive evidence that the payment was exacted *colore officii,*[215] where the plaintiff has contested the payments, this protest should be of evidential value, indicating that the payment was not made voluntarily.[216] Furthermore, protests may put the state on notice that the legality of the payments is in doubt.[217]

The status of the protest requirement in Irish law is unclear. In *O'Rourke v Revenue Commissioners*, Keane J held that the failure of the plaintiff to protest against the imposition of the tax precluded him from relying on duress *colore officii*:

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[208] *Aerolineas Argentinas and Others v Federal Airports Corporation* (1995) 63 FCR 100 (FCA) 122.
[209] *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 (HCA) 263-264 (Griffith CJ).
[210] *Mason* (1959) 102 CLR 108 (HCA) 141; *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137 (HCA) 145; *Rogers v Louth County Council* [1981] IR 265 (SC) 271. See also Collins, 'Restitution from Government Officials' (1984) 29 McGill Law Journal 407, 410; Virgo, *Principles of the Law of Restitution* (n 53) 405; Burrows, *The Law of Restitution,* (2nd edn Butterworths, London 2002) 436. See now, Burrows, *The Law of Restitution,* (3rd edn OUP, Oxford 2011) 266-267.
[211] Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 62) 448.
[212] *Murphy v Attorney General* [1982] IR 241 (SC) 319. See also *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 141 (Windeyer J).
[213] *Vancouver Growers Ltd v GH Snow Ltd* [1937] 4 DLR 128 (BCSC) [12]-[13]; *Maskell v Horner* [1915] 3 KB 106 (CA) 110-111 and 120. In *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC) 10, Keane J cited Kenny J's judgment in *Dolan v Neligan* [1967] IR 247 as authority for this requirement.
[214] *Mason* (1959) 102 CLR 108 (HCA) 143. See also *Beaver Lamb & Shearling Co v R* [1960] SCR 505 (SCC) [70] (Ritchie J); *Glidurray Holdings Ltd v Qualicum Beach (Village)* (1981) 129 DLR (3d) 599 (BCCA) [9]-[10]; *Woolwich* [1993] AC 70 (HL) 186 (Lord Jauncey).
[215] McKenna, 'Mistake of Law Between Statutory Bodies and Private Citizens: An Examination of the Rationale for Recovery of Money Paid' (n 68) 229; Pannam, 'The Recovery of Unconstitutional Taxes in Australia and the United States' (n 46) 786.
[216] Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 62) 456; Virgo, 'Restitution from Public Authorities: Past, Present and Future' [2006] Judicial Review 370, 374.
[217] See McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law' (n 34) 258.

> If the plaintiff in the present case, instead of acquiescing in the deduction by the Department of the tax on the PAYE basis, had resisted those deductions (if necessary by the institution of proceedings), had then made returns under Schedule D and had paid, in response to a demand, the additional tax on the Schedule E basis, but *had done so under protest*, there would, I think, have been no answer to a claim for their repayment, ... While the money thus taken from him could no doubt be regarded as money paid under a mistake of law, it would in my view have been exacted in those circumstances *colore officii* and accordingly recoverable by the plaintiff in accordance with the principles stated by Kenny J in *Dolan v Neligan.*[218]

The Supreme Court in the *Health Amendment Bill* case referred to this requirement without expressly disapproving it.[219] However, it appears to be unfounded as a matter of authority, seeing as no other jurisdiction considers the presence or absence of protest to be determinative of a claim under duress *colore officii.* It is also inconsistent with *Murphy,* where Henchy J adopted Windeyer J's formulation of duress *colore officii* in *Mason,* which did not require that a protest be made.[220] Furthermore, Keane J's approach is undesirable as a matter of principle, as it favours litigants who have the resources to challenge tax demands over those who, whether or not they have the means to contest legislation through litigation, assume that taxing provisions are valid and pay accordingly.[221]

B. Duress.

Where a plaintiff has conferred a benefit as a result of duress, the plaintiff's intention to confer the benefit is vitiated, or improperly obtained, and the plaintiff may recover the benefit under the law of restitution. The test for duress has been formulated in two different ways.[222] The first test requires a coercion of the payor's will that vitiates his consent to make the payment.[223] The second, developed by Lord Goff in the *Evia Luck,* simply requires that

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[218] *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC) 10. Emphasis added. This was noted in *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [71].
[219] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [71].
[220] *Murphy v Attorney General* [1982] IR 241 (SC) 316.
[221] Collins, 'Restitution from Government Officials' (n 209) 421; McKenna, 'Mistake of Law Between Statutory Bodies and Private Citizens: An Examination of the Rationale for Recovery of Money Paid' (n 68) 224-225; McCamus identifies this a one of the problems associated with a 'threat' requirement: McCamus, 'Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law' (n 34) 247.
[222] See, generally, Virgo, *The Principles of the Law of Restitution* (n 53).
[223] *See Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293 (QBD) 336; *Pao On v Lau Yiu Long* [1980] AC 614 (PC) 635; *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366 (HL) 383-385.

the pressure exerted on the claimant was illegitimate and that it caused the plaintiff to make the payment.[224] These tests, originally developed in the context of economic duress, have been acknowledged to apply to duress irrespective of the category into which it falls.[225] In the *Evia Luck,* Lord Goff doubted 'whether it is helpful in this context to speak of the plaintiff's will having been coerced.'[226] However, academic opinion on which test is to be preferred have varied.[227] In *R v Attorney General of England and Wales*,[228] Lord Hoffmann, delivering the majority advice of the Privy Council, appeared to adopt an amalgamation of these two tests:

> In *Universe Tankships Inc of Monrovia v International Transport Workers Federation* Lord Scarman said that there were two elements in the wrong of duress. One was pressure amounting to compulsion of the will of the victim and the second was the illegitimacy of the pressure.[229]

Lord Goff's test in the *Evia Luck* is to be preferred for its clarity and it is the test most commonly adopted by the courts. Recent Privy Council decisions focus on the legitimacy of the pressure rather than solely on coercion of the will.[230] A focus on pressure amounting to coercion of the will simply reduces the test for duress to a test of causation. It asks whether the pressure caused the payment and does not focus on the nature of the pressure, an enquiry that is just as important as the causation requirement. It has been argued that all demands made by the state are backed with an implicit coercive force.[231] If that is the case, and if the test for duress focuses solely on the coercion of the taxpayer's will, this analysis would mean that all benefits conferred upon the state, whether pursuant to legitimate or illegitimate demands, would be recoverable on the basis of duress. However, Beatson has noted that there is considerable 'difficulty at the margin of deciding whether a threat is legitimate or

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[224] *Dimskal Shipping v ITF (The Evia Luck)* [1992] 2 AC 152 (HL) 165-166. See also *Borrelli v Ting* [2010] UKPC 21 [34]; *Farm assist Limited (in Liquidation) v Secretary of State for Environment Food & Rural Affairs* [2008] EWHC 3079 (TCC) [8]; *DSND Subsea v Petroleum Geo-Services* [2000] BLR 530 [131].
[225] *Borrelli v Ting* [2010] UKPC 21 [34]; *Farm assist Limited (in Liquidation) v Secretary of State for Environment Food & Rural Affairs* [2008] EWHC 3079 (TCC) [8]; *DSND Subsea v Petroleum Geo-Services* [2000] BLR 530 [131].
[226] *The Evia Luck* [1992] 2 AC 152 (HL) 166.
[227] See Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* (OUP, Oxford 1991) 113-117; Atiyah 'Economic Duress and the "Overborne Will"' (1982) 98 LQR 197; Birks, 'The Travails of Duress' [1990] LMCLQ 342; Virgo, *The Principles of the Law of Restitution* (n 53) 204-208.
[228] *R v Attorney General of England and Wales* [2003] UKPC 22.
[229] *Ibid,* [15]. Internal citations omitted.
[230] *Ibid.* See also *Borrelli v Ting* [2010] UKPC 21 [34].
[231] See Chapter 2 at 33-38.

illegitimate especially where what is threatened is not unlawful.'[232] In *R v Attorney General of England and Wales* Lord Hoffmann elaborated on what constitutes 'illegitimate pressure':

> The legitimacy of the pressure must be examined from two aspects: first, the nature of the pressure and secondly, the nature of the demand which the pressure is applied to support... Generally speaking, the threat of any form of unlawful action will be regarded as illegitimate. On the other hand, the fact that the threat is lawful does not necessarily make the pressure legitimate. [233]

Claims for overpaid tax may often be reconceptualised in terms of duress as, where the taxing provision is unlawful, the payment will have been made in response to an illegitimate demand. [234] However, one area in which the approach of the various jurisdictions is reasonably consistent is the view that legitimate pressure, such as compulsion of legal process, will not constitute duress.[235] In *Moore v Vestry of Fulham*, Lord Halsbury explained the rationale for this principle as follows:

> ... when a person has had an opportunity of defending an action if he chose, but has thought proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defence to the original action.[236]

Therefore, in cases where the taxing legislation contains no powers of confiscation or other penalties for non-payment, it is unlikely that it will be possible to establish compulsion, as the public authority's demand is simply backed by a threat to sue, a legitimate threat, which does not constitute duress.[237] In *Mason v New South Wales*, Menzies and Kitto JJ expressly

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[232] Burrows, 'Public Authorities, Ultra Vires and Restitution' (n 65) 43.
[233] *R v Attorney General of England and Wales* [2003] UKPC 22 [16].
[234] Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2011) 499-501.
[235] *Maskell v Horner* [1915] 3 KB 106 (CA) 121-122; *Woolwich* [1993] AC 70 (HL) 165. See also *Marriot v Hampton* (1797) 7 Term Reports 269; *Hamlet v Richardson* 9 Bing 644; *Ward & Co v Wallis* [1900] 1 QB 675, 677-678; *Catton v Ashwell and Nesbit, Limited* [1928] Ch 484, 512. In Ireland see *Burke v Beatty and White* [1928] IR 91 (HC) 96; *Carse v Taylor* [1858] 7 ICLR 451, 455. In Australia, see *Werrin v The Commonwealth* (1938) 59 CLR 150 (HCA) 158-159; *J & S Holdings Pty Ltd v NRMA Insurance Ltd* (1981) 57 FLR 385 (FCA) 426. In Canada, see *Johnston v Brown* (1846) 5 NBR 264 (NBSC); *Irving Oil Co v Belledune Housing & Enterprises Ltd* (1968) 1 NBR (2d) 48 [28]. In *Re Municipal Spraying & Contracting Ltd* (1980) 15 BLR 37 [96], it was held that money paid was recoverable notwithstanding that it had been paid under compulsion of legal process, and to this extent must be regarded as wrongly decided.
[236] *Moore v Vestry of Fulham* [1895] 1 QB 399 (CA) 401-402. See also *Clydesdale Bank Limited v Schröder & Co* [1913] 2 KB 1 (KBD) 5; *Irving Oil Co v Belledune Housing & Enterprises Ltd* (1968) 1 NBR (2d) 48 [38]; Virgo, *Principles of the Law of Restitution* (n 53) 669.
[237] See *Werrin v The Commonwealth* (1938) 59 CLR 150 (HCA) 158-159; *Mason* (1959) 102 CLR 108 (HCA) 135 (Menzies J); *Cushen v City of Hamilton* [1902] Ont LR 265. It has also been acknowledged that it was on

acknowledged that the pressure must be something other than compulsion of legal process before the money would be recoverable.[238] On this basis, *William Whitely v R* can be reconciled with the line of authority in which recovery was permitted, as the threat in *William Whitely* was one of compulsion of legal process.[239] In light of judicial acknowledgment that demands for public payments are implicitly backed by the coercive power of the state,[240] it is not desirable that the state should be entitled to rely on the defence of compulsion of legal process. On the other hand, it is also arguable that the state should not be denied an opportunity to obtain redress through proper legal channels.

Although it has been questioned whether duress provides an appropriate vehicle through which to allow recovery of overpaid taxes,[241] some cases have allowed recovery on the basis that the payment to the public body was compelled. In *Air Canada*, Wilson J held that payments made under unconstitutional legislation could not be regarded as having been made voluntarily.[242] Similarly, in *Woolwich*, Lord Browne-Wilkinson was willing to permit recovery of the taxes on the basis that 'such payments have been made under compulsion, the relative positions and powers of the two parties being unequal.'[243] This can be contrasted with conflicting dicta to the effect that citizens are presumed to pay their taxes voluntarily,[244] or, at least, to intend the executive to have them.[245] In *Woolwich,* Lord Goff held that 'the concept of compulsion would have to be stretched to the utmost to embrace the circumstances of such a case as this.'[246] However, other jurisdictions have been willing to apply the concept

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this basis on which recovery was denied in *William Whiteley Ltd v R* 101 LT 741: see *Woolwich* [1993] AC 70 (HL) 165; Virgo, *Principles of the Law of Restitution* (n 53) 405.

[238] *Mason* (1959) 102 CLR 108 (HCA) 126 (Kitto J), 133 (Menzies J)

[239] Burrows, 'Public Authorities, Ultra Vires and Restitution' (n 65) 43; Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 62) 450. However, compare Collins, 'Restitution from Government Officials' (n 209) 423.

[240] *Mason* (1959) 102 CLR 108; *Woolwich* [1993] AC 70 (HL); *Rogers v Louth County Council* [1981] IR 265 (SC) 271.

[241] McKenna, 'Mistake of Law Between Statutory Bodies and Private Citizens: An Examination of the Rationale for Recovery of Money Paid' (n 68) 226; Collins, 'Restitution from Government Officials' (n 209) 429; Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' in Finn (ed) *Essays on Restitution* (Law Book Co, Sydney 1990) 175.

[242] *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC) [13] (Wilson J). See also *Mason* (1959) 102 CLR 108, 129 (Kitto J). See also 133 (Menzies J).

[243] *Woolwich* [1993] AC 70 (HL) 197.

[244] *Vancouver Growers Ltd v GH Snow Ltd* [1937] 4 DLR 128 (BCSC) [9].

[245] *Murphy v Attorney General* [1982] IR 241 (SC) 318. However, this view is inconsistent with Henchy J's conclusion at 317 that PAYE deductions from a taxpayers income were 'involuntary to the point of being compulsory collections.'

[246] *Woolwich* [1993] AC 70 (HL) 173. See also *DMG* [2005] EWCA Civ 78, [2006] Ch 243 [271] where Buxton LJ noted this point.

of duress to demands for unconstitutional taxes,[247] particularly where the taxing legislation contains a statutory power of distress[248] or levy,[249] or where the provision provides for penal rates of interest for non-payment.

The Irish courts have been generally willing to consider duress as a ground for restitution from public authorities. In *Dolan v Neligan,* Kenny J commented on the coercive force underpinning demands made by the state:

> The plaintiff described his reaction to the letter of the 31st May as "the gun was to my head and I had to pay" and, when asked whether he knew that he could appeal against the Revenue Commissioners' ruling, stated that "it is only in desperation that one goes to law." I know that this represents a view which is held by the great majority of business people in this country.[250]

In *Rogers v Louth County Council*, Griffith J, relying on *Mason v New South Wales,* acknowledged that a payment obtained by compulsion could be recovered in an action for money had and received. [251] Similarly, in *Murphy*, Henchy J drew on a compulsion analysis, holding that PAYE payments, which were deducted at source, were 'involuntary to the point of being compulsory collections'.[252] In *O'Rourke*, Keane J referred with approval to all bases of recovery suggested in *Woolwich,* approving, if not following, Lord Browne Wilkinson's compulsion analysis.[253]

Even in jurisdictions that have recognised that duress is a cause of action applicable to overpaid taxes, it is not always clear what will constitute duress and the doctrine has given rise to inconsistent findings. Early Canadian cases demonstrate a particularly incoherent approach to duress. In *Beaver Lamb & Shearling Co v R*,[254] the Supreme Court took a narrow approach to duress, holding that the freezing of the respondent company's assets and threats to prosecute its president did not render the respondent's payment of $30,000

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[247] *Eadie v Township of Brantford* [1967] SCR 573, 63 DLR (2d) 561 (SCC); *AJ Seversen Inc v Qualicum Beach (Village)* (1982) 135 DLR (3d) 122 (BCCA) [12]; *Mason* (1959) 102 CLR 108; *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137 (HCA).

[248] *Mason* (1959) 102 CLR 108 (HCA). See also, Virgo, *Principles of the Law of Restitution* (n 53) 405.

[249] *Saint John (City) v Fraser-Brace Overseas Corp* [1958] SCR 263, 13 DLR (2d) 177 (SCC) [44].

[250] *Dolan v Neligan* [1967] IR 247 (HC) 252. See also *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC) 10.

[251] *Rogers v Louth County Council* [1981] IR 265 (SC) 271.

[252] *Murphy v Attorney General* [1982] IR 241 (SC) 317. However, the ground of restitution relied upon in *Murphy* was duress *colore officii.*

[253] *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC) 11-13. For a further discussion of this point, see Chapter 6.

[254] *Beaver Lamb & Shearling Co v R* [1960] SCR 505 (SCC).

involuntary. In *Eadie v Township of Brantford,* the Supreme Court took a permissive approach to the doctrine, holding that pressure emanating from the plaintiff's personal circumstances was sufficient to amount to compulsion.[255] Similarly, prior to the decision of the House of Lords in *Woolwich,* the common law had two conflicting streams of authority on whether money demanded by public authorities was repayable on the basis of compulsion.[256]

Even where a specific source of compulsion is recognised, it is not clear whether it will always be recognised as compulsion. For example, it is not clear to what extent a *mere power* of distress can constitute duress where there has been no threat to use it. Early Canadian cases suggest that a mere power will not constitute duress.[257] However, in *Mason,* Kitto J held that the coercive nature of the legislation itself was sufficient to constitute duress,[258] and the plaintiffs were entitled to recover the overpaid charges, notwithstanding that no express threat had been made against them. In *Woolwich*, Lord Goff declined to adopt the expansive approach to duress adopted by the High Court of Australia[259] and it appears that, in England at least, the mere existence of a power is not sufficient to establish duress if no threat is in fact made. This analysis of the case law suggests that, where the taxing legislation contains no powers of confiscation or other penalties for non-payment, it is unlikely that it will be possible to establish compulsion on the basis of duress.

C. The Relationship between Duress and Duress *Colore Officii* and the *Woolwich Principle.*

The relationship between duress and duress *colore officii* is unclear.[260] It is unclear whether duress *colore officii* is a distinct cause of action from that of duress, a distinct species of duress,[261] or part of a broader principle of compulsion[262] that is not specifically within the parameters of duress. However, duress *colore officii* is distinct from duress in that it does not

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[255] *Eadie v Township of Brantford* [1967] SCR 573, 63 DLR (2d) 561 (SCC) [19]. See also *George (Porky) Jacobs Enterprises Ltd (Plaintiff) Appellant v City of Regina* [1964] SCR 326, 44 DLR (2d) 179 (SCC) [17]-[19].

[256] Discussed above at 177-178.

[257] See *Spring-Rice v Regina (Town)* (1901) 5 Terr LR 171 (Northwest Territories Supreme Court).

[258] *Mason* (1959) 102 CLR 108 (HCA) 126, 127, and 129. See also *Aerolineas Argentinas and Others v Federal Airports Corporation* (1995) 63 FCR 100 (FCA) 119; *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137 (HCA) 144-145.

[259] *Woolwich* [1993] AC 70 (HL) 173. See also Lord Jauncey's comments at 194.

[260] Collins, 'Restitution from Government Officials' (n 209) 425.

[261] *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 140-141.

[262] *Woolwich* [1993] AC 70 (HL) 199 (Lord Browne-Wilkinson). However, this view is not shared by the editors of Goff and Jones, *The Law of Restitution* (Common Law Library, 7th edn Thomson Sweet and Maxwell, London 2007)[27-005]. See also Burrows, 'Public Authorities, Ultra Vires and Restitution' (n 65) 56.

focus on any threats to the plaintiff that affect the plaintiff's voluntariness.[263] Instead, the doctrine focuses on the defendant's position of power, relative to that of the plaintiff:

> if one party has the power of saying to the other, 'That, which you require shall not be done except upon the conditions which I choose to impose,' no person can contend that they stand upon any thing like an equal footing. [264]

In this regard, duress *colore officii* could be regarded as closer in rationale to *Woolwich* than to duress *simpliciter*. However, if the courts accept the relevance of protest as an indication of involuntariness, this would suggest that the voluntariness of the plaintiff is not wholly irrelevant to duress *colore officii*.

Furthermore, the law of restitution is moving from narrowly defined causes of action to more general ones. This is evident from the courts' rejection of specific forms of mistake, such as liability mistakes and mistakes of fact, in favour of a broad test of causative mistake. This reflects the view that what matters is that the plaintiff's intention to confer the benefit is vitiated. A similar development within the law of duress is evident from the courts' willingness to move away from narrow tests such as duress of the person and duress of goods, in favour of a general test that focuses on the illegitimacy of the pressure and its causative effect. [265] In light of this development, there is a strong case for contending that the narrow category of duress *colore officii* should be subsumed within the general test for duress, whereby the nature of the demand made by a public official should simply be regarded as another form of illegitimate pressure.[266] If this development takes place, it is likely that many of the restrictions that traditionally inhibit duress *colore officii* as a cause of action will fade away.

Commentators have suggested that the ground of duress *colore officii* has been wholly supplanted by the *Woowich* principle 'which does all the work of extortion by colour of

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[263] *Morgan v Palmer* (1824) 2 B&C 729, 736 (Bayley J).

[264] *Ibid,* 734-735 (Abbott CJ). See also Birks, 'Restitution from Public Authorities' (n 34) 199. Virgo, *Principles of the Law of Restitution* (n 53) 406. See also *Lloyd's Bank v Bundy* [1975] QB 326 (CA) 337. For this reason, *Nepean Hydro* is not a colore officii case, as the plaintiff was another branch of government rather than a private individual: Collins, 'Restitution from Government Officials' (n 209) 412.

[265] *Borrelli v Ting* [2010] UKPC 21 [34]; *Farm assist Limited (in Liquidation) v Secretary of State for Environment Food & rural Affairs* [2008] EWHC 3079 (TCC) [8]; *DSND Subsea v Petroleum Geo-Services* [2000] BLR 530 [131].

[266] See Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2011) 500-501

office and more'.[267] However, it is not clear that duress *colore officii* is no longer of relevance in Irish law. *Murphy,* the primary authority for restitution from the executive, allowed recovery on the basis of duress *colore officii.*[268] In *O'Rourke v Revenue Commissioners*, Keane J considered a possible claim on the basis of duress *colore officii*, but rejected the doctrine's application to the facts.[269] Finally, the most recent case to consider claims for restitution from the state, the *Health Amendment Bill* case held that the issue of whether a payment was demanded *colore officii* was a material element of a claim for restitution of money paid without lawful authority.[270] Although it is questionable whether it is necessary to characterise a demand as being made *colore officii* if unlawfully exacted taxes are recoverable as of right, the reference to the *colore officii* nature of the payment demonstrates that the concept of *colore officii* continues to inform Irish thinking on restitution from public authorities.[271] Finally, there may be practical advantages to retaining duress and duress *colore officii* as grounds of restitution alongside the *Woolwich* principle. In particular, if the courts perceive that obtaining a payment by duress or by duress *colore officii* involves wrongdoing, the defendant will not be entitled to rely on the change of position defence where these causes of action are relied upon.[272]

Conclusions

This Chapter has argued that private law causes of action can be relied upon to obtain restitution from the state. In particular, mistake has proven to be an important weapon in the armoury of plaintiffs seeking restitution of overpaid tax,[273] as it confers important tactical

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[267] Virgo, *Principles of the Law of Restitution* (n 53) 407. See also Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2011) 499. However, Goff and Jones have argued that 'it may be premature to write the obituary notice of the *colore officii* line of cases': Goff and Jones, *The Law of Restitution* (n 262) [27-005].

[268] *Murphy v Attorney General* [1982] IR 241 (SC) 317.

[269] *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC) 10.

[270] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [72].

[271] *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Commission Report No 227: Cm 2731, 1994) [6.14]:

> Some of the *colore officii* cases permit recovery in situations which do not clearly fall within the principle established by the *Woolwich* decision. Until the courts pronounce on the correct future treatment of the *colore officii* cases, it is prudent to regard the cases as still affording a separate ground for restitution to that established by the House of Lords in the *Woolwich* case.

[272] See, Burrows, 'Public Authorities, Ultra Vires and Restitution' (n 65) 56; Burrows, *The Law of Restitution,* (3rd edn OUP, Oxford 2011) 266-267.

[273] See, for example, *DMG* [2006] UKHL 49, [2007] 1 AC 558; *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561.

advangtages on plaintiffs, such as extension of statutory limitation periods.[274] Similarly, duress and duress *colore officii* continue to provide a prominent basis for restitution of overpaid tax in Australia and in Ireland. As will be seen in Chapter 7, legislatures have sought to limit recourse to traditional unjust factors, such as mistake, by restricting limitation periods in mistake of law claims.[275] However, any abandonment of traditional unjust factors is due to legislative limitations upon these causes of action, rather than upon any inherent inability of traditional unjust factors to accommodate restitution claims against the state.

Not only can traditional unjust factors accommodate restitution claims against the state, the courts have also ensured that such causes of action can respond to claims from the state by limiting restrictions traditionally associated with such causes of action and by adopting expansive conceptions of mistake, duress *colore officii,* and duress.[276] However, two comments may be made in respect of this proposition. First, different jurisdictions have relaxed the requirements of different causes of action, so that the approach of the jurisdictions considered in this thesis is not consistent. For example, the Irish and Australian courts have relaxed the requirements of duress *colore officii* so that it is available in claims for recovery of overpaid tax.[277] In contrast, the English courts have maintained the traditional restrictions on duress *colore officii.*[278] Second, even where the courts have relaxed restrictions upon causes of action, they have done this in different ways.[279] For example, the English and Canadian courts directly abolished the mistake of law rule, whereas the High Court of Australia reinterpreted many of the cases commonly relied upon as authority for the mistake of law rule as cases founded upon a 'voluntary submission to an honest claim.'[280] It is not clear which approach the Irish courts are likely to follow if the mistake of law rule is ever expressly overruled in Ireland. As discussed in Part I, the approach of the English and Canadian courts is to be preferred as more intellectually honest to that of the High Court of Australia.

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[274] See section 32(1)(c) of the Limitation Act 1980 (England) and section 72(1) of the Statute of Limitations 1957.
[275] See sections 320 and 321 of the Finance Act 2004 (England) and section 107 of the Finance Act 2007 (England).
[276] *Dolan v Neligan* [1967] IR 247 (HC) 252; *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC) 10; *Rogers v Louth County Council* [1981] IR 265 (SC) 271.
[277] *Aerolineas Argentinas and Others v Federal Airports Corporation* (1995) 63 FCR 100; *Murphy v Attorney General* [1982] IR 241 (SC).
[278] *Woolwich* [1993] AC 70 (HL).
[279] *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) 161; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).
[280] *David Securities* (1992) 175 CLR 353 (HCA) 372-374.

It is no surprise that many developments discussed in this chapter, such as the abolition of the mistake of law rule, were first considered in cases involving claims for restitution from the state.[281] These developments are due to judicial recognition of the strong public interest in ensuring that the state is not unjustly enriched by unlawfully exacted taxes and that restitution claims against the state should not be defeated by technical restrictions. However, in spite of the relaxation of many of these restrictions, certain anomalous restrictions remain to be addressed within the Irish law of restitution. In particular, the existence of a protest requirement to engage duress *colore officii*[282] and the uncertain status of the mistake of law bar are serious shortcomings in the Irish law of restitution that should be resolved, and should be resolved in a manner that renders the law of restitution more principled and coherent.

[281] See *Mason* (1959) 102 CLR 108 (HCA)(duress); *Murphy v Attorney General* [1982] IR 241 (SC) (duress *colore officii*); *Air Canada* [1989] 1 SCR 1161, 59 DLR (4th) 161 (mistake); *Kleinwort Benson* [1999] 2 AC 349 (HL) (mistake).
[282] *O'Rourke* [1996] 2 IR 1 (HC) 10.

Chapter 6: Grounds Specific to Restitution from the Executive

In addition to the unjust factors outlined in Chapter 5, the law of restitution has developed specific grounds of restitution, which are motivated by public policy considerations, rather than focusing on the vitiation of the plaintiff's consent. The most important of these causes of action is the principle developed by Lord Goff in *Woolwich Equitable Building Society v IRC*, where he held that unlawfully exacted taxes are recoverable as of right. This cause of action, known as the *Woolwich* principle, is discussed in Part I. Part I considers the status of the *Woolwich* principle in Irish law. It traces the development of the *Woolwich* principle in English law, discusses its adoption into Irish law and considers the limitations placed on the cause of action by the Irish and English courts. It also considers the likelihood of its adoption in other jurisdictions.

Part I demonstrates that, although the *Woolwich* principle has been adopted in Irish law in terms broadly similar to its adoption in England, Ireland's adoption of the principle is undermined by difficulties stemming from the failure of the Irish courts to distinguish between the three bases of recovery canvassed in the *Woolwich* decision. Part I also highlights the uncertainty that exists at the parameters of the *Woolwich* principle as a matter of Irish and English law.

Part II considers the absence of consideration approach suggested by Lord Browne-Wilkinson in *Woolwich* and considers whether the Irish courts are likely to adopt it. It is beyond the scope of this thesis to enter into a detailed analysis of absence of basis in Irish law. However, Part II demonstrates that, although the Irish courts have not yet explicitly considered absence of consideration or absence of basis as a ground of restitution, the language in some recent decisions is reminiscent of an absence of basis approach. However, it argues that it would be unwise of the Irish courts to align itself with an absence of basis model.

Both the *Woolwich* principle and absence of consideration are causes of action specific to public bodies that exist within the private law of restitution. However, it has also been suggested that there should be a separate, public law, regime for the recovery of

overpaid taxes. This suggestion has received a mixed reception. Part III of this paper considers public law regimes that have been proposed in Canada and in England, and considers whether the decision of the Irish Supreme Court in *A v Governor of Arbour Hill Prison*[1] indicates that Ireland is likely to adopt a similar regime for recovery. Part III argues that such public law regimes are unnecessary, as restitutionary claims against the state can be accommodated within private law unjust factors. It also argues that those regimes are undermined by serious conceptual problems, and that they are likely to be attended by serious difficulties of practical application.

I. The Woolwich Principle

A. Development of the *Woolwich Principle*

Prior to the decision in *Woolwich Equitable Building Society v IRC*, commentators argued that existing unjust factors, such as mistake of law and duress *colore officii*, were unsuited to recovery of money unlawfully exacted by the state.[2] They suggested that an alternative ground of restitution should be available, based simply on the ultra vires nature of the state's demand.[3] The issue arose directly for consideration in *Woolwich Equitable Building Society v IRC*. Lord Goff held that, where a taxpayer sought restitution of unlawfully exacted taxes, it was unnecessary to prove the existence of mistake or compulsion. He held that 'the simple fact that the tax was exacted unlawfully should prima facie be enough to require its repayment'[4] and such unlawfully exacted payments are recoverable as of right.

Lord Goff advanced several considerations in support of this principle. First, he held that such a right to recovery was necessary to give full effect to Article 4 of the Bill of Rights:

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[1] *A v The Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88.

[2] Birks, 'Restitution from Public Authorities' (1980) Current Legal Problems 191, 194; Collins, 'Restitution from Government Officials' (1984) 29 McGill Law Journal 407, 412; Pannam, 'The Recovery of Unconstitutional Taxes in Australia and the United States', (1964) 42 Texas Law Review 777, 788. See, however, Burrows, 'Public Authorities, Ultra Vires and Restitution', in Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press, Oxford 1991) 40.

[3] Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' in Finn (ed) *Essays on Restitution* (Law Book Co, Sydney 1990) 194-195; Birks, 'Restitution from Public Authorities' (n 1) 206; Collins, 'Restitution from Government Officials' (n 1) 412. However, see, Fitzgerald, 'Ultra Vires as an Unjust Factor in the Law of Unjust Enrichment' (1993) 2 Griffith Law Review 1, 3-5.

[4] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL) 173. Hereafter *Woolwich*.

> retention by the state of taxes unlawfully exacted is particularly obnoxious, because it is one of the most fundamental principles of our law—enshrined in a famous constitutional document, the Bill of Rights 1688—that taxes should not be levied without the authority of Parliament; and full effect can only be given to that principle if the return of taxes exacted under an unlawful demand can be enforced as a matter of right.[5]

In Ireland, this principle is buttressed by the legislative primacy conferred on Dáil Éireann by the Irish Constitution.[6]

Second, Lord Goff observed that, where the Revenue Commissioners make a demand for payment, that demand is backed with the implicit coercive power of the state.[7] As Kelly J acknowledged in *Bank of Ireland Trust Services Ltd v Revenue Commissioners*, the 'nature of a demand for tax or similar impost on the citizen by the State, with the perceived economic and social consequences of non-payment stemming from the inequality of the parties' respective positions' was a significant factor in motivating the House of Lords to adopt the *Woolwich* principle.[8] This concern to protect individuals from the coercive power of the state had previously led the courts in many jurisdictions to adopt generous formulations of duress *colore officii* where it was relied upon to obtain recovery of unlawfully exacted taxes.[9] In *Woolwich*, Lord Goff rejected this approach in favour of an automatic right of recovery. Unlike duress *colore officii*, where the *Woolwich* principle is relied upon there is no need to show that the benefit was conferred in return for a withheld entitlement—it is sufficient that the tax was not lawfully due.

Third, Lord Goff referred to the *San Giorgio* principle[10] in EU law, which provides for a right of recovery of taxes exacted contrary to Community law. He argued that it was desirable that domestic law should develop in a similar manner, as 'it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under European law.'[11] However, although Lord Goff adverted to these

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[5] *Ibid,* 172.
[6] See Chapter 2 at 30-32.
[7] *Woolwich* [1993] AC 70 (HL) 172.
[8] *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC) 187.
[9] See, *State Bank of New South Wales Limited v Commissioner of Taxation* (1995) 62 FCR 371 (FCA) 381; *Dolan v Neligan* [1967] IR 247 (HC) 252. Discussed in Chapter 5 at 173-174.
[10] Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595.
[11] *Woolwich* [1993] AC 70 (HL) 177.

considerations, the driving force that he identified as underpinning the *Woolwich* principle was that 'common justice' required repayment of unlawfully exacted sums:

> Common justice seems to require that tax to be repaid, unless special circumstances or some principle of policy require otherwise; prima facie, the taxpayer should be entitled to repayment as of right.[12]

It is questionable whether justice provides a convincing or principled rationale for restitution of unlawfully exacted taxes,[13] as the specific public law principles discussed in Chapter 2 provide a convincing rationale for the *Woolwich* principle without recourse to a vaguely defined conception of justice. Moreover, appeals to justice, without more, suggests the importation of an element of discretion that is inconsistent with the principled development of the law of restitution.

In *Woolwich*, Lord Goff expressly held that he was developing a new principle rather than 'rediscovering' an old one.[14] Commentators have suggested that his failure to recognise a *pre-existing* cause of action was 'disappointing',[15] arguing that the right to recovery of unlawfully exacted taxes was implicitly supported by existing case law[16]—a view accepted by the Court of Appeal in *Woolwich.*[17]

It is not clear whether, prior to *Woolwich*, Irish law recognised a right to restitution of overpaid tax. In *Dolan v Neligan,* Kenny J expressed conflicting views as to whether public law principles could justify a right to recovery as of right where money was exacted unlawfully. He rejected the plaintiff's contention that money could be recoverable simply on the basis that it had been paid without statutory authority.[18] However, Kenny J's subsequent comments indicate that, had he not considered himself to be precluded from doing so by the

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[12] *Ibid,* 172. See also Goff and Jones, *The Law of Restitution* (Common Law Library, 7th edn Thomson Sweet and Maxwell, London 2007) [27-002]; *Harris v Quigley* [2005] IEHC 81, [2006] 1 IR 165 [29].
[13] McKendrick, 'Restitution of Unlawfully Demanded Tax' [1993] LMCLQ 88, 93.
[14] *Woolwich* [1993] AC 70 (HL) 167-168. However, he conceded that *Hooper v Exeter Corporation* (1887) 56 LJQB 457 could have provided a potential basis for establishing a right to recovery as of right.
[15] Burrows, *The Law of Restitution,* (3rd edn OUP, Oxford 2011) 501-503. See also, McKendrick, 'Restitution of Unlawfully Demanded Tax' (n 13) 90.
[16] Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' (n 2); McKendrick, 'Restitution of Unlawfully Demanded Tax' (n 13) 90; Burrows, *The Law of Restitution,* (n 15) 502-503. See further, *Campbell v Hall* (1774) 1 Cowp 204; *Hooper v Exeter Corporation* (1887) 56 LJQB 457; *Attorney General v Wilts United Dairies* (1921) 37 TLR 884; *British Oxygen Co Ltd v South of Scotland Electricity Board (No 2)* [1959] 1 WLR 587 (HL) 596.
[17] *Woolwich* [1993] AC 70 (CA) 97-98 (Glidewell LJ) and 141 (Butler-Sloss LJ).
[18] *Dolan v Neligan* [1967] IR 247 (HC) 253-254.

terms of the taxing legislation, he would have permitted recovery of unlawfully exacted duties on the basis that they had been collected in the absence of legislative authority:

> There was no legal authority for the demand for or collection of the duty and, were it not for the problem presented by s 30 of the Customs Consolidation Act, 1876, I would unhesitatingly hold that the plaintiff was entitled to recover the sum claimed as money had and received by the defendant to his use.[19]

This comment suggests that Kenny J was willing to hold money exacted in the absence of legal authority to be recoverable as of right, notwithstanding his earlier comments.

The *Woolwich* principle is not concerned with the plaintiff's vitiated intention to confer the benefit, but instead is founded on the constitutional principle that the state cannot retain money to which it is not entitled. As such, the *Woolwich* principle is a policy motivated ground of restitution rather than one predicated on vitiated intention or consent.[20]

An alternative possible basis for the *Woolwich* principle was considered by Henderson J in *FII Group Litigation*. He held that the *Woolwich* principle was 'founded on the unlawful levying of tax and therefore on the commission of a legal wrong'.[21] In *Littlewoods Retail Limited v Revenue and Customs Commissioners*, Vos J agreed with Henderson J's conclusion that the *Woolwich* principle was founded on wrongdoing, as the claim was based on 'unlawfulness in the form of unlawful exaction of taxes from the citizen.'[22]

This approach is undesirable. Although the *Woolwich* principle is based on unlawful exactions of taxes, this does not lead inevitably to the conclusion that the cause of action is founded on wrongdoing. In *Murphy v Attorney General*, the Irish Supreme Court expressly accepted that the State had received the money in good faith and held that the invalidity of the tax did not preclude the defendant from relying on the change of position defence.[23]

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[19] *Ibid,* 258.

[20] See Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' (n 2) 174-175; Virgo, *Principles of the Law of Restitution* (2nd edn OUP, Oxford 2006) 411. See also *Harris v Quigley* [2005] IEHC 81, [2006] 1 IR 165 [29].

[21] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch) [339]. Hereafter *FII Group Litigation*. The Court of Appeal considered that the Revenue Commissioners were precluded from relying on the change of position defence by virtue of the principle of effectiveness and so did not consider this point on appeal: [2010] EWCA Civ 103 [190]-[193].

[22] *Littlewoods Retail Limited v Revenue and Customs Commissioners* [2010] EWHC 1071 (Ch), [2010] STC 2072 [105]-[107].

[23] *Murphy v Attorney General* [1982] IR 241 (SC) 319. See also, Jones, 'Some Thoughts on Change of Position', in Burrows and Roger (eds), *Mapping the Law: Essays in Honour of Peter Birks* (OUP, Oxford 2006)

Similarly, in *Kingstreet*, Bastarache J held that the state had recovered the money in good faith and so could not be characterised as a wrongdoer.[24]

Furthermore, this focus on wrongdoing is unfortunate for three reasons. First, focus on wrongdoing obscures the important constitutional and public law principles underpinning the *Woolwich* principle. Second, it conflates the concepts of ultra vires and wrongdoing. This approach is inconsistent with that of the Irish Supreme Court in *Pine Valley*, where Henchy J held that an ultra vires act of a state actor did not of itself give rise to an action for damages 'unless he acted negligently, or with malice (in the sense of spite, ill-will or suchlike improper motive), or in the knowledge that the decision would be in excess of the authorised power'.[25] Third, focus on wrongdoing may give rise to uncertainty, as it is not clear what the courts mean by 'wrongdoing' in this context. [26] The better view is that the *Woolwich* principle is a policy-motivated ground of restitution, designed to give effect to the important public law considerations discussed in Chapter 2.

B. Adoption of Woolwich in other jurisdictions

Restitution from public authorities in Ireland, Australia and Canada is underpinned by similar considerations to those outlined by Lord Goff in *Woolwich*.[27] However, in spite of this, few jurisdictions have fully embraced the *Woolwich* principle. The Canadian Courts have adopted a public law ground of restitution. This is discussed in Part III. Part (i) of this Section considers the reasons behind the Australian courts' reticence in adopting the *Woolwich* principle and outlines the limited manner in which the Australian courts have

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73. This should be contrasted with situations where the state authority was aware of the invalidity of the legislation on which the charge is based. See *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105. Bant has argued that a recipient should demonstrate reasonable reliance on its security of receipt for the change of position defence to be made out and that an assumption by the Revenue that all taxes are lawful does not constitute such reasonable reliance: Bant, *The Change of Position Defence* (Hart, Oxford 2009) 151-155. However, the Irish courts are unlikely to be responsive to this argument, in light of the presumption of constitutionality enjoyed by statutes.

[24] *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [33]. Hereafter *Kingstreet*.

[25] *Pine Valley Developments Limited v The Minister for the Environment* [1987] 1 IR 23 (SC) 40. See also *Holland v Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)* [2007] Sask CA 18, 281 DLR (4th) 349 [31]. Affirmed on appeal: *Holland v Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)* [2008] SCC 42, 294 DLR (4th) [8]-[9]. See also *Peel (Regional Municipality) v Canada* [1992] 3 SCR 762, (1993) 98 DLR (4th) 140 (SCC) [1]; Bant, 'Restitution from the Revenue and Change of Position' [2009] LMCLQ 166, 172.. See also, Goymour and Virgo, 'Unlawful Tax: Tantalizing Glimpses of Restitution' (2010) 69 CLJ 232, 235; Shiers and Williams, '*FII GLO (Chancery)* and *FJ Chalke:* Tax and Restitution Developing Hand in Hand' [2009] British Tax Review 365, 375; Williams, *Unjust Enrichment and Public Law* (Hart Publishing, Oxford 2010) 13.

[26] This issue is also relevant in the context of the change of position defence. See Chapter 8 at 301-302.

[27] Although Lord Goff's remarks relating to the *San Giorgio* principle are inapplicable in Canada and Australia for obvious reasons.

engaged with the *Woolwich* principle. Ireland is the only jurisdiction of the three that has formally adopted the *Woolwich* principle. However, its approach has been, at times, incoherent. Adoption of the *Woolwich* principle in Ireland is discussed in Section (ii).

(i) Australia

The Australian Courts have not yet expressly accepted the *Woolwich* principle, although the principle has been judicially acknowledged in three different ways. First, some cases have assumed acceptance of the principle. In *Royal Insurance*, Mason CJ was guided by the relevant principles as laid down in *Woolwich*.[28] In other cases, such as *SCI Operations Pty Ltd v Commonwealth of Australia*, the courts have treated *Woolwich* as 'relevant,'[29] or as part of Australian law[30] without expressly approving the decision.

Second, Australian judicial opinion acknowledges that explicit recognition of the *Woolwich* principle in Australia is only a matter of time. In *Chippendale Printing Co Pty Ltd v Commissioner of Taxation and Another*, Lehane J held that the *Woolwich* principle was likely to be adopted in Australia,[31] and in *State Bank of New South Wales Limited v Commissioner of Taxation*, Wilcox J saw 'no reason why the reformulation of the law effected in *Woolwich* should not be adopted in Australia.'[32]

Third, the Australian courts may be willing to recognise the recovery of unlawfully exacted taxes as of right, without expressly recognising the *Woolwich* principle. In *Aerolineas Argentinas and Others v Federal Airports Corporation*, the Federal Court of Australia held that in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 2)*[33] the Full Court of the Federal Court recognised the 'availability of a common law action for moneys paid pursuant to an illegal provision of a statute or pursuant to an illegal demand made under a statute.'[34] However, the paragraph of *Kawasaki Motors (No 2)* upon which the court in *Aerolineas Argentinas* relied, speaks of recovery of unlawfully exacted taxes in the context of taxes exacted *colore officii* and therefore it is doubtful whether those cases, read in tandem,

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[28] *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 67. See also *Aerolineas Argentinas and Others v Federal Airports Corporation* (1995) 63 FCR 100, 121.

[29] *Aerolineas Argentinas and Others v Federal Airports Corporation* (1995) 63 FCR 100, 119-120; *Lamesa Holdings BV v Commissioner of Taxation* (1999) 92 FCR 210 [88].

[30] *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 69 FCR 346, 370-371. See also *Lamesa Holdings BV v Commissioner of Taxation* (1999) 92 FCR 210 [88].

[31] *Chippendale Printing Co Pty Ltd v Commissioner of Taxation and Another* (1996) 62 FCR 347 (FCA) 364. However, there are some difficulties in relying on this case as authority, as Lehane J considered that the decision in *Woolwich,* if it had any effect in Australian law, expanded the existing category of duress. See also, Wells, 'Restitution from the Crown: Private Rights and Public Interest' (1994) 16 Adelaide Law Review 191, 208.

[32] *State Bank of New South Wales Limited v Commissioner of Taxation* (1995) 62 FCR 371 (FCA) 378.

[33] *Comptroller-General of Customs v Kawasaki Motors Pty Ltd (No 2)* (1991) 32 FCR 243 (FCA).

[34] *Aerolineas Argentinas and Others v Federal Airports Corporation* (1995) 63 FCR 100 (FCA) 121.

provide strong support for restitution as of right for unlawfully exacted taxes. However, the Australian courts have no pressing need to incorporate the *Woolwich* principle into Australian law. This is in part due to their early abolition of the mistake of law bar, and in part due to their expansive approach to duress and duress *colore officii*[35]. However, it may simply be that the correct fact situation has not arisen in which the *Woolwich* principle, as opposed to any of the other causes of action, is available. It is worth remembering that *Woolwich* was an unusual case in that the claimant was unable to rely on either duress or mistake as a cause of action.[36]

(ii) Ireland

In Ireland, the courts have generally taken a liberal approach to claims for restitution from public authorities. For example, in *Dolan v Neligan*, Kenny J adopted expansive formulations of mistake and duress, removing limitations to both causes of action that would otherwise have precluded recovery by the plaintiff.[37] Similarly, in *Murphy v Attorney General*, the Supreme Court adopted a particularly generous formulation of duress *colore officii*, and, on that basis, permitted recovery of taxes paid under unconstitutional legislation.

With such a generous approach to traditional unjust factors, it would not have been surprising if the Irish courts had been slow to adopt the *Woolwich* principle. However, the *Woolwich* cause of action was adopted in *O'Rourke v Revenue Commissioners*.[38] Although Keane J purported to follow the majority approach in *Woolwich*, in abstracting what he considered to be 'the essence of the decision in that case',[39] he referred, not only to Lord Goff's approach, but also to the two bases of recovery suggested by Lord Browne-Wilkinson.[40] Thus, Keane J's decision in *O'Rourke* is problematic, in that, in applying the *Woolwich* decision, he appears to be willing to approve all three bases of recovery suggested in *Woolwich*: absence of consideration, compulsion, and the principle that unlawfully exacted taxes are recoverable as of right. In the case before him, Keane J concluded that the taxes paid by the plaintiff were recoverable 'as of right.'[41] Therefore, it could be argued that Keane J's reasoning in *O'Rourke* is straightforward: Keane J approved all three bases of recovery in

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[35] Both developments are discussed in detail in Chapter 5.
[36] Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' (n 2) 174-175.
[37] See Chapter 5 at 147-148 and 179-180. Furthermore, as noted above, Kenny J also appeared to be willing to order restitution of the taxes on the basis that they had been collected in the absence of legislative authority: *Dolan v Neligan* [1967] IR 247 (HC) 258.
[38] *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC).
[39] *Ibid,* 11.
[40] See Chapter 5 at 147-149.
[41] *O'Rourke* [1996] 2 IR 1 (HC) 18.

Woolwich, but the ground on which he allowed recovery in *O'Rourke* was Lord Goff's *Woolwich* principle. This appears to have been the interpretation of *O'Rourke* adopted in *Harris v Quigley*:

> After going on to consider whether the claim might be defeated by *Murphy v The Attorney General* and having concluded that having regard in particular to the limited scope of the payments it was not, Keane J went on to approve the law as laid down in *Woolwich v IRC* and the obiter dicta of Lord Goff cited above.[42]

Approval of each of the three distinct grounds of recovery in *Woolwich* would be unproblematic, provided that Keane J maintained a conceptual distinction between each independent ground. However, closer examination of Keane J's judgment demonstrates that he did not maintain such a distinction between the causes of action and, as a result, he misstated the rationale for the *Woolwich* principle. The source of this confusion is Keane J's comment that 'the majority decision in the *Woolwich* case was also founded on a wider principle, ie that the money was paid for no consideration.'[43] Because Keane J referred to all three possible grounds of recovery discussed by Lord Goff and Lord Browne-Wilkinson, it is not clear which of these grounds he considers to be based on this wider principle. However, in light of the fact that he ultimately applies the *Woolwich* principle as formulated by Lord Goff, the obvious conclusion is that he considers this ground of recovery, the *Woolwich* principle, to be founded on an absence of consideration rationale. This is inconsistent with commonly accepted justifications for the *Woolwich* principle, which focus on the principle of legality, the public interest that the state does not retain money to which it is not lawfully entitled, and a need for parity with the recovery of ultra vires disbursements made by the state.[44] The fact that the money was paid for 'no consideration' supports the absence of consideration approach advocated by Lord Browne-Wilkinson in *Woolwich*.[45]

Keane J's failure to maintain a conceptual distinction between the three separate grounds of recovery proposed in *Woolwich* has led to further confusion in Irish jurisprudence, as the courts have struggled to identify the different bases of recovery identified in *O'Rourke*. In *Bank of Ireland Trust Services Ltd v Revenue Commissioners*, Kelly J simply adopted Keane J's approach in *O'Rourke* without elaborating on what he considered that approach to

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[42] *Harris v Quigley* [2005] IESC 79, [2006] 1 IR 165 [20]. Internal citations omitted.
[43] *O'Rourke* [1996] 2 IR 1 (HC) 13. Compare *Harris v Quigley* [2005] IEHC 81, [2006] 1 IR 165 [29].
[44] See Chapter 2 at 33-36.
[45] See below at 223-224.

be.[46] However, Keane J's analysis can hardly be blamed for the total confusion that resulted in *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*. In the *Health Amendment Bill* case, it was not strictly necessary for the Supreme Court to define the scope of the *Woolwich* principle. It was sufficient for the Court to determine whether elderly people had a cause of action for restitution of charges that they had unlawfully paid for health care, and whether this cause of action constituted a form of constitutionally protected property. However, the Court did not confine itself to these conclusions and attempted to define what it considered to be the *Woolwich* principle:

> This court is satisfied that our law recognises a cause of action for restitution of money paid without lawful authority to a public authority. Material elements may be whether the money was demanded colore officii, whether it was paid under a mistake of law, whether the parties were of equal standing and resources, whether the money was paid under protest and whether it was received in good faith. The decision of this court in *Rogers v Louth County Council* may be relevant. It is not appropriate, in the context of the present reference, to expound the precise contours of that cause of action, in the absence of evidence of particular cases. It will be apparent that a large number of patients who paid unlawful charges enjoy such a cause of action.[47]

This passage is significant insofar as the first line constitutes recognition by the Supreme Court that unlawfully exacted taxes are recoverable as of right. However, there are several substantial difficulties with the court's description of this cause of action for recovery of unlawfully exacted charges.

First, it is not clear what the Supreme Court means when it refers to 'material elements' of a cause of action. Usually, elements of a cause of action are necessary, either cumulatively or in the alternative, or they are unnecessary. Referring to elements of a cause of action as 'material' is ambiguous and does nothing to clarify what is required to engage the *Woolwich* principle. Furthermore, if the *Woolwich* principle provides for recovery as of right, these material elements can add nothing to the cause of action. If money is recoverable as of right, it is recoverable as of right; the relative standing or good faith of the parties is irrelevant. Second, in treating *colore officii*, mistake of law, the equality of the parties' positions, protest and good faith to be elements of a single cause of action, the court conflated

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[46] *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC) 189-190.
[47] *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105 [72]. Hereafter *Health Amendment Bill*. Internal citations omitted.

several issues. Duress *colore officii* and mistake of law are separate, independent, grounds for restitution. It is not clear why they should be subsumed within a cause of action based on the ultra vires nature of the receipt. Third, it is unclear why the courts considered protest to be an element of the cause of action. The protest requirement has been disregarded in all other jurisdictions[48] and, prior to the *Health Amendment Bill* reference, had, in this jurisdiction, been confined to cases of duress *colore officii*. It was for this reason that the claim based on the *Woolwich* principle succeeded in *O'Rourke*, when the claim based on duress *colore officii* failed.[49] Furthermore, it is undesirable that the right to recovery is based on formal requirements that add nothing to the cause of action as a matter of principle. Fourth, although the equality of the parties positions was held to be relevant by Lord Browne-Wilkinson in his second stream of authority based on compulsion, it is not relevant where recovery is available as of right. In this regard, the equality between the parties' positions appears to be a superfluous factor, as it has been accepted as a matter of course that private parties dealing with the state are not in a position of equal strength.[50]

The approach of both the High Court and the Supreme Court in *Harris v Quigley*[51] avoids much of the confusion evident in the *Health Amendment Bill* case. In both courts, it was assumed that *O'Rourke* applied the *Woolwich* principle as developed by Lord Goff. In the High Court, Gilligan J suggested that the ground for restitution was that the money had been paid without legal basis.[52] In the Supreme Court, Geoghegan J held that, in the absence of a statutory authority to retain the overpaid income tax, the plaintiffs were entitled to restitution of the sums paid.[53] However, the Supreme Court did not consider itself to be differing in approach from that of Gilligan J in the High Court. This approach demonstrates that the confusion of the Irish courts stems from a failure to distinguish between the different approaches adopted by Lord Goff and Lord Browne-Wilkinson in *Woolwich*. As a result, the Irish courts frequently purport to adopt the general right to recovery as formulated by Lord Goff, but, in doing so, rely on concepts adumbrated by Lord Browne-Wilkinson in

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[48] *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 143. See also *Beaver Lamb & Shearling Co v R* [1960] SCR 505 (SCC) [70] (Ritchie J); *Glidurray Holdings Ltd v Qualicum Beach (Village)* (1981) 129 DLR (3d) 599 (BCCA) [9]-[10]; *Woolwich* [1993] AC 70 (HL) 186 (Lord Jauncey).

[49] See Chapter 5 at 174-175.

[50] *Woolwich* [1993] AC 70 (HL) 198 (Lord Browne Wilkinson); *British Steel plc v Customs and Excise Commissioners* [1997] 2 All ER 366 (CA) 378; *State Bank of New South Wales Limited v Commissioner of Taxation* (1995) 62 FCR 371 (FCA) 381; *Dolan v Neligan* [1967] IR 247 (HC) 252; *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC) 187.

[51] *Harris v Quigley* [2005] IEHC 81, [2005] IESC 79, [2006] 1 IR 165.

[52] *Harris v Quigley* [2005] IEHC 81, [2006] 1 IR 165 [32].

[53] *Harris v Quigley* [2005] IESC 79, [2006] 1 IR 165 [21]-[22].

developing their analysis. Until the Irish courts distinguish between the different causes of action considered in *Woolwich*, the general principle of recovery cannot develop in a coherent or principled fashion.

C. Parameters of the *Woolwich* principle.

In those jurisdictions that have adopted the *Woolwich* principle, there has been some disagreement as to its precise scope. This section considers the parameters of the *Woolwich* principle. Section (i) considers when the *Woolwich* principle will be engaged, and whether it is necessary that the payment made to the state was motivated by an unlawful demand. Section (ii) outlines the kinds of payments to which the *Woolwich* principle will apply. Section (iii) discusses whether the plaintiff must take judicial review proceedings to set the measure aside before advancing a claim pursuant to the *Woolwich* principle. Section (iv) analyses what kinds of invalidity will engage the *Woolwich* principle. Section (v) considers the relationship between the *Woolwich* principle and statutory schemes for recovery of overpaid tax.

(i) Does the demand requirement form part of the *Woolwich* principle?

What circumstances will engage the *Woolwich* principle? Is it sufficient that the plaintiff has made a payment to a public authority that was not due? Or, must the plaintiff establish that he made the payment in response to an ultra vires demand? Some commentators have argued that the *Woolwich* principle is contingent upon an ultra vires demand.[54] The impetus for such a requirement probably stems from duress *colore officii*, where the demand for payment made by the holder of a public office contained an implied threat that an entitlement would be withheld if the payment was not made. However, there are several objections to such a requirement. First, no justification has been offered as to *why* such a demand requirement would carry over from duress *colore officii*, as the *Woolwich* principle looks to the ultra vires nature of the tax. Second, there is little judicial support for such a requirement, as cases have overlooked any possible demand requirements. In *Eagerpath*, Brooke LJ appeared to consider that the *Woolwich principle* applied to 'wrongly paid taxes at common law'[55] and did not refer to a demand requirement. Similarly, in *Hudson Contract Services Limited v HMRC*, it was assumed that the *Woolwich* principle could apply to claims

[54] McInnes, 'Mistaken Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance*' (1996) Monash University Law Review 209, 224-225; Burrows, 'Restitution in Respect of Mistakenly Paid Tax' (2005) 121 LQR 540, 542.

[55] *Eagerpath Ltd v Edwards (Inspector of Taxes)* [2001] STC 26 (CA) [34].

in respect of 'sums that are not due *or* which are the result of an unlawful demand.' [56] These cases suggest that the courts have not considered a demand to be an essential element of the *Woolwich* principle and reflect the preferable view that *Woolwich* is premised on ultra vires receipts rather than ultra vires demands.[57]

Although Henderson J held in *FII Group Litigation* that such a requirement formed part of the *Woolwich* principle,[58] commentators have observed that the cases cited by Henderson J to justify this conclusion are not strong authority for a formal demand requirement. Lee has noted that the demand requirement was established by the Court of Appeal in *DMG*,[59] which was then followed in subsequent cases.[60] Once the decision of the Court of Appeal in *DMG* was overturned on appeal, it could provide no further authority for the presence of a demand requirement.[61] Shiers and Williams also have argued that *NEC Semi-Conductors* does not seem to be 'real authority' for a demand requirement:

> In that case, the Court of Appeal concluded and the House of Lords confirmed that the tax was in any event lawful. There was therefore simply no unlawfulness to raise the '*Woolwich* principle', and nothing else in the *NEC Semi-Conductors* judgment appears to support Henderson J's conclusion that it confined the ambit of *Woolwich* to cases involving a demand.[62]

Therefore the authorities upon which Henderson J based the demand requirement were weak. Furthermore, Henderson's approval of a demand requirement is heavily qualified, as he held that there must be a demand 'at least in some sense', suggesting that this requirement will be easily satisfied.[63]

On appeal, the Court of Appeal rejected Henderson J's conclusion that a demand was a necessary element of the *Woolwich* cause of action. It held that *NEC Semiconductors* did

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[56] *Hudson Contract Services Limited v The Commissioners for HM Revenue & Customs* [2007] EWHC 2561 (Ch) [42]. Emphasis added.
[57] Alder, 'Restitution in Public Law: Bearing the Cost of Unlawful State Action' (2002) 22 Legal Studies 165, 178.
[58] *FII Group Litigation* [2008] EWHC 2893 (Ch) [245]. Henderson J held that 'a Woolwich claim must involve, at least in some sense, the making of a demand by the Revenue'.
[59] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2005] EWCA Civ 78, [2006] Ch 243 [289] (Buxton LJ).
[60] See, for example, *Boake Allen Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25, [2006] STC 606 [159]-[162].
[61] Lee, 'Restitution from the Revenue: Exacting Principles from the Court of Appeal' [2010] RLR 75.
[62] Shiers and Williams, '*FII GLO (Chancery)* and *FJ Chalke*: Tax and Restitution Developing Hand in Hand' (n 25) 369.
[63] *FII Group Litigation* [2008] EWHC 2893 (Ch) [245].

not mandate such a conclusion. It was sufficient that the money was exacted without legal justification:

> We can see no reason why the cause of action should be confined to those taxes that are payable on demand as against those, such as VAT, that are payable without a demand....
>
> What is important is that the taxpayer pays "pursuant to a perceived obligation to pay which results from the combined presumption of constitutional validity of duly enacted legislation and of the holding out of such validity by the legislature"[64]

The issue has received little attention in Ireland or in Australia. Because the *Woolwich* principle has not been expressly adopted in Australia, little analysis has been devoted to its necessary elements. However, in *Qantas Airways Ltd v Commissioner of Taxation (Cth)*, the Federal Court rejected the plaintiff's claim for restitution on the basis of the ultra vires nature of the demand on the basis that no express demand was made.[65] Although the issue has not arisen for direct consideration in Ireland, there are some indications that the Irish courts have not adopted a demand requirement. In *O'Rourke*, Keane J allowed restitution of income tax deductions, which do not involve a payment in response to a demand.[66] In *Bank of Ireland Trust Services Ltd v Revenue Commissioners*, although Kelly J described the *Woolwich* principle as 'a prima facie right of recovery based solely on payment of money to an ultra vires demand by the public authority,'[67] he applied the *Woolwich* principle to the case before him, notwithstanding that sums paid pursuant to the VAT Act 1972 could not be regarded as being paid 'pursuant to a demand.' *O'Rourke* and *Bank of Ireland Trust Services* suggest that, although the Irish courts have referred to the *Woolwich* principle as being premised on the ultra vires nature of a demand, a demand is not an integral feature of the cause of action.

The approach adopted by the Irish Courts and by the Court of Appeal in *FII* is preferable to an interpretation of *Woolwich* that incorporates a demand requirement. First, it is consistent with the traditional view that *Woolwich* provides for recovery of unlawfully exacted taxes as of right.[68] Second, it avoids drawing an arbitrary distinction between taxes paid pursuant to a demand and payments where the elements of the taxing scheme cannot be

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[64] *FII Group Litigation* [2010] EWCA Civ 103 [158] and [164].
[65] *Qantas Airways Ltd v Commissioner of Taxation (Cth)* (2001) 115 FCR 288 [73]-[77].
[66] However, PAYE payments are a deduction at source that in *Murphy* had been likened to a compulsory deduction: *Murphy v Attorney General* [1982] IR 241 (SC) 317.
[67] *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC) 187.
[68] Goymour and Virgo, 'Unlawful Tax: Tantalising Glimpses of Restitution' (n 25) 233.

construed as imposing a demand.[69] After all, the public law considerations referred to in Chapter 2 apply to both types of payment.[70] The preferable view is that the *Woolwich* principle applies to ultra vires receipts, irrespective of whether or not the payment was made pursuant to a demand.

(ii) In what circumstances does the *Woolwich* principle apply?

In considering the circumstances in which the *Woolwich* principle will apply, it is necessary to answer two closely related questions. First, it is necessary to establish whether the availability of the *Woolwich* principle depends upon the nature of the transaction entered into by a public authority, or upon the public nature of the authority. Second, it is necessary to consider whether the *Woolwich* principle is limited to unlawfully exacted taxes or whether it can apply to other forms of taxes and levies.

Opinion is divided as to whether the *Woolwich* principle should be engaged as a result of the public nature of the defendant, or by the public nature of the impugned transaction. Some commentators have argued that 'the nature of the restitutionary claim in each case should be determined by reference to the characteristics of the recipient, rather than the perceived nature of the transaction.'[71] As a matter of authority and as a matter of principle, the better view is that availability of the *Woolwich* principle turns upon the nature of the transaction.[72] Indeed, although some cases have focused on the nature of the recipient, in determining whether private or public law principles should be engaged,[73] most have characterised *Woolwich* claims by reference to the nature of the transaction, rather than the nature of the defendant.[74] For example, Lord Goff in *Woolwich* considered that only payments of taxes and levies would be subject to a settled law defence, suggesting that he considered the nature of the charge to be the determining factor when considering recovery of overpayments to the state.[75] In *DMG*, Lord Hoffmann spoke in terms of transactions rather

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[69] *FII Group Litigation* [2010] EWCA Civ 103 [158]; Lee, 'Restitution from the Revenue: Exacting Principles from the Court of Appeal' (n 61).

[70] See also, Burrows, *The Law of Restitution* (n 15) 507.

[71] Virgo, *Principles of the Law of Restitution* (n 20) 405; Virgo, 'Restitution from Public Authorities: Past, Present and Future' [2006] Judicial Review 370, 379; Virgo, 'Deutsche Morgan Grenfell: The Right to Restitution of Tax Paid by Mistake Rejected' [2005] British Tax Review 281, 283-284.

[72] Williams, 'The Beginnings of a Public Law of Unjust Enrichment?' (2005) 16 Kings College Law Journal 194, 206; Burrows, *The Law of Restitution* (n 15) 508-509; *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Commission Report No 227: Cm 2731, 1994) [6.44]-[6.46]; Beatson, 'Mistakes of Law and Ultra Vires Receipts: The Law Commission Report' [1995] RLR 280, 286.

[73] See, for example, Buxton LJ's judgment in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2005] EWCA Civ 78, [2006] Ch 243.

[74] *Ibid,* [215] (Jonathon Parker LJ).

[75] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL) 174-176; See also *DMG* [2006] UKHL 49, [2007] 1 AC 558 [16].

than in terms of the nature of the defendant, holding that the *Woolwich* principle did not apply to 'private transactions'.[76] Similarly, in the same case, Lord Hope held that 'the element of public interest' was lacking in the case of private transactions involving public authorities.[77]

This approach is consistent with recent statements from other jurisdictions, which focus on the nature of the transaction rather than the nature of the body involved. In *Elder Advocates of Alberta Society v Alberta*, the Alberta Court of Appeal indicated that the traditional unjust enrichment principles would continue to apply where the claim related to an invalid contract entered into by a public authority.[78] Therefore, it is better to consider private transactions as falling within the 'private life' of public bodies and so subject to the general law of restitution. However, in certain cases, fiscal disruption issues may be relevant in the context of private transactions, even where more general public law considerations are absent.[79]

Focus upon the nature of the defendant is also undesirable as a matter of principle. Public authorities can act in a purely private capacity as well as in a public capacity. For example, the fact that a contract is concluded by a statutory authority is not sufficient to make it amenable to judicial review,[80] instead such contracts are construed according to ordinary principles of contract law.[81] Moreover, the rationale for the *Woolwich* principle is in some way premised on the coercive power of the State. This coercive power has nothing to do with transactions in which the State is no different from a private citizen.

Furthermore, focus on the nature of the transaction, rather than on the public nature of the body is consistent with the approach adopted in administrative law. In considering whether an administrative decision is amenable to judicial review, the English courts have moved away from simply considering the source of the power and place increasing

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[76] *Ibid,* [13].
[77] *Ibid,* [49].
[78] *Elder Advocates of Alberta Society v Alberta* [2009] ABCA 403, 315 DLR (4th) 59 [63]. See also *Pacific National Investments Ltd v Victoria (City)* [2004] SCC 75, 245 DLR (4th) 211 [32]-[35]. Similarly, in Australia, it appears that payments made to the state under an ordinary commercial agreement will fall outside the *Woolwich* principle. *Esso Australia Resources Ltd v Gas & Fuel Corporation (Vic)* [1993] 2 VR 99, 108; *State Bank of New South Wales Limited v Commissioner of Taxation* (1995) 62 FCR 371, 381-382.
[79] Virgo, 'Striking a Balance in the Law of Restitution' [1995] LMCLQ 362, 371. See also, Williams, *Unjust Enrichment and Public Law* (n 25) 35.
[80] *R (Beer (t/a Hammer Trout Farm)) v Hampshire Farmers Markets Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233 [16]. See also Woolf, Jowell and LeSueur (eds) *De Smith's Judicial Review* (6th edn Sweet and Maxwell, London 2007) [3-060].
[81] *Rosborough v Cork County Council* [2008] IEHC 94, [2008] 4 IR 572 [31]. See also, *Irish Pharmaceutical Union v Minister for Health* [2007] IEHC 222 [7.3]; *Dublin City Council v Williams* [2010] IESC 7.

significance on the nature of the function exercised by the body in the case before it.[82] In a legislative context, section 6(3)(b) of the Human Rights Act 1998 provides that in considering whether the Act is applicable to bodies other than core public authorities, the courts should have regard to whether or not the functions exercised by it are of a public nature.[83] Similarly, the Irish courts focus on the nature of the functions[84] and duties[85] performed by the public body[86] when considering whether a decision is amenable to judicial review. However, Irish jurisprudence places less weight on a function-based approach, considering the function exercised by the authority to be one of a number of relevant factors in considering whether the decision made by the body is amenable to judicial review.[87] This focus upon the nature of the function in public law means that, even if the availability of the *Woolwich* principle depends on the nature of the defendant, determining the nature of the body, if it is to be consistent with the approach adopted in administrative law, will simply bring the enquiry back to a consideration of the function being exercised by the body, which, in turn, requires us to consider the nature of the transaction.

The second issue to be considered is whether the *Woolwich* principle is limited to unlawfully exacted taxes or whether it can apply to other charges and levies. Academic

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[82] *R v Panel on Take-overs and Mergers, Ex parte Datafin Plc* [1987] QB 815 (CA) 847-848; *R v Jockey Club, ex parte RAM Racecourses Ltd* [1993] 2 All ER 225 (CA) 246 (Simon Brown J); *R (Beer (t/a Hammer Trout Farm)) v Hampshire Farmers Markets Ltd* [2003] EWCA Civ 1056, [2004] 1 WLR 233 [12]-[13] and [16]. See also Woolf, Jowell and LeSueur (eds), *De Smith's Judicial Review* (n 80) [3-041]-[3-068].

[83] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 [65]. Woolf et al have observed that the term 'function of a public nature' has been used with 'increasing frequency' in legislation: Woolf, Jowell and LeSueur (eds), *De Smith's Judicial Review* (n 80) [3-075].

[84] *Geoghegan v The Institute of Chartered Accountants in Ireland* [1995] 3 IR 86 (SC) 130-131.

[85] *Beirne v Commissioner of An Garda Síochána* [1993] ILRM 1 (SC) 2; *Bane v The Garda Representative Association* [1997] 2 IR 449 (HC) 470.

[86] See Delany, *Judicial Review of Administrative Action* (2nd edn Roundhall, Dublin 2009) 11-17.

[87] *O'Donnell v Tipperary (South Riding) County Council* [2005] IESC 18, [2005] 2 IR 483 [12]-[13]; *Geoghegan v The Institute of Chartered Accountants in Ireland* [1995] 3 IR 86 (SC) 130-131. The discussion in the present section will be confined to Irish and English law, in light of the similarities between these jurisdictions. However, there has been 'surprisingly little' discussion of this issue in Canadian Law: see, Woolf, Jowell and LeSueur (eds), *De Smith's Judicial Review* (n 80) at 171. Section 32 of the Charter will apply to a decision where the body itself is governmental in nature, or where the activity in question is 'governmental' in nature: *Eldridge v British Columbia* [1997] 3 SCR 624, 151 DLR (4th) 577 [44]; *Canadian Federation of Students v Greater Vancouver Transportation Authority* [2009] SCC 31, [2009] 2 SCR 295, 309 DLR (4th) 277 [15]. In Australia, the test for justiciability at a federal level is governed by section 3(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). It provides for review of 'a decision of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion ...) ... under an enactment.' The High Court of Australia has taken a restrictive approach to justiciability, both under state law and federal law. See *Neat Domestic Trading Pty Ltd v AWB Ltd* [2003] HCA 35, 215 CLR 27; *Griffith University v Tang* [2005] HCA 37, 221 CLR 99; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 (HCA). See further, Allars, 'Public Administration in Private Hands' (2005) Australian Journal of Administrative Law 126; Cassimatis, 'Statutory Judicial Review and the Requirement of a Statutory Effect on Rights or Obligations: "Decisions under an Enactment"' (2006) 13 Australian Journal of Administrative Law 169; Mantziaris and McDonald, 'Federal Judicial Review Jurisdiction after *Griffith University v Tang*' (2006) 17 Public Law Review 22.

commentary in England favours the view that the *Woolwich* principle should not be confined to taxes, but should also apply to other forms of charges.[88] The question has also been considered in several cases. In *Waikato Regional Airport Limited v The Attorney General*,[89] the Privy Council held that the *Woolwich* principle was not confined to payments of tax and was not necessarily precluded in situations where the claimant had received a commercial benefit from the transaction with the state. Instead, the Privy Council appeared to consider that a relevant, although not necessarily determinative, factor was that the charges were levied under a statutory power.[90]

In *Norwich City Council v Stringer*, the Court of Appeal held that the *Woolwich* principle was not confined to payments of tax and extended to payments of a similar nature.[91] In considering the kind of payments that would attract the *Woolwich* principle, the court had regard to the nature of the demand made by the state and the justice or injustice in allowing recovery.[92] The Court of Appeal held that the demand must be one backed by an implicit coercive threat. This was held not to exist in *Stinger*, where the local authority was simply seeking the return of money that it had paid to the defendant in error:

> ... although it is true that a demand was made, it was not a demand backed by coercive power of the sort that Lord Goff had in mind. It did not put the citizen at the disadvantage with the state that a demand for tax puts him: because (as one might think possibly Mr. Stringer was aware, and would have been aware if he had taken advice) the defect in the notice meant that the Council could not in fact enforce the recovery of the money. Putting it simply, it asked for its money back, a very different situation from a demand for tax which one is bound to fulfil on pain of penalty.[93]

This approach has two potential problems. First, the requirement that the demand is backed by an implicit threat is called into question by the fact that the Court of Appeal has since held that no demand is necessary to engage the *Woolwich* principle.[94] Second, the

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[88] See Williams, 'The Beginnings of a Public Law of Unjust Enrichment?' (n 72) 206. See also Birks, '"When Money is Paid in Pursuance of a Void Authority"—a Duty to Repay?' [1992] Public Law 580, 587-88; Beatson, 'Mistakes of Law and Ultra Vires Receipts: The Law Commission Report' (n 72) 286; Virgo, 'Restitution from Public Authorities: Past, Present and Future' (n 71) 373; Goff and Jones, *The Law of Restitution* (n 12) [27-003]. *Waikato Regional Airport Limited v Attorney General* [2003] UKPC 50, [2004] 3 NZLR 1 [79].

[89] *Waikato Regional Airport Limited v Attorney General* [2003] UKPC 50, [2004] 3 NZLR 1.

[90] *Ibid,* [80].

[91] *Norwich City Council v Stringer* (2001) 33 HLR 15, (2000) 2 LGLR 1102 (CA) [20].

[92] *Ibid,* [21].

[93] *Ibid,* [22].

[94] See above at 196-199.

Court's approach could operate unfairly against claimants, particularly those who do not, or may not be in a position to, seek legal advice. Such claimants may perceive a public authority to have the power to enforce payment or impose a penalty in the event of non-payment, particularly where the state holds itself out as having the power to charge when it does not. Third, the *Woolwich* principle does not turn on the plaintiff's intention or psychological motivation for making the payment. It is rooted in public policy. Therefore, it is irrelevant that the claimant in *Stringer* might not have felt compelled to make the payment. However, if the approach in *Stringer* is rejected, we get no further in determining what kinds of payments may be recovered under the *Woolwich* principle.

In Ireland, the *Woolwich* principle has yet to be applied to payments other than tax payments. However, the *Health Amendment Bill* case affirmed that unlawfully levied charges in respect of residential care could be recovered on the basis of a cause of action that could have been, and probably was intended to be, the *Woolwich* principle,[95] indicating that the *Woolwich* principle will not be confined to payments of tax in this jurisdiction. In Australia, some decisions have suggested that it would be 'unrealistic and unfair' to restrict the application of the *Woolwich* principle to payments of a public nature, made to a public authority, fall outside the strict definition of a tax.[96]

(iii) Must the plaintiff set the measure aside before seeking restitution pursuant to the *Woolwich* principle?

One issue that must be considered is whether the administrative decision or legislation imposing the charge must be challenged in judicial review proceedings before a claim in restitution can be brought to recover the money paid.

In England, the judicial review procedure must be used where the claimant is seeking a mandatory order, a prohibiting order, a quashing order, or an injunction under section 31 of the Senior Courts Act.[97] The judicial review procedure may be used where the claimant seeks a declaration or an injunction.[98] In Ireland, Order 84 of the Rules of the Superior Courts makes a similar provision, providing that orders of *certiorari*, *mandamus*, prohibition or *quo warranto* 'shall' be sought by way of judicial review,[99] whereas orders of declaration and

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[95] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [71]-[72]. See above at 193-194.
[96] *State Bank of New South Wales Limited v Commissioner of Taxation* (1995) 62 FCR 371 (FCA) 381-382. See also *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 69 FCR 346 (FCA) 378.
[97] See also, CPR 54.2.
[98] CPR 54.3.
[99] Rules of the Superior Courts, Order 84 Rule 18(1).

injunction 'may' be made by judicial review.[100] The judicial review procedure confers certain procedural protections on public authorities, and provides for the speedy resolution of matters pertaining to public law,[101] so that uncertainty exists regarding the validity of an administrative decision for as short a time as possible.[102] In light of these objectives, the English courts have previously taken a restrictive approach to the principle of procedural exclusivity; the House of Lords, in *O'Reilly v Mackman*, held that it is an abuse of process to begin by ordinary action something that should be challenged by way of judicial review.[103]

O'Reilly v Mackman is commonly regarded as the 'high-water mark'[104] of the courts' restrictive approach to the principle of procedural exclusivity. The introduction of the CPR has changed matters, as it reduces the differences between judicial review proceedings and plenary actions.[105] The principle of procedural exclusivity has lost much of its force in England as a result. In any event, subsequent cases adopted a more flexible or 'broad'[106] approach[107] and exceptions to the principle have been recognised:

> where public and private law decisions are not separate and distinct; where the public law aspect of a the claim was collateral to an issue which was the proper subject matter of private law proceedings; where private law aspects of the claim dominated the proceedings; where a person sought to challenge the validity of a public authority's decision as a defence in a civil claim; and where the parties did not contest the appropriateness of the chosen procedure.[108]

In particular, where a point of public law arises collaterally to a private law cause of action, it will be not be an abuse of process to proceed by way of ordinary action.[109] This is known as the 'collateral challenge' doctrine. Thus, in *Wandsworth LBC v Winder*, the defendant was entitled to rely on the ultra vires nature of rent increases as a defence to a claim to recover

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[100] Rules of the Superior Courts, Order 84 Rule 18(2).
[101] *O'Reilly v Mackman* [1983] 2 AC 237 (HL) 285; *Cocks v Thanet DC* [1983] 2 AC 286 (HL) 294-295.
[102] *Mackman* [1983] 2 AC 237, 284.
[103] *Ibid,* 285.
[104] Woolf, Jowell and LeSueur (eds) *De Smith's Judicial Review* (n 80) [3-101].
[105] *Ibid*, [3-103].
[106] *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 (HL) 653 (Lord Lowry).
[107] *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 (CA) [16]. See also *Boake Allen Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25, [2006] STC 606 [97] (Sedley LJ); *Bloomsbury International Limited & Ors v Sea Fish Industry Authority & Anor* [2009] EWHC 1721 (QB) [35]-[36].
[108] Woolf, Jowell and LeSueur (eds), *De Smith's Judicial Review* (n 80) [3-101]. Footnotes omitted. See also Williams, *Unjust Enrichment and Public Law* (n 25) 14.
[109] *O'Reilly v Mackman* [1983] 2 AC 237 (HL) 285; *Cocks v Thanet DC* [1983] 2 AC 286 (HL) 295-296; *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 (CA) [16].

arrears of rent by the claimant local authority.[110] Lord Fraser held that he was entitled to rely on the public law issue as a defence, notwithstanding that it did not fall within the exceptions identified by Lord Diplock in *O'Reilly v Mackman*, in the sense that that issue was not truly collateral to the action but was 'the whole basis of the respondent's defence and it is the central issue which has to be decided.'[111] In this regard, it could be said that the English courts have, in purporting to follow *Mackman*, greatly expanded their conception of what constitutes a 'collateral challenge'. Similarly, in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*, Lord Bridge held that

> where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him. [112]

Lord Bridge held that the statutory terms of the legislation governing the relationship between claimant and defendant conferred a private law right on the defendant as though under the terms of a contract, and the fact that the issue involved review of a discretionary decision of the defendant was not sufficient to take it beyond the scope of private law proceedings.[113]

It has been suggested that the duplication of proceedings should be avoided,[114] and that a challenge to an ultra vires taxing decision/legislation could be brought collaterally to a private law claim for restitution.[115] The approach of the English courts on this point has generally been flexible. In *British Steel plc v Customs and Excise Commissioners*, Millett LJ, who addressed the issue of procedural exclusivity in general terms, observed that it was not necessary take judicial review proceedings to challenge the commissioners' decision that the proposed use of the oil was not a qualifying use pursuant to the Hydrocarbon Oil Duties Act

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[110] *Wandsworth LBC v Winder* [1985] AC 461 (HL) 507-510.
[111] *Ibid,* 508.
[112] *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 (HL) 628-629.
[113] *Ibid,* 630.
[114] See Virgo, 'Restitution from Public Authorities: Past, Present and Future' (n 71) 375-376; McKendrick, 'Restitution of Unlawfully Demanded Tax' (n 13) 97; Birks, '"When Money is Paid in Pursuance of a Void Authority"—a duty to repay?' (n 88) 589; Burrows, *The Law of Restitution* (n 15) 509-510.
[115] Alder, 'Restitution in Public Law: Bearing the Cost of Unlawful State Action' (n 57) 167.

1979. Instead, 'the issue could also have been determined in private law proceedings for a declaration.'[116] However, in *Woolwich*, Lord Slynn suggested that such declaratory relief was superfluous:

> If a claim lies for money had and received, judicial review adds nothing. If the money falls in law to be repaid, a direct order for its repayment is more appropriate than a declaration that it should repay it or an order setting aside a refusal to repay.[117]

Similarly, in *Bloomsbury International Limited & Ors v Sea Fish Industry Authority & Anor*, the SIFA sought to argue that it was an abuse of process for the claimant to seek restitution of levies by way of a private law cause of action rather than seeking judicial review. Hamblen J followed the approach of the Court of Appeal in *British Steel*, holding:

> the Claimants are asserting an "entitlement to a subsisting right in private law" and are seeking "to establish private law rights". They assert a common law right in restitution. That right arose on payment. It did not arise out of an administrative decision, nor are the Claimants seeking to set aside the decision of an administrative body. The only remedy claimed by the Claimants in the present case is a monetary remedy. They do not need to seek and do not seek any administrative law remedy or a declaration or injunction.[118]

The court concluded that the case before them fell under the principle determined in *Winder* and that the defendant could rely on a public law defence as a defence to tax recovery proceedings.

In Ireland, the courts have consistently taken a more flexible approach to procedural exclusivity than in England and 'have frequently turned a blind eye to the consequences of the public-private divide (especially so in the case of public functions rather than public bodies) whilst spasmodically acknowledging its existence.'[119] In *O'Donnell v Dun Laoghaire Corporation*, Costello J declined to follow the approach of Lord Diplock in *O'Reilly v Mackman*, saying that it was not appropriate to construe the jurisdiction conferred by Order

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[116] *British Steel plc v Customs and Excise Commissioners* [1997] 2 All ER 366 (CA) 380. Sir Richard Scott, with whom Saville LJ agreed, simply held that section 9(4) of the Act did not exclude a common law right to restitution. See also *Bloomsbury International Limited & Ors v Sea Fish Industry Authority & Anor* [2009] EWHC 1721 (QB) [35]-[36].

[117] *Woolwich* [1993] AC 70 (HL) 200.

[118] *Bloomsbury International Limited & Ors v Sea Fish Industry Authority & Anor* [2009] EWHC 1721 (QB) [35].

[119] Hogan and Gwynn Morgan, *Administrative Law in Ireland* (3rd edn Roundhall, Dublin 1998) 766. See now, Hogan and Gwynn Morgan, *Administrative Law in Ireland* (4th edn Roundhall, Dublin 2010) 947-949.

84, rule 18 in that way.[120] Thus, it would seem that, although pursuing proceedings by plenary action instead of by way of judicial review may in some circumstances constitute an abuse of process, unlike the English approach, pursuit of the issue by plenary action will not constitute an abuse of process *per se*.[121]

This more expansive approach has not undermined the protections available to public authorities in the judicial review process. For example, in *O'Donnell*, Costello J was willing to apply the provisions relating to delay under Order 84, notwithstanding that the action had been brought by way of plenary action:

> It seems to me that in considering the effects of delay in a plenary action there are now persuasive reasons for adopting the principles enshrined in O. 84, r. 21 relating to delay in applications for judicial review, so that if the plenary action is not brought within three months from the date on which the cause of action arose the court would normally refuse relief unless it is satisfied that had the claim been brought under O. 84 time would have been extended.[122]

This approach has been described as one that accords 'with the usual tenor of Irish decisions which is anti-technicality and, often, sympathetic to applicants.'[123] In addition to a flexible approach to procedural exclusivity, the Irish courts have also adopted the collateral challenge doctrine.[124] However, the doctrine will not apply where the court hearing the plenary action did not have jurisdiction to hear the judicial review proceedings or to make the required order.[125] Nor will it apply where the body whose order is sought to be set aside is not a party to the plenary proceedings.[126] It has also been suggested that a stricter approach to collateral challenge will be adopted in civil, as opposed to criminal, proceedings.[127] The first two restrictions are readily understandable and reflect comparable restrictions adopted in English

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[120] *O'Donnell v Corporation of Dun Laoghaire* [1991] ILRM 301 (HC). See also *Dublin City Council v Williams* [2010] IESC 7.
[121] *O'Donnell v Corporation of Dun Laoghaire* [1991] ILRM 301.
[122] *Ibid.*
[123] Hogan and Gwynn Morgan, *Administrative Law in Ireland* (3rd edn Roundhall Sweet & Maxwell, Dublin 1998) 793. See now, Hogan and Gwynn Morgan, *Administrative Law in Ireland,* (4th edn Roundhall, Dublin 2010) 948.
[124] *Listowel v McDonagh* [1968] IR 312 (SC) 318; *Blanchfield v Judge Harnett* [2002] IESC 41, [2002] 3 IR 207, 220-221.
[125] *Slattery's Limited v Commissioner of Valuation* [2001] IESC 66, [2001] 4 IR 91, 99-100; *Blanchfield v Judge Harnett* [2002] IESC 41, [2002] 3 IR 207, 221; *Dublin City Council v Williams* [2010] IESC 7.
[126] *Slattery's Limited v Commissioner of Valuation* [2001] IESC 66, [2001] 4 IR 91, 99.
[127] *Blanchfield v Judge Harnett* [2002] IESC 41, [2002] 3 IR 207, 221 (Fennelly J) and 210 (Keane J).

public law.[128] However, no principled basis has been proposed for confining the collateral challenge doctrine to criminal proceedings, and there appears to be little basis for such a restriction.

Although flexibility has been the guiding principle for the Irish courts on the question of public law jurisdiction, the Irish courts have not gone so far as to permit restitution by way of plenary proceedings where the measure under which the money was paid is still extant. In many of the leading cases on restitution from public authorities, the charging provision had been impugned and set aside in earlier proceedings,[129] or in an earlier hearing of the same proceedings.[130] Recent cases appear to confirm that an administrative decision must be set aside before restitution can be claimed in relation to sums paid pursuant to that decision. In *Kildare Meats Limited v The Minister for Agriculture*, the plaintiffs sought restitution of sums paid as security to the defendant, following his decision to forfeit those sums. Fennelly J held that the plaintiffs were not entitled to proceed by way of plenary action where the decision to forfeit those sums had not been set aside on judicial review:

> This decision, until set aside or abandoned, had the effect, once the security had been forfeited, of depriving the plaintiffs of their right to the export refunds claimed. The decision could not simply be ignored or bypassed by a direct claim for payment of the refunds. The plaintiffs' proceedings were, therefore, misconceived.[131]

The English approach to the matter is preferable to that of the Irish courts. It avoids a duplication of proceedings and is premised on the predominantly accepted view that the right to restitution of overpaid tax arises as a matter of private law. However, if the right to restitution arises as a matter of public law, the judicial review procedure may be the most appropriate means of seeking recovery of overpaid tax. This issue is considered further in Part III.

(iv) What Kinds of Invalidity Will Engage the *Woolwich* Principle?

There are five situations in which the validity or enforceability of legislation, including taxing legislation, may be challenged. Therefore, there are five potential situations

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[128] *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 (HL) 650 (Lord Lowry); *Boddington v British Transport Police* [1999] 2 AC 143 (HL) 160. See also Woolf, Jowell and LeSueur (eds), *De Smith's Judicial Review* (n 80) [4-074].

[129] *Dolan v Neligan* [1967] IR 247 (HC); *Rogers v Louth County Council* [1981] IR 265 (SC); *O'Rourke* [1996] 2 IR 1 (HC).

[130] *Murphy* [1982] IR 241 (SC).

[131] *Kildare Meats Limited v Minister for Agriculture* [2004] IESC 8, [2004] 1 IR 92 [30]-[31].

in which the *Woolwich* principle may apply. A taxing measure may be challenged on the basis that it is ultra vires, misapplied, incompatible with the European Convention on Human Rights, contrary to EU law, or unconstitutional. Each means of challenge, if successful will give rise to different legal consequences. First, a taxation measure may be ultra vires, in the traditional sense of being ultra vires its parent statute. This is the paradigm example of when the *Woolwich* principle will apply, as, in *Woolwich*, the plaintiff successfully obtained restitution of money paid pursuant to invalid regulations, where the invalidity of the regulations stemmed from the fact that they were ultra vires the parent statute.[132]

Second, a plaintiff may have paid a tax that was not due because he paid the tax pursuant to a misinterpretation or a misapplication of valid legislation. Recovery can be obtained pursuant to the *Woolwich* principle in such a case, as an exaction of tax pursuant to a mistaken application of valid legislation is ultra vires. As Sir Richard Scott VC noted in *British Steel*, a measure will be ultra vires where it is based on ultra vires regulations or on a mistaken view of the law:

> An unlawful demand for duty must, in a sense, always be an ultra vires demand. Whether the demand is based on ultra vires regulations, or on a mistaken view of the legal effect of valid regulations, or on a mistaken view of the facts of the case, it will, as it seems to me, be bound to be a demand outside the taxing power conferred by the empowering legislation. If, for any of these reasons, a demand for tax is an unlawful demand, it seems to me to follow from the speeches of the majority in the *Woolwich* case that the taxpayer would, prima facie, become entitled, on making payment pursuant to the unlawful demand, to a common law restitutionary right to repayment.[133]

Similarly, in *O'Rourke v Revenue Commissioners*, the plaintiff successfully relied upon the *Woolwich* principle to recover taxes paid on the basis of a misapplication of valid legislation. Keane J held:

> I do not consider that any meaningful distinction can be drawn in this context between tax paid under a regulation subsequently found ultra vires, as in the *Woolwich* case,

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[132] *Woolwich* [1993] AC 70 (HL).

[133] *British Steel plc v Customs and Excise Commissioners* [1997] 2 All ER 366 (CA) 376. See also Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' [1993] 6 British Tax Review 442, 455-456; Burrows, *The Law of Restitution* (n 15) 505-507.

and excessive amounts paid by a taxpayer because the taxing authority has misconstrued a relevant statute or regulation, which is the position here.[134]

Third, the legislation may be declared to be incompatible with the European Convention of Human Rights, pursuant to section 5 of the ECHR Act 2003. However, such a declaration has no effect on the validity or enforceability of the legislation in question,[135] and the charging provision will continue in full force and effect. Therefore, where a declaration of incompatibility is made, the tax remains valid and due. The only possible exception to this is where the legislation can be interpreted in a manner that renders it compatible with the State's obligations under the Convention.[136] However, in such a case the money will be recoverable on the basis that it was paid pursuant to a misapplication of the statute rather than on the basis of the statute's incompatibility.

Fourth, the provision may be contrary to principles of EU law. Where a law is incompatible with EU law, it must be disapplied.[137] Furthermore, the right to an effective remedy in EU law[138] and the *San Giorgio* principle against unjust enrichment[139] provide dual imperatives for the principle that a State must repay charges levied in breach of EU law.[140] The *Woolwich* principle can be invoked to give effect to this principle.[141]

Finally, the provision may be repugnant to an Article of the Irish Constitution and, as such, is void *ab initio*.[142] As the statutory provision under which the tax was paid is void, the tax has been exacted without any statutory basis and, as such, would be recoverable under the *Woolwich* principle. Therefore, the *Woolwich* principle most clearly applies in cases of ultra vires and unconstitutional charges. Both these contexts are also contexts in which concerns in relation to the principle of legality are particularly prevalent.

(v) When will the Woolwich Principle be Excluded by a Statutory Regime?

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[134] *O'Rourke* [1996] 2 IR 1 (HC) 13. See also *Harris v Quigley* [2005] IESC 79, [2006] 1 IR 165 [21].
[135] Section 5(2) of the European Convention on Human Rights Act 2003 ('ECHR Act').
[136] See section 3 of the Human Rights Act 1998 (UK) and section 2 of the ECHR Act 2003 (Irl).
[137] *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners* [2008] UKHL 2, [2008] 1 WLR 195 [6]; *Autologic Holdings Plc v Inland Revenue Commissioners* [2005] UKHL 54, [2006] 1 AC 118 [17].
[138] Joined cases C-397/98 and C-410/98 *Metallgesellschaft Ltd and Hoechst AG v Commissioners of Inland Revenue* [2001] ECR I-1727 [95];
[139] Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595 [12].
[140] Case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of Inland Revenue* [2006] ECR I-11753 [202]; Joined cases C-397/98 and C-410/98 *Metallgesellschaft* [2001] ECR I-1727 [84]; Joined Cases C-192/95 to C-218/95 *Comateb* [1997] ECR I-165 [20].
[141] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [7] (Lord Hoffmann). Indeed, in *FII Group Litigation* [2010] EWCA Civ 103 [173]-[174], the Court of Appeal suggested that the *Woolwich* principle was the only cause of action necessary to give an effective remedy. This issue is discussed in Part III.
[142] See *Murphy* [1982] IR 241. Discussed in Part III below.

An important issue is whether or not the existence of a statutory regime of recovery precludes common law restitutionary causes of action. This question is not confined to the *Woolwich* principle, but applies to all restitutionary causes of action. However, the *Woolwich* principle was the cause of action relied upon in many of the recent Irish cases that have considered this issue[143] and therefore it is convenient to address the matter in this Chapter. Where statute provides an exhaustive code for recovery of overpaid tax, common law causes of action will be excluded.[144] For example, where sections 865 and 865A of the Taxes Consolidation Act 1997 apply to claims for repayment of tax, they provide an exclusive regime for the recovery of overpayments and the payment of interest thereon.[145] Where common law causes of action are not explicitly excluded, whether they are implicitly excluded by a statutory regime is a matter of statutory construction.[146] Therefore, it will turn on the precise wording and structure of the statutory scheme in question. However, it is possible to extrapolate some general principles from cases that have considered this issue.

First, common law rights of recovery will not be lightly excluded as a matter of statutory construction. In *Dolan v Neligan*, Walsh J held that section 25 of the Customs Consolidation Act 1976 provided a statutory entitlement to the repayment of overpaid customs duties. However, in addressing the question of whether section 30 of the same Act precluded a common law right to recovery he held that:

> Unless it is clear that the statute makes this not merely an exclusive but also a sole procedure, the importer may seek the recovery of his money by any of the procedures which would be open to him if s. 30 had not been enacted.[147]

A similar approach was adopted by the High Court of Australia in *The Commonwealth of Australia v SCI Operations Pty Limited*, where McHugh and Gummow JJ held that legislation

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[143] *O'Rourke* [1996] 2 IR 1 (HC); *Harris v Quigley* [2005] IEHC 81, [2005] IESC 79, [2006] 1 IR 165.
[144] *Commonwealth v SCI Operations Pty Ltd* (1998) 192 CLR 285 (HCA); *Chippendale Printing Co Pty Ltd v Commissioner of Taxation* (1996) 62 FCR 347 (FCA); *Riessen v South Australia*[2001] SASC 71, 79 SASR 82 [26]. In Canada, see, *Sentinel Hill Ltd Partnerships v Canada (Attorney General)* [2008] ONCA 506 [17]; *Sorbara v Canada (Attorney General)* [2009] ONCA 506, 309 DLR (4th) 162 [9]-[11]; *British Columbia Ferry Corp v Minister of National Revenue* (2001) 271 NR 345 [42]-[44]; *Consumers Glass Co v Canada* (1990) 107 NR 156 [6]-[7].
[145] See section 865(6) of the Taxes Consolidation Act 1997.
[146] *Sargood* (1910) 11 CLR 258 (HCA) 277; *Dolan v Neligan* [1967] IR 247 (SC) 271; *DMG* [2006] UKHL 49, [2007] 1 AC 558 [135]; *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54, [2011] 2 AC 15 [29]-[30]. See also *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Commission Report No 227: Cm 2731, 1994) [7.8].
[147] *Dolan v Neligan* [1967] IR 247 (SC) 271.

> should not readily be construed as conferring upon the executive branch of government a discretion to retain, rather than an obligation to refund, moneys received under a statutory entitlement which from a subsequent date has been displaced by the operation of that legislation.[148]

Second, where the statute does not provide a means of recovery, yet does not expressly *exclude* recovery of overpaid tax, the courts will allow recovery on the basis of common law restitutionary principles. In *Harris v Quigley*,[149] the plaintiff sought recovery of taxes that were held to have been overpaid by the Appeal Commissioners. Section 941 of the Taxes Consolidation Act provides that, where a case is stated following a determination of the Appeal Commissioners, outstanding income tax is to be paid by the taxpayer, subject to a refund following a determination of the High Court or Supreme Court. Conversely, no such right of immediate repayment existed in favour of the taxpayer. In the High Court, Gilligan J held that, although the relevant statutory provisions did not *confer* a statutory entitlement to repayment on the plaintiff, neither did they *exclude* an entitlement to repayment.[150] He held that the money was repayable in accordance with the *Woolwich* principle, notwithstanding the absence of an express statutory right of recovery.[151] This conclusion was upheld on appeal. Geoghegan J rejected the Revenue Commissioners' submission that the existence of a statutory regime necessarily excluded all common law rights to recovery, holding that the

> absence of a specific statutory provision providing for recoupment in a quite different situation from the situation covered by section 941(9) cannot give rise to a submission that there is a statutory prohibition on recoupment.[152]

The analysis in *Harris* draws on the common law principle of statutory construction, common to all common law jurisdictions,[153] that legislative enactments are presumed not to

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[148] *The Commonwealth of Australia v SCI Operations Pty Limited* [1998] HCA 20, 192 CLR 285 [63]. See, however, Kirby J's comments in the same case at [97].
[149] *Harris v Quigley* [2005] IEHC 81, [2005] IESC 79, [2006] 1 IR 165.
[150] *Ibid,* [24].
[151] *Ibid,* [32]-[34].
[152] *Ibid,* [18]-[22].
[153] *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 (HL) 131; *Sargood* (1910) 11 CLR 258 (HCA) 277; *Comptroller-General of Customs and Another v Kawasaki Motors Pty Ltd (No 2)* (1991) 32 FCR 243, 258. See also *Chippendale Printing Co Pty Ltd v Commissioner of Taxation and Another* (1996) 62 FCR 347, 135 ALR 471, 352 (Tamberlin J) and 366 (Lehane J); *Lamesa Holdings BV v Commissioner of Taxation* (1999) 92 FCR 210 [105] (Sackville J). In Canada see *R v Mercure* [1988] 1 SCR 234, 48 DLR (4th) 1 [126]. See also *Spooner Oils Ltd v Turner Valley Gas Conservation Board* [1933] SCR 629, [1933] 4 DLR 545 [22] (SCC).

affect vested rights unless expressly required by the act or by necessary implication.[154] In the specific context of restitution from public authorities, this principle entails that statutory schemes will only exclude common law rights of recovery where the statute so provides, whether expressly or by necessary implication.[155] However, the decision of the UK Supreme Court in *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* suggests that a test lower than 'necessary implication' will be permissible to displace common law rights of recovery. Sir John Dyson SCJ held that the test to be applied in considering whether or not a statutory scheme displaces common law rights was a simple one of statutory construction. He referred to *Revenue and Customs Commissioners v Total Network SL*[156] and *DMG*, and held that in neither case did the court set down a test of necessary implication. In fact, he noted that Lord Walker expressly held in *DMG* that the question of whether a statutory regime supersedes and displaces common law rights and remedies was 'a question of statutory construction.'[157] He observed that the test of necessary implication had been developed in a human rights context and was confined to situations where a statutory scheme involved the overriding of a common law or human right.[158] He concluded:

> The question whether the Secretary of State can recover overpayments of benefit does not involve any fundamental human rights of the Secretary of State nor does it engage the principle of legality. I do not accept the submission that the respondents have to surmount the high hurdle erected by Lord Hutton in *B (A Minor)* or Lord Hobhouse in *Morgan Grenfell.* Rather the question is whether, as a matter of statutory interpretation, section 71 is an exclusive code for recovery of overpayments.[159]

Sir John considered that this approach would apply even in the context of restitution of unlawfully exacted taxes, noting that '[T]here is nothing in the reasoning in the tax cases

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[154] See *Hamilton v Hamilton* [1982] IR 466 (SC) 484 (Henchy J); *Minister for Social, Community and Family Affairs v Scanlon* [2001] 1 IR 64 (SC) 87-89; *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [109]-[110]; *Kelly v Scales* [1994] 1 IR 42 (HC) 44-45.

[155] *Dolan v Neligan* [1967] IR 247 (HC) 262; *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306, [2009] Ch 69 [9]; *Comptroller-General of Customs and Another v Kawasaki Motors Pty Ltd (No 2)* (1991) 32 FCR 243, 258. See also *Chippendale Printing Co Pty Ltd v Commissioner of Taxation and Another* (1996) 62 FCR 347 (FCA) 352 (Tamberlin J) and 366 (Lehane J); *Lamesa Holdings BV v Commissioner of Taxation* (1999) 92 FCR 210 (FCA) [105] (Sackville J); *Barbour v University of British Columbia* [2010] BCCA 63, 316 DLR (4th) 354 [16]-[26].

[156] *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] AC 1174 [31] (Lord Hope), [60] (Lord Scott), [105]-[110] (Lord Walker), and [130] Lord Mance.

[157] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [135]. Sir John Dyson SCJ also relied on Lord Hoffmann's comments at [19].

[158] *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2010] UKSC 54, [2011] 2 AC 15 [29]-[30], relying on *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 (HL) and *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, [2003] 1 AC 563.

[159] *Ibid,* [31].

to indicate that the courts were applying a rule which was peculiar to tax cases'.[160] However, it is arguable that this approach should not apply to recovery of unlawfully exacted payments from the state, as such claims engage common law and constitutional property rights.[161] Furthermore, European law may require disapplication of a statutory regime that ousts common law rights. In *FII*, Henderson J held that section 33 of the Taxes Management Act was not applicable in the case before him, as it could not be applied where the tax was contrary to European law.

Third, where a statutory scheme does not apply to a particular tax, common law rights of recovery will not be excluded. Thus, in *Woolwich* and in *DMG*, the claimants' common law claims were not excluded because section 33 of the Taxes Management Act 1979 did not apply. In *Woolwich*, the tax had not been paid as a result of an erroneous assessment, but because the legislation itself was ultra vires,[162] and in *DMG* the tax was not charged under an assessment as required by section 33. Section 33 has been amended to significantly widen its scope. The statutory right to recovery is now contained in Schedule 1AB to the TMA.[163] Paragraph 1(1) of that Schedule provides that the statutory right of recovery applies to circumstances where

(a) a person has paid an amount by way of income tax or capital gains tax but the person believes that the tax was not due, or a person has been assessed as liable to pay an amount by way of income tax or capital gains tax, or

(b) there has been a determination or direction to that effect, but the person believes that the tax is not due.

This reformulation will encompass situations, such as that in *Woolwich* and in *DMG*, where the claim previously fell outside the statutory regime.

Fourth, a common law right to recovery will be considered to have been excluded by necessary implication where the rights relied upon are inconsistent with the statutory scheme in question. In *Monro v Revenue and Customs Commissioners*, Arden LJ held that:

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[160] *Ibid,* [32].
[161] See Chapter 2 at 47-52.
[162] *Woolwich* [1993] AC 70 (HL) 169. See also *British Steel plc v Customs and Excise Commissioners* [1997] 2 All ER 366 (CA) 376 and 380; *FII Group Litigation* [2008] EWHC 2893 (Ch) [436].
[163] Inserted by section 100 of the Finance Act 2009. See also Schedule 52, Pt 1, para 2 of the same act.

> the authorities give clear guidance that if Parliament creates a right which is inconsistent with a right given by the common law, the latter is displaced. By 'inconsistent' I mean that the statutory remedy has some restriction in it which reflects some policy rule of the statute which is a cardinal feature of the statute. In those circumstances the likely implication of the statute, in the absence of contrary provision, is that the statutory remedy is an exclusive one.[164]

In the case before her, Arden LJ held that the 'necessary implication' could be implied from the fact that the legislature had created 'a specific remedy with a limitation to exclude payments made under generally accepted practice' which 'would be defeated if the court permitted an action to be brought at common law.'[165] Similarly, in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd*, the Federal Court of Australia held that a common law remedy will be excluded by necessary implication where its continued existence would render nugatory the more restrictive statutory mechanism for recovery.[166] In *Child Poverty Action Group* Sir John Dyson SCJ held that '[T]he question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended to co-exist with it.'[167] He held that

> [T]he question is not whether there are any differences between the common law remedy and the statutory scheme. There may well be differences. The question is whether the differences are so substantial that they demonstrate that Parliament could not have intended the common law remedy to survive the introduction of the statutory scheme.'[168]

This principle also applies to exclusive statutory procedures for recovery. *Autologic Holdings Plc v Inland Revenue Commissioners* concerned the question of an exclusive statutory procedure rather than a statutory right justiciable in the courts. The defendants contended that the claimants' claims were not properly justiciable in the High Court, but

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[164] *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306, [2009] Ch 69 [22].
[165] *Ibid,* [23]. See also the purposive approach to interpreting s 80 of the Value Added Tax Act 1984 adopted by Henderson J in *Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners* [2012] EWHC 458 (Ch) [104]-[110].
[166] *Comptroller-General of Customs and Another v Kawasaki Motors Pty Ltd (No 2)* (1991) 32 FCR 243 (FCA) 263, Beaumont J dissenting at 254. See also *Qantas Airways Ltd v Commissioner of Taxation (Cth)* (2001) 115 FCR 288 (FCA) [78]-[82]; *Lamesa Holdings BV v Commissioner of Taxation* (1999) 92 FCR 210 (FCA) [105].
[167] *Child Poverty Action Group* [2010] UKSC 54, [2011] 2 AC 15 [34]. This approach has been adopted in Australia, albeit in a different context, in *Bromley v Forestry Commission (NSW)* [2001] NSWCA 34, 51 NSWLR 378 [49].
[168] *Child Poverty Action Group* [2010] UKSC 54, [2011] 2 AC 15 [34].

instead should have been pursued via the statutory appeal to the Appeals Commissioner. Lord Nicholls, with whom Lord Millett and Lord Steyn agreed, held:

> Clearly the purpose intended to be achieved by this elaborate, long established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed...The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.[169]

Lord Nicholls held that it would constitute an abuse of process where 'the court is satisfied the taxpayer's court claim is an indirect way of seeking to achieve the same result as it would be open to the taxpayer to achieve directly by appealing to the appeal commissioners.'[170] Thus, where the relief sought by the claimant could be granted by the Appeals Commissioners, it was an abuse of process to pursue a claim through the courts. This was the case, even though the Appeals Commissioners had very limited powers to award a party its costs or to award interest on the sums repaid.[171] In light of the ECJ's determination that full restitution requires the payment of compound interest,[172] it is questionable whether a statutory mechanism will give an effective remedy for the purposes of European law when it cannot award such interest. However, Lords Nicholls qualified his comments, stating 'provided always that the statutory route accords with the Community law principles of equivalence and effectiveness.'[173]

Fifth, in considering whether the common law is supplanted by a statutory remedy, the courts will take into account whether or not a common law remedy existed at the time that the statutory procedure was introduced. In *Dolan v Neligan*, the Customs Commissioner argued that sections 30 and 31 of the Customs Consolidation Act 1976, which provided a statutory procedure for the recovery of overpaid customs duties, precluded the existence of any common law remedy for the recovery of overpaid customs. In considering whether or not the act displaced a common law right of recovery, Kenny J considered it to be relevant whether or not the common law cause of action was perceived to be in existence at the time

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[169] *Autologic Holdings Plc v Inland Revenue Commissioners* [2005] UKHL 54, [2006] 1 AC 118 [12].
[170] *Ibid,* [13].
[171] *Ibid,* [24]-[25].
[172] See Chapter 3 at 109-110.
[173] *Autologic Holdings Plc v Inland Revenue Commissioners* [2005] UKHL 54, [2006] 1 AC 118 [38].

that the statute was enacted. If the common law right was recognised at the time of enactment, clear words within the statute would be required to override it. He held:

> The existence of the cause of action for money extorted *colore officii* before the Act of 1876 was passed favours the plaintiff's argument because a statute is not to be construed as depriving a plaintiff of a cause of action which existed at the date when it was passed unless clear words with this effect are in the Act.[174]

This approach finds parallels in Australia, where it has been held that

> ...a statute which provides a new remedy where none is available at common law is presumed, as we have seen, to be intended to provide an exclusive remedy and, to the extent that there are overlapping common law remedies available in cases to which the statute applies, it is all the more improbable that those remedies are intended to coexist with the statutory remedies...[175]

The approach of the English courts also reflects this presumption. Section 33 of the Taxes Management Act 1970 was enacted as an 'enabling remedy' to provide a right of recovery where none existed before.[176] Therefore, in *Child Poverty Action Group*, the Court, considering the proper interpretation of section 71 of the Social Security Administration Act 1992, observed that the failure to exclude the common law right of repayment stemmed from the fact that no such right to repayment existed at the time of section 71's enactment and held that Parliament's failure to expressly exclude common law rights of recovery did not reflect a legislative intention to preserve common law rights to recovery.[177]

Tensions between statutory and common law rights of recovery are not confined to where private individuals seek restitution from the state. Statutory bodies have also tried to rely on common law rights to remedies to supplement statutory rights of recovery. *Total Network* involved a claim for VAT believed by the Revenue Commissioners to have been misappropriated by virtue of a carousel fraud. Although there was a statutory mechanism for the recovery of wrongfully paid VAT in the form of section 73(2) of the Value Added Tax

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[174] *Dolan v Neligan* [1967] IR 247 (HC) 262.
[175] *Chippendale Printing Co Pty Ltd v Commissioner of Taxation and Another* (1996) 62 FCR 347 (FCA) 367.
[176] *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306, [2009] Ch 69 [2]. See also Jones, '*Monro v HMRC*: Defining the Scope of Section 33 TMA 1970' (2008) British Tax Review 315, 319; Jones, 'Finance Act Notes: Section 100 and Schedule 52 - Recovery of Overpaid Tax' (2009) 5 British Tax Review 635, 635.
[177] *Child Poverty Action Group* [2010] UKSC 54, [2011] 2 AC 15 [14] (Lord Brown) and [22] (Sir John Dyson SCJ).

Act 1994 (VATA), this right to recovery was confined to recovery from UK taxpayers. Where a beneficiary under a carousel fraud was not a UK taxpayer, he fell outside the statutory scheme for recovery. In *Total Network*, the Revenue Commissioners sought to circumvent this anomaly by seeking damages for the tort of conspiracy from the defendant. Total Network argued that the statutory mechanisms for recovery constituted a comprehensive scheme for the collection of VAT. If none of the statutory remedies was available against the defendant, the Revenue Commissioners could not have recourse to common law causes of action, as such an approach would constitute the levying of taxation without parliamentary authority. The Court of Appeal, relying on the decision of the House of Lords in *DMG*, held that sections 73(2) and 77 of the 1994 Act provided 'a comprehensive remedy in respect of over-payment of credits and displace any common law remedy,'[178] precluding recourse to the tort of unlawful means conspiracy.

This determination was overturned by a majority of the House of Lords. Lord Mance, Lord Scott, and Lord Walker held that an alternative claim of unlawful means conspiracy was available to the Revenue Commissioners.[179] Lord Walker, with whom Lord Scott agreed, noted that the Commissioners' statutory powers were not confined to the 1994 Act, but were also derived from the Commissioners for Revenue and Customs Act 2005, which granted the Commissioners the specific power to conduct civil proceedings.[180] He held:

> ... if an official vehicle carrying cash belonging to the commissioners (cash representing collected taxes) were hijacked and the cash stolen, it seems to me that the commissioners would undoubtedly have a civil remedy available to reclaim it, if the robbers were apprehended and the proceeds of the robbery traced to a bank account. In my opinion the present case is essentially the same. [181]

However, a minority of the House of Lords considered that the statutory regime provided an exclusive and comprehensive regime of recovery, which precluded reliance on any tortious remedies.[182] Lord Hope held that, in light of this, the 'commissioners' attempt to resort to the common law for this purpose, which is without precedent, is contrary to principle.'[183] Lord Neuberger also raised the concern that to allow common law remedies to supplement

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[178] *Revenue and Customs Commissioners v Total Network SL* [2007] EWCA Civ 39, [2008] 1 AC 1174 (CA) [84]-[86].
[179] *Ibid,* [110] (Lord Walker), [128] (Lord Mance).
[180] *Ibid,* [106].
[181] *Ibid,* [109]. See also [128] (Lord Mance).
[182] *Ibid,* [30]-[31] (Lord Hope) and [177] (Lord Neuberger).
[183] *Ibid,* [31].

statutory rights to recovery would render nugatory the limitations on recovery and procedural protections built into sections 73 and 77 of the Value Added Tax Act 1994.[184] He also observed that 'non-payment of tax due under a statute should not amount to a tort actionable at the suit of the commissioners', as the Revenue Commissioners had not suffered an identifiable loss that could be compensated by an award of damages.[185]

The matter has been reconsidered by the UK Supreme Court in *Child Poverty Action Group*.[186] This case concerned the Secretary of State's attempts to recover overpaid social security benefits. Section 71 of the Social Security Administration Act 1992 permitted the Secretary of State to recover overpayments where the claimant had received an inflated award arising from misrepresentation or the non-disclosure of a fact material to the claimant's entitlement to receive the benefits in question. This right existed in tandem with a common law right to recovery of payments of sums greater than the sum awarded to the claimant. In cases where the Secretary of State had made inflated awards as a result of an error not arising from misrepresentation or non-disclosure, he developed a practice of writing to such claimants and asserting a common law right to recovery of those payments. The applicant challenged this practice, claiming that a right to recovery in the case of an inflated award was confined to the circumstances set out in section 71 of the Act, namely to cases where the overpayment arose as a result of the claimant's non-disclosure or misrepresentation. The UK Supreme Court upheld this challenge, holding that 'section 71 constitutes a comprehensive and exclusive scheme for dealing with all overpayments of benefit made pursuant to awards'.[187]

The Court observed that the failure to exclude the common law right of repayment stemmed from the fact that no such right to repayment existed at the time of section 71's enactment and held that Parliament's failure to expressly exclude common law rights of recovery did not reflect a legislative intention to preserve common law rights to recovery.[188] Lord Brown held that it was

> inconceivable that Parliament would have contemplated leaving the suggested common law restitutionary route to the recovery of overpayments available to the

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[184] *Ibid*, [201].
[185] *Ibid*, [179].
[186] *Child Poverty Action Group* [2010] UKSC 54, [2011] 2 AC 15.
[187] *Ibid*, [12] (Lord Brown).
[188] *Ibid*, [14] (Lord Brown) and [22] (Sir John Dyson SCJ).

> Secretary of State to be pursued by way of ordinary court proceedings alongside the carefully prescribed scheme of recovery set out in the statute.[189]

He concluded that the legislation demonstrated that 'Parliament from first to last has taken the view that only those who themselves brought about the overpayments should be liable to reimburse them and that in their cases reimbursement should be made easily enforceable.'[190] However, in his concurring judgment, Sir John Dyson SCJ warned that judges should not be too ready to find that statutory provisions have displaced common law rights and should only so find where the statutory scheme is inconsistent with the common law rights.[191]

Conclusions

Although the Irish courts have supplemented the generously formulated causes of action discussed in Chapter 5 with the *Woolwich* principle, which permits recovery of overpaid tax as of right, Ireland's adoption of this principle is beset with significant difficulties. This is partly due to the failure of Keane J in *O'Rourke* to identify the rationale for the *Woolwich* principle or to consider its relationship with the other grounds of recovery discussed in the *Woolwich* case. It is also due to the fact that the Irish courts have had few opportunities to refine the parameters of the *Woolwich* principle in subsequent cases.

When the Irish courts come to consider the parameters of the *Woolwich* principle, their approach is likely to be defined by flexibility. For example, the Irish courts have not yet required an unlawful demand on the part of the state to engage the *Woolwich* principle. Furthermore, the flexible approach traditionally adopted by the Irish courts in relation to procedural exclusivity means that the Irish courts are unlikely to be troubled by jurisdictional issues where restitution is sought from a public body. If such an issue arises, it is likely that they will follow the flexible approach adopted in *British Steel plc v Customs and Excise Commissioners*. Moreover, the decision of the Supreme Court in *Harris v Quigley*, coupled with common law and constitutional presumptions against interference with vested rights, means that the Irish courts will not lightly hold that the existence of a statutory regime for recovery has supplanted common law rights to restitution of overpaid tax, in the absence of a clear statutory intention that this should be the case.

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[189] *Ibid*, [14].
[190] *Ibid*, [15]. See also [24] (Sir John Dyson SCJ).
[191] *Ibid*, [34].

Having considered the *Woolwich* principle in detail, it is now necessary to turn to the other causes of action considered in that case. The first of these, the general principle of compulsion advocated by Lord Browne-Wilkinson, was considered in Chapter 5. Part II considers the other cause of action suggested by Lord Browne-Wilkinson: absence of consideration.

II. Absence of Consideration

Absence of consideration is an unjust factor that has received a mixed reception in many jurisdictions. It was first developed by Lord Browne-Wilkinson in *Woolwich*, who held that there were two streams of authority relating to unlawfully exacted taxes, one of which was 'founded on the concept that money paid under an ultra vires demand for a tax or other impost has been paid without consideration.'[192] He concluded:

> I find the approach attractive: money paid on the footing that there is a legal demand is paid for a reason that does not exist if that demand is a nullity. There is in my view a close analogy to the right to recover money paid under a contract the consideration for which has wholly failed.[193]

In comparison with the automatic right to recovery of unlawfully exacted tax identified by Lord Goff in *Woolwich*, and discussed in Part I, Lord Browne-Wilkinson's absence of consideration analysis has received comparatively little judicial attention. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, Hobhouse J purported to adopt an 'absence of consideration' approach to restitution of money paid pursuant to ultra vires contracts.[194] This approach was upheld on appeal, where Dillon LJ held that *Woolwich* was best characterised as a case in which there had been no consideration for the payment.[195]

The failure to adopt Lord Browne-Wilkinson's approach may stem from the fact that it is not clear what he means by absence of basis. There are two possible explanations to absence of basis. The first is that 'absence of consideration' is an extended variant of total consideration. Instead of requiring that the consideration for the payment totally failed in the

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[192] *Woolwich* [1993] AC 70 (HL) 197. The cases that Lord Browne-Wilkinson relied on as authority for this proposition were *Campbell v Hall* (1774) 1 Cowp 204, *Dew v Parsons* (1819) 2 B & Ald 562, *Steele v Williams* (1853) 8 Exch 625, and *Queens of the River Steamship Co Ltd v Conservators of the River Thames* (1899) 15 TLR 474.The other stream of authority, which is based on compulsion, has already been discussed in Chapter 5.
[193] *Woolwich* [1993] AC 70 (HL) 197. See further, Williams, Unjust Enrichment and Public Law (n 25) 24-26.
[194] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 1 WLR 938 (QBD) 924.
[195] *Westdeutsche* [1994] 1 WLR 938 (CA) 945.

traditional sense in which this cause of action is commonly understood, absence of consideration extends this cause of action to cases in which the transaction or demand for payment was invalid, such that there is no legally valid consideration for the payment. The second, and more likely explanation is that Lord Browne-Wilkinson's approach is closely aligned to the absence of basis approach developed by Birks and discussed in Chapter 2.

There are several reasons why the latter interpretation is to be preferred. First, it is difficult to reconcile this extended meaning of 'consideration' with the principle that 'consideration' in the context of 'total failure of consideration' is 'not the promise which is referred to as the consideration, but the performance of the promise.'[196] This new interpretation seems particularly inapposite when one considers that public authorities will rarely be obliged to make counter-performance in response to payments received by them in their public capacity. Second, it is not clear that any meaningful distinction can be drawn between concluding that there is no valid consideration for a payment where a transaction is void, and a conclusion that there is no legal basis for a payment where the transaction is void.

Burrows has described Lord Browne-Wilkinson's 'absence of consideration' approach as 'unhelpful'.[197] He argues that a wide approach to absence of basis would render all gifts recoverable, whereas a narrow approach of absence of basis 'is circular and begs the questions of whether there is an unjust factor.'[198] However, absence of basis appears to have been approved, albeit obliquely, by Keane J in *O'Rourke v Revenue Commissioners*. Keane J approved both Lord Goff's *Woolwich* principle and Lord Browne-Wilkinson's two alternative bases for recovery,[199] holding that 'the majority decision in the *Woolwich* case was also founded on a wider principle, ie that the money was paid for no consideration.'[200] It is unclear from his judgment whether or not he distinguished between Lord Browne-Wilkinson's approach and Lord Goff's general right of recovery, and he may simply have considered that an absence of consideration analysis underpinned the *Woolwich* principle.[201] In *Harris v Quigley*, Gilligan J's judgment also hints at an 'absence of consideration' approach. In that case, Gilligan J suggested that the basis for the cause of action identified in *O'Rourke* was

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[196] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 48.
[197] Burrows, *The Law of Restitution* (n 15) 504.
[198] *Ibid.*
[199] *O'Rourke* [1996] 2 IR 1 (HC) 12-13.
[200] *O'Rourke* [1996] 2 IR 1 (HC) 13. Compare *Harris v Quigley* [2005] IEHC 81, [2006] 1 IR 165 [29].
[201] See above at 191-195.

that the money had been paid without legal basis.[202] Similarly, English cases on restitution from public authorities have lapsed into the language of absence of basis.[203] Williams has argued that this trend is unsurprising, as '"absence of consideration" is merely a private law mistranslation of *ab initio* voidness in public law':[204]

> From the public law perspective...the concept of 'no consideration' begins to make more sense. In relation to the *Woolwich* case, it was argued that a declaration that a public law act was ultra vires is a declaration that it never existed in the first place, because it could not, it was void, ab initio, and that it was a recognition of this public law finding that became mistranslated into the private law concept of 'absence of consideration.'[205]

In addition to the absence of consideration approach suggested by Lord Browne-Wilkinson in *Woolwich*, some decisions demonstrate a willingness to adopt Birks's similar, but more expansive, 'absence of basis' approach[206]— which relies on traditional unjust factors, in addition to other bases of invalidity, to demonstrate that the payment had been made without basis and should be returned[207] — in the context of restitution from public authorities. For example, in *DMG* Lord Walker favoured the adoption of an absence of basis approach:

> my tentative inclination is to welcome any tendency of the English law of unjust enrichment to align itself more closely with Scottish law, and so to civilian roots. I see attractions in the suggestion made by Professor Birks in *Unjust Enrichment*...[208]

Absence of basis and absence of consideration are closely related causes of action, as both focus on the absence of a legal basis for the payment. Some commentators have welcomed this judicial willingness to adopt an absence of basis approach.[209] In particular, Maher has suggested that failure of basis 'may provide a better explanation' for the *Woolwich* principle developed by Lord Goff.[210] However, this view should be resisted. The experience

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[202] *Harris v Quigley* [2005] IEHC 81, [2006] 1 IR 165 [32]. However, as is discussed below, on appeal, the Supreme Court adopted a formulation of the *Woolwich* principle that is more closely aligned with Lord Goff's analysis.
[203] *NEC Semi-Conductors Ltd v Inland Revenue Commissioners* [2006] STC 606.
[204] Williams, *Unjust Enrichment and Public Law* (n 25) 61.
[205] *Ibid,* 60.
[206] See Chapter 2 at 28-30.
[207] Birks, *Unjust Enrichment* (2nd edn OUP, Oxford 2005) 116. See Chapter 2 at 25-29.
[208] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [158].
[209] Goymour, 'Premature Tax Payments and Unjust Enrichment' (2007) 66 CLJ 24, 27.
[210] Maher, 'A New Conception of Failure of Basis' [2004] RLR 96, 108.

of the Canadian courts following *Garland v Consumers' Gas Co*[211] demonstrates the difficulties that courts face in reconciling traditional unjust factors within an absence of basis approach. Furthermore, it is possible that a civilian approach such as that advocated by Birks would have the effect of narrowing the bases on which recovery of unlawfully exacted taxes can be sought. As Häcker has argued:

> A civilian system might well struggle to overcome the objection raised by Lord Scott, namely that DMG's payment discharged a valid ACT liability. And even if corporation tax had not actually been payable in advance, it is unclear under what circumstances and to what extent interim interest should generally be available for the mistaken early discharge of a (future) liability.[212]

III. A Public Law Ground of Restitution

Although the traditional view has been that restitution from public authorities falls within the private law of restitution, founded on the unjust enrichment principle, some commentators have argued that restitution from public authorities can

> ...most effectively be accommodated within the public law framework of the Administrative Court. This is because the main justification for the *Woolwich* principle, as opposed to the traditional restitutionary grounds of duress and mistake, depends on public law values rather than the right of the person who made the payment as such.[213]

However, adoption of a public law route would confer significant advantages upon the state. First, claims for judicial review are subject to a shorter limitation period than private law claims.[214] Such limitation periods provide 'some protection to the revenue against delayed claims, which would otherwise be limited only by the six year period of limitation of action,'[215] and, as a necessary corollary, 'may cause insuperable problems for plaintiffs'[216]

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[211] *Garland v Consumers' Gas Co* [2004] SCC 25, 237 DLR (4th) 385. Discussed above in Chapter 2.
[212] Hacker, 'Still at the Crossroads' (2007) 123 LQR 177, 181. See also Virgo, 'Deutsche Morgan Grenfell: Restitution of Mistaken Tax Payments: Back to Basics' [2007] British Tax Review 27, 30.
[213] Alder, 'Restitution in Public Law: Bearing the Cost of Unlawful State Action' (n 57) 166. See also Pal, 'The Supreme Court of Canada's Approach to the Recovery of Ultra Vires Taxes: At the Border of Private and Public Law' (2008) 66 University of Toronto Faculty Law Review 65.
[214] CPR 53.4 imposes a three month limitation period upon judicial review proceedings.
[215] *Woolwich* [1993] AC 70 (CA) 120.

who seek to advance a claim for restitution against the state, particularly as tax schemes are so complex that flaws within such a claim may not become apparent until some time after the money has been paid. Furthermore, an excessively stringent limitation period may be contrary to European Community law, where the charges had been exacted in breach of Community law. As discussed in Chapter 7, the CJEU has indicated that a limitation period of three years in respect of recovery of taxes not due would be a reasonable limitation period.[217] There is a substantial risk that a limitation period of only three months would be found by the CJEU to be an unreasonable limitation period that renders 'the exercise of rights conferred by Community law' virtually impossible or excessively difficult.[218]

Second, the discretionary nature of the relief in judicial review cases makes such proceedings an unattractive option for claimants:

> public law remedies are discretionary. Therefore, an applicant's chance of recovery *in general* under the existing rules is arguably better using private law (where the remedy is automatic as a matter of right), than using public law where all remedies are discretionary.[219]

However, advocates of an administrative law approach have argued that the discretionary approach of a public law regime might be best suited to the public interest concerns inherent in a claim against the state for restitution of overpaid tax.[220]

Third, it is not clear that restitutionary relief is available in response to judicial review claims. Alder has argued that 'where repayment is conceived as a public duty, a mandatory order (formerly *mandamus*) can achieve the same purpose as restitution.'[221] However, in *R v Barnet Magistrates Court Ex p Cantor*, Garland J expressed doubts as to whether an order of *mandamus* could compel a state body to make restitution.[222] He added that 'the court should be cautious in supplying a remedy by way of judicial review where a claim by writ would be

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[216] McKendrick, 'Restitution of Unlawfully Demanded Tax' (n 13) 96; Virgo, 'Restitution from Public Authorities: Past, Present and Future' (n 71) 376.
[217] Case C-231/96 *Edis v Ministero delle Finanze* [1998] ECR I-4951 [35]; Case C-260/96 *SPAC v Ministero delle Finanze* [1998] ECR I-4997 [19]; Case C-228/96 *Aprile Srl v Amministrazione delle Finanze dello Stato* [1998] ECR I-7141 [19].
[218] *Ibid.*
[219] Williams, 'Recovery of *Ultra Vires* Taxes: a Wholly Public Approach?' [2007] RLR 130, 135. See also Virgo, 'Restitution from Public Authorities: Past, Present and Future' (n 71) 376.
[220] Alder, 'Restitution in Public Law: Bearing the Cost of Unlawful State Action' (n 57) 172.
[221] *Ibid,* 179.
[222] *R v Barnet Magistrates Court Ex p Cantor* [1999] 1 WLR 334, 343.

anything other than obvious and certain.'[223] Conversely, in *British Sky Broadcasting Group Plc v Customs and Excise Commissioners*, Elias J would have been willing to make an award of restitution in judicial review proceedings for breach of the duty to act fairly. [224] The matter has since been put beyond doubt. Part 54.3(2) CPR now provides that '[A] claim for judicial review may include a claim for damages, restitution or the recovery of a sum due but may not seek such a remedy alone.'[225]

Other jurisdictions have taken a more permissive view. The Australian courts have allowed restitution by an order of *mandamus*. For example, the relief sought in *Royal Insurance* was an order of mandamus directing repayment. In *Comptroller-General of Customs and Another v Kawasaki Motors Pty Ltd*, the court considered that section 16(1)(d) of the ADJR Act could extend to orders for restitution of taxes overpaid in exceptional circumstances, but that such relief would be discretionary.[226]

In Ireland, it is unclear whether restitutionary relief is available pursuant to the Rules of the Superior Courts. Order 84, rule 18 provides that

> An application for an order of *certiorari*, *mandamus*, prohibition or *quo warranto* shall be made by way of an application for judicial review in accordance with the provisions of this Order.

Rule 19 provides that

> On an application for judicial review any relief mentioned in rule 18 (1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter and in any event the Court may grant any relief mentioned in rules 18 (1) or (2) which it considers appropriate notwithstanding that it has not been specifically claimed.[227]

Rule 24 empowers the court to make an award of damages in certain prescribed circumstances. Rule 19 suggests that only the forms of relief specified in rule 18 are available in claims for judicial review and that forms of relief, other than those mentioned in rule 18

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[223] *Ibid,* 344.
[224] *British Sky Broadcasting Group Plc v Customs and Excise Commissioners* [2001] EWHC Admin 127, [2001] STC 437 [34]-[36]. However, he held that a breach of duty was not made out on the facts of the case.
[225] CPR 54.3(2).
[226] *Comptroller-General of Customs and Another v Kawasaki Motors Pty Ltd* (No 2) (1991) 32 FCR 243 (FCA) 265-266.
[227] Order 84, rule 19 (RSC)

are not available. The issue has not yet been judicially considered in Ireland. In *Power v Minister for Social and Family Affairs*, MacMenamin J held that the applicant, upon making out his claim for breach of his legitimate expectations by the respondent was 'entitled to restitution, that is to be placed in the same financial position as he would have been in had the decision not been made.' At first sight, this decision appears to suggest that restitutionary awards will be made in response to public law claims. However, it is clear that MacMenamin J did not use 'restitution' in its more technical sense as a response to unjust enrichment. Instead, he envisaged that the relief granted would compensate the plaintiff for the frustration of his legitimate expectations. Thus, *Power* cannot be regarded as authority for the proposition that restitutionary relief is available in claims for judicial review. Nonetheless, the power to award damages in rule 24 could be interpreted to empower the court to make a money award that reverses the defendant's gain, instead of compensating the plaintiff for loss. However, similarly to Rule 54.3 of the CPR, Delany has suggested that 'Order 84 does not create an independent cause of action for damages and that damages can only be claimed pursuant to rule 24 where they are sought as an ancillary remedy to one of the established public law remedies.'[228]

In spite of these practical difficulties, many jurisdictions have contemplated a public law cause of action for restitution of overpaid tax with varying degrees of success.[229] The only jurisdiction analysed in this thesis that has not directly engaged with such an approach is Australia. However, in *British American Tobacco Australia Ltd v Western Australia*, Kirby J suggested that there was a direct constitutional cause of action to recover taxes. He argued in favour of 'an implied cause of action, derived from the Constitution itself, permitting recovery of an invalid tax levied in breach of a constitutional provision.'[230] This was a lone remark, made in a dissenting judgment and no reference, approving or otherwise, has been made to Kirby J's approach in any subsequent case. Therefore, it not certain that a public law cause of action will be adopted in Australia in the near future.

This Part considers public law regimes for recovery of unlawfully exacted taxes that have been canvassed in three jurisdictions: England, Canada, and Ireland. In doing so, it seeks to demonstrate that no convincing argument has been made for the abandonment of

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[228] Delany, *Judicial Review of Administrative Action* (n 86) 338.
[229] See *DMG* [2005] EWCA Civ 78, [2006] Ch 243; [2006] UKHL 49, [2007] 1 AC 558; *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3.
[230] *British American Tobacco Australia Ltd v Western Australia* [2003] HCA 47, 217 CLR 30 [131]-[134].

traditional unjust factors where restitution is sought from the state and that serious shortcomings attend the public law regimes discussed in this Chapter.

Section A considers the decisions of the Court of Appeal and the House of Lords in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners*[231] and discusses the hybrid regime proposed by Dr Rebecca Williams on the basis of that decision. It argues that, while the House of Lords was correct to reject the Court of Appeal's decision in *DMG*, it failed to engage with the question of whether a public law regime is desirable in principle. Conversely, while Williams's approach provides the principled analysis of a public law regime lacking from the judgments in *DMG*, the hybrid regime that she proposes is unworkable in practice.

Section B considers the public law regime for recovery developed by the Supreme Court of Canada in *Kingstreet* and argues that the *Kingstreet* approach is unnecessary, unprincipled, and unworkable in practice.

Section C considers the relationship between the law of restitution and the consequences of a declaration of constitutional invalidity in Irish law. The Supreme Court decision in *A v Governor of Arbour Hill Prison*[232] may suggest that Irish law has begun to move in the direction of a public law right to recovery of unlawfully exacted taxes, similar to that suggested in *Kingstreet*. However, this Section argues that the finding in *A* is based on a misinterpretation of *Murphy v Attorney General*, and that such an approach is unfounded as a matter of authority and undesirable as a matter of principle.

A. Restitution and Public Law in England

Any consideration of restitution and public law in English law must take as its starting point the case of *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners*, where the Court of Appeal characterised the restitution of taxes as a public law regime distinct from the private law of restitution.[233] This approach arose as a result of a misconstruction of Lord Goff's decision in *Kleinwort Benson*, where Lord Goff referred to:

> two separate and distinct regimes in respect of the repayment of money paid under a mistake of law. These are (1) cases concerned with the repayment of taxes and other similar charges which, when exacted ultra vires, are recoverable as of right at

[231] *DMG* [2005] EWCA Civ 78, [2006] Ch 243; [2006] UKHL 49, [2007] 1 AC 558.
[232] *A v The Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88.
[233] See Virgo, *Principles of the Law of Restitution* (n 20) 412.

common law under the principle in *Woolwich*, and otherwise are the subject of statutory regimes regulating recovery; and (2) other cases, which may broadly be described as concerned with repayment of money paid under private transactions, and which are governed by the common law.[234]

The Court of Appeal held that 'the first of the two regimes which Lord Goff there identifies is a comprehensive and complete regime in relation to overpayments of tax made under a mistake of law'.[235] It held that the *Woolwich* principle 'was intended to form a complete code in relation to recovery of ultra vires payments by use of the common law rather than under statute.'[236] It considered that the importance of the constitutional principle at stake mandated the development of an exclusive regime for recovery. [237] Thus, a plaintiff who sought recovery of unlawfully exacted taxes, whether under a mistake of law or not, was confined to claims under the *Woolwich* principle. [238]

This decision was the subject of considerable criticism. First, commentators argued that the approach of the Court of Appeal was based on a misreading of Lord Goff's speech in *Kleinwort Benson*: if Lord Goff 'had intended to draw such a fundamental distinction he might have been expected to do so explicitly.'[239] The Court of Appeal's interpretation of Lord Goff's comments was by no means the only available interpretation, as the passage had been previously understood to refer only to the availability of a settled law defence where restitution of taxes were sought by the plaintiff.[240] On appeal, the House of Lords rejected the Court of Appeal's analysis, holding that it was based on a misreading of Lord Goff's speech in *Kleinwort Benson.* Lord Goff did not develop an exclusive regime for the recovery of unlawfully exacted taxes but, instead, simply considered the possibility of a settled law defence in the context of taxes paid by mistake. [241] Lord Hope held that 'if Lord Goff had

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[234] *Kleinwort Benson* [1999] 2 AC 349 (HL) 382.
[235] *DMG* [2005] EWCA Civ 78, [2006] Ch 243 [205] (Jonathon Parker LJ).
[236] *Ibid,* [267] and [271]-[272].
[237] *Ibid,* [261] (Rix LJ) and [277] (Buxton LJ). See also *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [34], discussed below.
[238] *Ibid,* [208].
[239] Virgo, *Principles of the Law of Restitution* (n 20) 413; Virgo, '*Deutsche Morgan Grenfell:* The Right to Restitution of Tax Paid by Mistake Rejected' (n 71) 283. See also Virgo, 'Restitution from Public Authorities: Past, Present and Future' (n 71) 379; Beatson, 'Unlawful Statutes and Mistake of Law: Is there a Smile on the Face of Schrödinger's Cat?' in Burrows and Rogers (eds) *Mapping the Law: Essays in Honour of Peter Birks* (OUP, Oxford 2006) 170.
[240] This was how Lord Goff's comments were interpreted by Coghlin J in *Mallusk Cold Storage v Dept of Finance* [2003] NIQB 58, [2003] RA 370 [25]. See also Burrows, 'Restitution in Respect of Mistakenly Paid Tax' (n 54) 541.
[241] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [46] (Lord Hope) and [141] (Lord Walker). See, Goymour, 'Premature Tax Payments and Unjust Enrichment' (n 209) 25.

thought that the general right of recovery did not apply to payments of taxes and general charges, he would surely have said so in his discussion of that general right.'[242] Furthermore, the House of Lords held that Lord Goff's comments regarding a settled law defence were inconsistent with an exclusive public law regime that excluded mistake claims for overpaid tax. Lord Hoffmann noted:

> Lord Goff's speech in the *Kleinwort Benson* case does not deny the right to recover tax on the ground that it was paid by mistake. On the contrary, his discussion of a possible settled law defence necessarily entails that he thought that there was such a cause of action.[243]

A second major shortcoming of the Court of Appeal's decision is that, other than general references to the importance of the constitutional principles at stake in a claim for restitution of overpaid taxes, little justification was offered for the development of two exclusive regimes,[244] which had the effect of carving out an exception to the principle of concurrent liability and depriving the plaintiff of a claim that would otherwise be available.[245] This criticism was also accepted by the House of Lords, which held that the Court of Appeal's approach was inconsistent with the principle of concurrent liability;[246] mistake and the *Woolwich* principle were concurrently available causes of action.[247]

Reaction to the House of Lords' decision in *DMG* has been mixed. Although commentators have approved of the outcome of the decision, insofar as it confirms that the *Woolwich* principle does not provide an exclusive regime for the recovery of unlawfully exacted taxes, many have been critical of the reasoning by which the House of Lords reached this conclusion. Many of these criticisms have been discussed elsewhere.[248] The most fundamental shortcoming of the case is the failure of the House of Lords and the Court of Appeal to fully engage with the reasons *why* a public law regime should be accepted or

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[242] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [49].
[243] *Ibid,* [18]. See also Lord Hope at [46].
[244] Virgo, '*Deutsche Morgan Grenfell:* The Right to Restitution of Tax Paid by Mistake Rejected' (n 71) 284; Beatson, 'Unlawful Statutes and Mistake of Law: Is there a Smile on the Face of Schrödinger's Cat?" (n 239) 175.
[245] Burrows, 'Restitution in Respect of Mistakenly Paid Tax' (n 54) 542; Virgo, 'Deutsche Morgan Grenfell: The Right to Restitution of Tax Paid by Mistake Rejected' (n 71) 284-285. *Mallusk* [2003] NIQB 58, [2003] RA 370 [25].
[246] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [51] (Lord Hope).
[247] *Ibid,* [51] (Lord Hope) and [83] (Lord Scott).
[248] Goymour, 'Premature Tax Payments and Unjust Enrichment' (n 209) 26; Virgo, 'Deutsche Morgan Grenfell: Restitution of Mistaken Tax Payments: Back to Basics' (n 212) 30; Hacker, 'Still at the Crossroads' (n 212) 181.

rejected in principle. Mitchell has argued that the approach of the House of Lords was 'rather superficial', focusing mainly on interpreting Lord Goff's comments in *Kleinwort Benson*, rather than considering whether an exclusive regime would be desirable in principle.[249] This failing is to some extent attributable to the approach adopted by the Court of Appeal, which justified its approach on the basis of a detailed dissection of Lord Goff's comments in previous cases. Therefore, it is unsurprising that the House of Lords adopted a similar approach on appeal. Similarly, Williams argues that the House of Lords' rejection of an exclusive regime in *DMG* was largely as a result of the manner in which the Court of Appeal—which had favoured such a regime—reached its conclusions.[250] These criticisms demonstrate that the English courts have not yet dealt in any meaningful manner with the question of a public law ground of restitution. This is unfortunate as, if a public law regime for restitution should be rejected in principle, it should not be rejected for the wrong reasons.

An in-depth study of restitution from public authorities has been carried out by Williams, who suggests that restitution from public authorities should be exclusively governed by a hybrid private-public regime. She argues that a wholly private approach to restitution from public authorities is flawed, as none of the reasons traditionally advanced as a rationale for the *Woolwich* principle can fully account for the principle or for its ambit of operation.[251] Similarly, she argues that the tendency of the courts to refer to absence of consideration in *Woolwich* and the swaps cases stems from a failure to appreciate the public law elements of the *Woolwich* cause of action:[252]

> In referring to 'absence of consideration' it thus becomes clear that the courts have not, within private law, deliberately been toying with the idea of moving towards the civilian system (though this is the practical danger inherent in their use of the expression). Rather they have been attempting to handle a public law concept using only private law tools, leading to a private law mistranslation with potentially far reaching consequences.[253]

However, Williams discounts a wholly public approach for restitution from public authorities, arguing that a purely public, discretionary, approach may weaken a taxpayer's

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[249] Mitchell, 'Mistaken Tax Payments: *Deutsche Morgan Grenfell v IRC*' (Case Comment) [2007] RLR 123, 125.
[250] Williams, *Unjust Enrichment and Public Law* (n 25) 94-97.
[251] *Ibid*, 23-30, 36, and 67.
[252] *Ibid*, 61.
[253] *Ibid*, 36.

right to restitution: 'whereas restitution *would* have been given as a matter of right following a successful private law unjust enrichment claim, it need not be so given in public law.'[254] She argues that a better approach is to regard *Woolwich* claims as hybrid claims: the traditional unjust enrichment framework should continue to determine the existence of an enrichment derived at the expense of the claimant, and the unjust factor is provided by the existence of a public law ultra vires event.[255] She argues that, because the primary motivation for recovery in cases involving restitution from public authorities is the importance of preventing ultra vires acts, the public law ground for restitution, where it is available, should take precedence over other unjust factors, and only this unjust factor should be available to litigants.[256] Thus, Williams develops a hierarchy of unjust factors where restitution is sought from public authorities, within which the public law unjust factor takes precedence over traditional unjust factors. She also maintains that

> There is no suggestion that the long established grounds for restitution are somehow being swallowed up by the *Woolwich* cause of action, because there will still be instances when the reason for restitution recognised in *Woolwich* does not apply.[257]

Williams argues that this approach would lead to greater clarity in the law. First, she argues that a hybrid approach allows the 'dual public and private nature' of the claims against public authorities to be addressed directly.[258] Second, she claims that it is more straightforward to allow recovery on the basis of the illegality itself than to make the claimant show the presence of an unjust factor. Not only would such an approach be more straightforward,

> only by regarding public law as the reason for restitution does the law gain full access to that crucial event in a manner which allows it to take the truly hybrid approach such claims require. If the action is brought on the basis of mistake or failure of consideration, the public law event may be equally crucial to the claim, but the court will be prevented from seeing the case as anything more than purely private and this is bound in turn to lead to private law mistranslations of concepts...[259]

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[254] *Ibid,* 34.
[255] *Ibid,* 36-39 and 67.
[256] *Ibid,* 72-74.
[257] *Ibid,* 98.
[258] *Ibid,* 72.
[259] *Ibid,* 73.

She argues that her approach, while compatible with Community law, is more restrictive than that currently adopted by the courts, meaning that there will no longer be 'any impetus to rely on techniques that *are* in breach of community law as a means of limiting claims.'[260] She also argues that some of the distinctions and anomalies that have bedevilled restitution from public authorities, such as the distinction between commercial transactions and the payment of taxes,[261] the 'controversy over whether swaps transactions concerned mistakes at all or rather mispredictions',[262] and the difficulties in determining the proper role for absence of basis analysis,[263] would be rendered obsolete once attention is focused upon the *ultra vires* event at issue within the transactional relationship between the parties.

Williams's thesis makes an important contribution to our understanding of the law of restitution from public authorities for a number of reasons. First, she highlights the relevance of public law principles in the context of restitution from public authorities. It is important to explicitly acknowledge that claims from public authorities are different from wholly private law claims and that such claims engage principles of public law, even if the extent to which they do so is unclear. However, Williams's approach is radical, as, by focusing on the public interest in correcting ultra vires events, she removes the focus from the individual claimant, and his vitiated intention, in favour of a public interest in reversing ultra vires events.[264] This is not a wholly new departure in claims for restitution from the state. After all, the *Woolwich* principle is a policy motivated cause of action that does not turn upon the claimant's vitiated intention. However, for reasons discussed below, it is not clear that consent-based unjust factors should be wholly supplanted by public law concerns in claims for restitution from public bodies.

Second, some aspects of Williams's hybrid approach have much to recommend them. For example, one of the strengths of her approach is that she retains a private law analysis for determining whether the public authority has been enriched at the claimant's expense. As the decision of the Canadian Supreme Court in *Kingstreet* has demonstrated, a wholly public law approach to restitution from public authorities may leave courts without the appropriate tools to determine the extent of the public authority's liability to make restitution or the appropriate

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[260] *Ibid,* 106.
[261] *Ibid,* 99.
[262] Williams, 'The Beginnings of a Public Law of Unjust Enrichment?' (n 72).
[263] Williams, *Unjust Enrichment and Public Law* (n 25) 36.
[264] However, the public policy ground of restitution developed in *Woolwich* did not contain any focus on the plaintiff's intention.

measure of recovery for claimants in such claims. Williams's hybrid approach avoids such difficulties.

However, in spite of these important contributions, Williams's approach gives rise to a number of serious difficulties. First, it is questionable whether judicial confusion has been caused by a failure to adopt a single overarching rationale for the *Woolwich* principle, and it may be the case that Williams overstates the problems relating to current judicial interpretations of the *Woolwich* principle. The *Woolwich* principle is a cause of action that is underpinned by a number of policy concerns,[265] from which it may be difficult to distil a single overarching rationale. However, problems in applying the *Woolwich* principle are more likely to stem from the fact that the scope and the constituent elements of this relatively new cause of action have yet to be fully expounded by the judiciary.[266] Furthermore, other private law causes of action have been successfully relied upon by the courts to justify restitution of overpaid taxes.[267] Therefore, once it is understood that the *Woolwich* principle and private law unjust factors can be relied upon in restitution claims against the state, much of the impetus for a hybrid cause of action falls away.

Second, a hierarchy of reasons for restitution, rather than striking the balance between an exclusive regime for recovery and the concurrent liability approach adopted by the House of Lords in *DMG*, contains the worst of both possible combinations. The position of the *Woolwich* ground at the top of the hierarchy may give rise to brightline disputes as to what falls within and without this scheme of recovery. Williams's suggestion that 'there will still be instances when the reason for restitution recognised in *Woolwich* does not apply',[268] has the potential to cause considerable confusion, as it tells us that there may be circumstances in which the traditional unjust enrichment analysis may be available, without giving any indication as to what those circumstances might be. Even where a determination can be made as to whether the hybrid cause of action is applicable, it is unclear what the consequences of that determination might be. It is not clear whether plaintiffs who cannot satisfy the court that they come within the *Woolwich* principle, will be entitled to 'drop down' to the unjust factors in the lower level of the hierarchy. Nor is it clear what will happen when only part of a claim

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[265] See discussion at 185-189 and Chapter 2 at 29-39.

[266] See, for example, the recent debate as to whether the *Woolwich* principle is confined to cases in which there has been an unlawful demand: *DMG* [2005] EWCA Civ 78, [2006] Ch 243 [289]; *Boake Allen Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25, [2006] STC 606 [159]-[162]; *FII Group Litigation* [2008] EWHC 2893 (Ch) [245]; *FII Group Litigation* [2010] EWCA Civ 103 [158] and [164].

[267] See, generally, Chapter 5.

[268] Williams, *Unjust Enrichment and Public Law* (n 25) 98. See also Bastarache J's comments in *Kingstreet,* discussed below.

falls within the hybrid ground; for example, where part of the plaintiff's claim under the *Woolwich* principle is statute barred, but the plaintiff could rely on a mistake so as to extend the limitation period.[269] Williams suggests that the public law unjust factor precludes consideration of other unjust factors. Thus, it would appear that the hierarchy is not so much a hierarchy as an exclusive regime for the recovery of overpaid taxes of the type rejected in *DMG*.[270] She argues that the House of Lords' rejection of an exclusive regime in *DMG* was largely as a result of the manner in which the Court of Appeal reached its conclusions.[271] However, the House of Lords attributed considerable importance to the principle of concurrent liability and there is a risk that this principle may be obscured if, as suggested by Williams, the issue is considered solely in terms of procedural exclusivity rather than concurrent liability.[272] Furthermore, it is not clear why the importance of reversing ultra vires events requires an exclusive regime of the kind envisaged by Williams. Indeed, it could be argued that the importance of reversing ultra vires events requires that the plaintiff be entitled to reverse the event in any way possible rather than being confined to a single cause of action.[273] If this is the case, Williams's thesis does precisely the reverse of what it hopes to achieve.

Following the House of Lords' decision in *DMG*, the Court of Appeal has displayed a worrying tendency to return to its preference for an exclusive regime for the recovery of unlawfully exacted taxes. In *FII*, the Court of Appeal overruled Henderson J's conclusion that both mistake and *Woolwich* claims were necessary to give effect to the *San Giorgio* principle.[274] It held that the *Woolwich* principle was not dependent on the existence of an unlawful demand and therefore provided an effective remedy as required by Community law to all restitution claims that arose in the case before it.[275] Crucially, the Court of Appeal in *FII* did not go as far as it did in *DMG*. It did not hold that plaintiffs would be *confined* to the *Woolwich* principle when making *San Giorgio* claims; it simply held that the *Woolwich* principle was sufficient to provide an effective remedy under European law. The effect of the

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[269] This issue is of less relevance in England, in light of the restricted limitation periods applicable to mistake claims. See sections 320 and 321 of the Finance Act 2004 and section 107 of the Finance Act 2007.
[270] *DMG* [2006] UKHL 49, [2007] 1 AC 558 [18] (Lord Hoffmann), [46] (Lord Hope).
[271] Williams, *Unjust Enrichment and Public Law* (n 25) 94-97.
[272] *Ibid,* 278.
[273] See also, Virgo, '*Deutsche Morgan Grenfell:* The Right to Restitution of Tax Paid by Mistake Rejected' (n 71) 284; Burrows, 'Restitution in Respect of Mistakenly Paid Tax' (n 54) 542.
[274] *FII Group Litigation* [2008] EWHC 2893 (Ch) [260]. See Williams, *Unjust Enrichment and Public Law* (n 25) 108-110.
[275] *FII Group Litigation* [2010] EWCA Civ 103 [173]. See Lee, 'Restitution from the Revenue: Exacting Principles from the Court of Appeal' (n 61) 75-82.

Court's decision is that, provided that the *Woolwich* principle is available to claimants, Parliament is entitled to impose heavy restrictions on other, concurrently available, causes of action.[276] Nonetheless, the approach of the Court of Appeal hints at a willingness to artificially confine the availability of other unjust factors. The preferable view is that expressed by Henderson J in *Thin Cap*, where he held that:

> it is in my view wrong in principle to treat the Community law principle of effectiveness as though it were a limiting one, and to look for the minimum remedies in UK law that are needed to satisfy it. The true principle is, rather, that it stipulates a minimum content that UK law must provide if *San Giorgio* claims are to be satisfied. If, however, English law provides two alternative causes of action to which a claimant may have recourse, it is no part of the principle of effectiveness to say that only the more restrictive of those causes of action is needed. Thus, I do not see how it would avail the Revenue to establish that the *Woolwich* cause of action would, by itself, or with appropriate extensions, be sufficient to satisfy the claimants' *San Giorgio* claims, when they also have the alternative open to them of making a mistake-based restitution claim. On the contrary, my understanding is that where domestic law goes further than is strictly necessary to give effect to Community law rights, Community law requires the full range of domestic remedies to be made available, and not to be curtailed without due notice.[277]

As a matter of authority and as a matter of principle, this view is to be preferred. It avoids the shortcomings of a public law regime identified in the wake of the Court of Appeal decision in *DMG* and is consistent with the principle of concurrent liability reaffirmed by the House of Lords in the same case.

B. Restitution and Public Law in Canada

Although the Canadian courts previously adopted a private law regime in relation to the recovery of unlawfully exacted taxes,[278] this has been supplanted by a public law cause of action, developed by the Supreme Court of Canada in *Kingstreet Investments Ltd v New Brunswick (Department of Finance)*. The plaintiff sought to recover a user charge that had

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[276] *FII Group Litigation* [2010] EWCA Civ 103, [2010] STC 1251 [225]-[227]. See also *Littlewoods Retail Limited v Revenue and Customs Commissioners* [2010] EWHC 1071 (Ch) [84]-[86].

[277] *Test Claimants in the Thin Cap Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2009] EWHC 2908 (Ch) [223]. See also *Littlewoods* [2010] EWHC 1071 (Ch) [41].

[278] Smith, 'Public Justice and Private Justice: Restitution after *Kingstreet*' (2008) 46 Canadian Business Law Journal 11, 20. See also *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC) [83].

been held to be ultra vires the provincial legislature. Allowing the plaintiff's claim for restitution, Bastarache J held that restitution was not awarded on the basis of traditional unjust enrichment principles, but as a matter of constitutional right. He held that 'the ordinary principles of unjust enrichment should not be applied to claims for the recovery of monies paid pursuant to a statute held to be unconstitutional'.[279] Instead, the taxpayer was entitled to recover the unconstitutional taxes as a matter of constitutional right, independently of the unjust enrichment principle.[280] The constitutional right of recovery formed a third category of restitution, distinct from restitution of unjust enrichment and restitution for wrongs.[281]

Bastarache J gave two reasons for adopting this approach. First, he held that '[A]n unjust enrichment analysis is ill-suited to deal with the issues raised by ultra vires taxes':[282]

> ...a technical interpretation of "benefit" and "loss" is hard to apply in tax recovery cases. Furthermore, in the context of this case, the unjust enrichment framework adds an unnecessary layer of complexity to the real legal issues. Some of the components of the modern doctrine are of little use to a principled disposition of the matter, but are rather liable to confuse the proper application of the key principles of constitutional law at issue.[283]

Second, Bastarache J held that, where recovery of unconstitutional taxes was at issue, the only appropriate remedy was a constitutional basis for restitution, as the important constitutional principles at issue would be ignored if the case was decided on a traditional unjust enrichment analysis.[284] However, he held that '[C]laims of unjust enrichment against the government may still be appropriate in certain circumstances.'[285]

Although some commentators have welcomed the public law approach adopted by Bastarache J in *Kingstreet*,[286] it should be rejected for six reasons. First, it is unclear why Bastarache J felt that a separate public law approach was necessary when Canadian law has

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[279] *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [39].
[280] *Ibid,* [34]. See also *Sorbara v Canada (Attorney General)* (2008) 304 DLR (4th) 470 (ONSC) [34].,
[281] *Ibid,* [40].
[282] *Ibid,* [12].
[283] *Ibid,* [35].
[284] *Ibid,* [34]. See also Pal, 'The Supreme Court of Canada's Approach to the Recovery of Ultra Vires Taxes: At the Border of Private and Public Law' (n 213) 80.
[285] *Ibid,* [34].
[286] See Pal, 'The Supreme Court of Canada's Approach to the Recovery of Ultra Vires Taxes: At the Border of Private and Public Law' (n 213). Williams has given a qualified welcome to the decision in *Kingstreet.* Although she welcomes the focus on the public law aspects of the claim, she notes that the 'adoption of the wholly public Canadian approach seems capable of creating as many problems in the opposite direction': Williams, 'Recovery of *Ultra Vires* Taxes: a Wholly Public Approach?' (n 219) 134.

accepted a civilian-style, absence of juristic reasons model for unjust enrichment claims.[287] Smith has argued that the approach adopted by the Canadian courts is particularly well suited to accommodating claims for restitution of unlawfully exacted taxes:

> After *Garland*, one might have thought that a case like *Kingstreet* should have been even easier to fit into the law of unjust enrichment.... [if] the taxing authority had not legal justification for the demand, it surely becomes clear that there is not juristic reason for the enrichment and the corresponding deprivation.[288]

Second, none of the reasons proffered by Bastarache J for removing claims for restitution of unconstitutional taxes from the private law of restitution is convincing. First, it is not clear why Bastarache J considered analysis of loss and benefit to pose insurmountable difficulties in the context of restitution of unlawfully exacted taxes, particularly as such claims concern the transfer of money. [289] Bastarache J is not alone in considering that quantifying the enrichment received by the state is particularly complex. In *Revenue and Customs Commissioners v Total Network*, where the Revenue Commissioners relied on tort law to compensate them for the loss of tax receipts, Lord Neuberger adverted to similar difficulties of quantification.[290] However, although quantification of the state's enrichment poses some problems, these difficulties are not insurmountable and it is not clear that the private law approach should be abandoned on this basis. Furthermore, although Bastarache J held that restitutionary principles on quantification of gain should not apply, he failed to identify the alternative rules that the court should rely on to determine the sum due to the taxpayer by way of restitution. Moreover, it is not clear why Bastarache J considered constitutional law principles were not 'proper policies' underlying the law of unjust enrichment. Bastarache J considered 'proper policy considerations' in this context to be such policies as have 'traditionally informed the development of restitutionary law'.[291] It is unclear why the public policy concern of 'ensuring that criminals do not profit from their crime' constitutes a proper policy concern for the law of restitution and the policy concern of

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[287] See *Garland v Consumers' Gas Co* [2004] SCC 25, 237 DLR (4th) 385 [44]-[46]; *Pacific National Investments Ltd v Victoria (City)* [2004] SCC 75, 245 DLR (4th) 211 [23]-[27]; *Kingstreet* [2007] SCC 1, [2007] 1 SCR 3, 276 DLR (4th) 342 [36].

[288] Smith, 'Public Justice and Private Justice: Restitution after *Kingstreet*' (n 278) 20. See also McInnes, 'Restitution for Ultra Vires Taxes' (2007) 123 LQR 365, 367.

[289] Smith, 'Public Justice and Private Justice: Restitution after *Kingstreet*' (n 278) 23.

[290] *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174 [179]. See also Man Yip, 'The Use Value of Money in the Law of Unjust Enrichment' (2010) 30 Legal Studies 586.

[291] *Kingstreet* [2007] SCC 1, [2007] 1 SCR 3, 276 DLR (4th) 342, [38]. See also Pal, 'The Supreme Court of Canada's Approach to the Recovery of Ultra Vires Taxes: At the Border of Private and Public Law' (n 213) 98.

ensuring that the state should not retain unlawfully obtained benefits does not.[292] Indeed, acceptance of the *Woolwich* principle suggests that the latter *is* a proper policy concern for the law of restitution. Nor is it clear why the constitutional principles underpinning the right to recovery in cases of unlawfully exacted taxes would be obscured by an unjust enrichment analysis, particularly since no such obfuscation has occurred in the context of the *Woolwich* principle in England.

Third, the approach of the Supreme Court in *Kingstreet* is inconsistent with other fields of law, insofar as it recognises a right to redress flowing directly from a finding of unconstitutionality. It is a well-established principle of the common law that a 'finding of public law wrongdoing in the form of ultra vires activity on the part of a public authority does not, in and of itself, give rise to private law liability, including private law liability for damages'.[293] Smith argues that *Kingstreet*, insofar as it establishes a free-standing claim to restitution, is inconsistent with other fields of law such as contract or tort.[294] Recent cases also seem uncomfortable with this conclusion and have resiled from this broad interpretation of the *Kingstreet* cause of action. In *Sorbara v Canada (Attorney General)*, the Ontario Superior Court of Justice held that the *Kingstreet* cause of action, although underpinned by constitutional principles, is not a constitutional cause of action *per se*. It held that Bastarache J

> was using constitutional principles to explain the rationale for a restitutionary remedy that previously could not be adequately explained using the conventional rationale of the principles of unjust enrichment.[295]

Similarly, in *Merchant Law Group v Canada (Revenue Agency)*, David Stratas JA held that:

> in *Kingstreet*, the Supreme Court did not create a new, sweeping constitutional remedy to recover tax assessed under a misapplication or misinterpretation of a taxing statute. ...Rather, the Supreme Court based the taxpayer's recovery on the common

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[292] McInnes, 'Restitution for Ultra Vires Taxes' (n 288) 367; Williams, 'Recovery of *Ultra Vires* Taxes: a Wholly Public Approach?' (n 219) 134.

[293] *Holland v Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)* [2007] Sask CA 18, 281 DLR (4th) 349 [31]. Affirmed on appeal: *Holland v Saskatchewan (Minister of Agriculture, Food & Rural Revitalization)* [2008] SCC 42, 294 DLR (4th) [8]-[9]. See page 189 above,

[294] Smith, 'Public Justice and Private Justice: Restitution after *Kingstreet*' (n 278) 26-27. However, other commentators have taken the opposite view and have argued that *Kingstreet* did not go far enough. See Pal, 'The Supreme Court of Canada's Approach to the Recovery of Ultra Vires Taxes: At the Border of Private and Public Law' (n 213) 79.

[295] *Sorbara v Canada (Attorney General)* (2008) 304 DLR (4th) 470 (ONSC) [39]. Affirmed on appeal: *Sorbara v Canada (Attorney General)* [2009] ONCA 506, 309 DLR (4th) 162 [5].

law cause of action for restitution, changing the analysis somewhat to reflect the fact that an ultra vires taxing provision was involved.[296]

Fourth, it is difficult to see how the public law principle will operate beyond the confines of the factual matrix in *Kingstreet*. *Kingstreet* itself establishes that the constitutional right of recovery exists 'not only in the case where taxes were levied under an unconstitutional statute..., but also where taxes were levied without legislative authority in the administrative-law sense.' [297] However, Bastarache J also recognised that an unjust enrichment analysis will continue to be relevant in some situations where restitution is sought from the state, although he gave no indication as to what those situations might be. [298] Peari has suggested that a distinction should be drawn between, on the one hand, taxes levied as a result of a misapplication of a valid statute, which are 'not different conceptually from an ordinary private law transaction between two private individuals' [299] and should be recoverable pursuant to traditional principles of unjust enrichment, and, on the other hand, taxes levied pursuant to unconstitutional legislation, which he claims should be 'governed by public law and distributive justice principles.'[300] However, this approach is inconsistent with the general approach of unjust enrichment, which has been to eschew fine distinctions when developing a general right to restitution.[301] Moreover, a distinction between misapplied and void statutory provisions perpetuates the distinction between errors going to jurisdiction and errors not going to jurisdiction[302]— a distinction no longer recognised in Ireland or in England.[303] This distinction was the source of considerable conceptual confusion and it would be unwise to establish separate bases for recovery on the basis of a distinction that has caused so many problems in the past.

Subsequent Canadian cases demonstrate the confusion that Bastarache J's judgment has caused. In *Hislop v Canada (Attorney General)* a majority of the Supreme Court of Canada took a narrow approach to the *Kingstreet* cause of action, holding that it applied only

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[296] *Merchant Law Group v Canada (Revenue Agency)* [2010] FCA 184 [22].
[297] Hogg, 'Recovery of Unauthorized Taxes: A New Constitutional Right' (2008) 46 Canadian Business Law Journal 5, 8. See also Pal, 'The Supreme Court of Canada's Approach to the Recovery of Ultra Vires Taxes: At the Border of Private and Public Law' (n 213) 77.
[298] Smith, 'Public Justice and Private Justice: Restitution after *Kingstreet*' (n 277) 31.
[299] Peari, 'Improperly Collected Taxes: The Border between Private and Public Law' (2010) 23 Canadian Journal of Law and Jurisprudence 125, 152.
[300] *Ibid*, 147-151.
[301] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 374-375; *Kleinwort Benson* [1999] 2 AC 349 (HL) 413-414.
[302] Peari, 'Improperly Collected Taxes: The Border between Private and Public Law' (n 299) 154.
[303] See *O'Reilly v Mackman* [1983] 2 AC 237 (HL) 278; *R v Hull University Visitor ex p Page* [1993] AC 682 (HL) 701; *Farrell v Attorney General* [1998] 1 IR 203 (SC) 224-225.

to taxes and not to other benefits, monetary or otherwise, conferred upon the state. The claim concerned a claim for survivor benefits under the state pension plan by the survivors of same-sex conjugal relationships. A majority of the Supreme Court held that such benefits did not fall within the principle articulated in *Kingstreet*:

> Where the government has collected taxes in violation of the Constitution, there can be only one possible remedy: restitution to the taxpayer. In contrast, where a scheme for benefits falls foul of the section 15 guarantee of equal benefit under the law, we normally do not know what the legislature would have done had it known that its benefits scheme failed to comply with the Charter. [304]

However, the reasoning of the majority draws unnecessarily fine distinctions between taxes and other forms of taxes and levies imposed by the state. If the constitutional principle applies in relation to compulsory charges levied by the state, then it should not matter whether that charge is labelled as a tax or as some other form of charge. This view was recognised by the dissenting judge in *Hislop*, Bastarache J, who held that a 'government has no more right to discriminate in the provision of benefits than it does to collect unconstitutionally levied taxes.' [305] Similarly, Pal has argued that

> [B]y distinguishing cases of ultra vires taxation from those concerning government benefits, *Hislop* limited this strong presumption of recovery to a much narrower subset of cases than was necessary or desirable.[306]

However, both Bastarache J and Pal fail to appreciate that the *Kingstreet* cause of action was not applicable in *Hislop*. The plaintiffs sought the payment of benefits pursuant to the scheme, they did not seek recovery of the contributions that their partners had made under the scheme. Thus, the claim made in *Hislop* sought to give effect to the expectations of the parties; it did not seek to reverse an unjust enrichment conferred upon the state. This conclusion highlights the further flaw in the majority's reasoning: by focusing on the nature of the charge, the court failed to fully articulate the true reason why *Kingstreet* was not applicable. Subsequent cases have failed to follow *Hislop* rigidly on this point. For example, in *Barbour v University of British Columbia*, Goepel J held that the reasoning in *Kingstreet* was not confined to unconstitutional taxes and extended to the recovery of parking fines

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[304] *Hislop v Canada (Attorney General)* [2007] SCC 10, 278 DLR (4th) 385 [108].
[305] *Ibid,* [163].
[306] Pal, 'The Supreme Court of Canada's Approach to the Recovery of Ultra Vires Taxes: At the Border of Private and Public Law' (n 213) 69.

collected by the defendant university without statutory authority, ignoring any suggestion to the contrary in *Hislop*.[307]

Fifth, *Kingstreet* offers no guidance as to how cases decided under the private law approach, previously adopted by the Canadian courts, can be accommodated within the new public law cause of action.[308] Thus, it fails to consider the potentially unsettling effect that this new cause of action may have on already settled issues. For example, will the decision of the Canadian Supreme Court in *Air Canada* continue to be relevant to mistake of law claims in light of the fact that, insofar as the Supreme Court in *Air Canada* took a predominantly private law approach, it must now be considered as wrongly decided?

The sixth and final reason why the *Kingstreet* approach is inappropriate to Ireland or England is that taxes in these jurisdictions 'go off' for a number of different reasons and each of these reasons gives rise to different legal consequences. Unconstitutional taxes (in Ireland) and ultra vires taxes (in Ireland and England) are void.[309] A taxing statute that offends European Community law is 'disapplied',[310] and taxes that are contrary to provisions of the European Convention of Human rights are subject to a declaration of incompatibility.[311] Each of these reasons will potentially give rise to different causes of action. A bipartite classification system that distinguishes between unconstitutional and ultra vires taxes on the one hand, and, on the other hand, taxes that are not due for some other reason would fail to take these distinctions into account. A unified approach that ignores the basis on which the taxes were unlawfully exacted gives rise to a more consistent and principled approach, which takes as its starting point the simple fact that the tax was not due.

In conclusion, the Canadian law of restitution from public authorities is in a state of disarray as a result of the *Kingstreet* decision. The Supreme Court in *Kingstreet* gave no convincing reasons why the traditional private law approach was inappropriate to deal with claims for restitution of unlawfully exacted taxes. It failed to explain how this new public law approach was consistent with the right to relief from the effects of an unconstitutional statute

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[307] *Barbour v University of British Columbia* [2009] BCSC 425, 310 DLR (4th) 130 [69]. Reversed on other grounds: *Barbour v University of British Columbia* [2010] BCCA 63, 316 DLR (4th) 354.

[308] See, for example, *Air Canada* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC); *Nepean Hydro-Electric Commission v Ontario Hydro* [1982] 1 SCR 347, 132 DLR (3d) 193 (SCC).

[309] *Murphy* [1982] IR 241 (SC); *Woolwich* [1993] AC 70 (HL).

[310] *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners* [2008] UKHL 2, [2008] 1 WLR 195 [6]; *Autologic Holdings Plc v Inland Revenue Commissioners* [2005] UKHL 54, [2006] 1 AC 118 [17]; *Kearns and Irish Bartering Services Ltd v European Commission* [2006] 2 IR 1 (HC) [21]; *Eircom Limited v Commission for Communications Regulation* [2007] 1 IR 1 (HC) [42].

[311] See section 5 of the ECHR Act 2003 (Ireland) and section 4 of the Human Rights Act 1998 (UK).

or ultra vires act, and it failed to establish clear parameters for this new cause of action. In light of these shortcomings, the *Kingstreet* approach should not be followed in other jurisdictions.

C. Restitution and Public Law in Ireland

The issue of a public law right to restitution has evolved in a somewhat different matter in the Irish context. Instead of considering whether there is a public law or constitutional right to restitution of unlawfully exacted taxes, the Irish courts have considered the issue in terms of the consequences of a declaration of constitutional invalidity, specifically, whether there is a general constitutional right to redress in respect of an unconstitutional measure. This cause of action is more general than the public law right to restitution identified in *Kingstreet*, as it is not confined to recovery of unlawfully paid taxes, but instead extends to all possible means of redress for the effects of an unconstitutional law. This approach has developed as a result of a misinterpretation of the decision in *Murphy v Attorney General*. *Murphy* was a case in which the relief granted was restitutionary in nature and was therefore based on private law principles. However, subsequent cases have treated the relief afforded in *Murphy* as flowing directly from the declaration of constitutional invalidity, ignoring the role that restitutionary principles had to play in Henchy J's decision.[312] The most recent case to do so is the decision of the Supreme Court in *A v The Governor of Arbour Hill Prison*.[313] *A* is an important decision, not only because it is the most recent attempt by the Supreme Court to interpret *Murphy*, but also because it is the first case since *Murphy* in which the Supreme Court explicitly considered the retroactive effect of a declaration of constitutional invalidity. However, *Murphy* is also a case about restitution and *A* ignores this. The manner in which the Supreme Court in *A* interpreted *Murphy* obscured the principles of restitution identified therein and, in doing so, treated *Murphy* as authority for the proposition that there is a general constitutional right for redress, subject to a judicial discretion to deny relief.

(i) *Murphy v Attorney General*

In *Murphy*, the plaintiffs challenged the constitutionality of sections 192-198 of the Income Tax Act, 1967, which treated a married woman's income as that of her husband for income tax purposes. The effect of these provisions was that the amount of tax payable by a married couple was greater than that payable by unmarried persons. Therefore, the plaintiffs

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[312] See, for example, *An Blascaod Mór Teoranta v Commissioners of Public Works in Ireland (No 4)* [2000] 3 IR 565 (HC) 589; *JW v JW* [1993] 2 IR 476 (SC) 495.

[313] *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88.

claimed that the provisions constituted an unjust attack on the institution of marriage, contrary to Article 41 of the Constitution. The Supreme Court held that the provisions in question were unconstitutional[314] and heard further submissions on whether the declaration of constitutional invalidity operated prospectively or retrospectively. A majority of the court held that a declaration of constitutional invalidity operated retrospectively.[315] A statutory provision that is repugnant to the Constitution is void from the date of its enactment and

> will normally provide no legal justification for any acts done or left undone, or for transactions undertaken in pursuance of it; and the person damnified by the operation of the invalid provision will normally be accorded by the Courts all permitted and necessary redress.[316]

In *Murphy*, Henchy J held that the unconstitutional taxes were recoverable as money exacted *colore officii*.[317] Therefore, the 'necessary and permitted redress' awarded in *Murphy* did not flow directly from the Court's declaration of invalidity, but was awarded on the basis of recognised restitutionary principles.[318] If a remedy had flowed directly from the declaration of invalidity, there would have been no need for Henchy J to have gone on to consider the application of restitutionary principles.

Henchy J went on to consider the circumstances in which a party adversely affected by an unconstitutional statute would be denied redress. This part of his judgment was heavily relied upon by Murray CJ in *A* and so it is necessary to reproduce the relevant section:

> But it is not a universal rule that what has been done in pursuance of a law which has been held to have been invalid for constitutional or other reasons will necessarily give a good cause of action: see, for example, the decision of this Court in *The State (Byrne) v Frawley*. While it is central to the due administration of justice in an ordered society that one of the primary concerns of the Courts should be to see that

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[314] *Murphy* [1982] IR 241 (SC) 287.
[315] *Ibid,* 330 (Griffin J), 333 (Kenny J). O'Higgins CJ dissenting. See also *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680 [21] (Lord Nicholls).
[316] *Ibid,* 313 (Henchy J).
[317] *Ibid,* 316-317. See also *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC) 186. However, since the decision in *Murphy*, the law of restitution has explicitly recognised that 'money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right': *Woolwich* [1993] AC 70, 177; *O'Rourke* [1996] 2 IR 1 (HC) 13.
[318] This was acknowledged by Keane CJ in *Desmond Kelly v Minister for the Environment* [2002] 4 IR 191 (SC) 232. See also *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88 [148] (Denham J); O'Dell, 'Restitution' [1997] *Byrne and Binchy's Annual Review of Irish Law,* 660.

> prejudice suffered at the hands of those who act without legal justification, where legal justification is required, shall not stand beyond the reach of corrective legal proceedings, the law has to recognise that there may be transcendent considerations which make such a course undesirable, impracticable or impossible.
>
> Over the centuries the law has come to recognise, in one degree or another that factors such as prescription (negative or positive), waiver, estoppel, laches, a statute of limitations, *res judicata*, or other matters (most of which may be grouped under the heading of public policy) may debar a person from obtaining a redress in the courts for injury, pecuniary or otherwise, which would be justiciable and redressable if such considerations had not intervened.[319]

Although Henchy J recognised that 'transcendent considerations' may make it 'undesirable, impracticable or impossible' to provide redress for a violation of constitutional rights, he goes on to identify these considerations as 'prescription ..., waiver, estoppel, laches, a statute of limitations, *res judicata*, or other matters (most of which may be grouped under the heading of public policy)'. All of these factors, with the exception of the nebulous 'other matters', are bars and defences recognised in law. Henchy J's expansive reference to transcendent considerations is therefore immediately confined to recognised defences. As Murray CJ, in the *Health Amendment Bill* case,[320] observed of those same 'transcendent considerations': '[E]ach of the circumstances here described is an instance of a defence to a lawful claim, which, therefore, presupposes the existence of a valid claim.'[321]

Henchy J identified two possible defences as a response to the plaintiffs' claims in *Murphy*. First, he considered that the claim could be extinguished by laches, where the plaintiff's delay in taking a claim led the State to rely upon the security of its receipt.[322] Second, he observed that a claim in restitution could be defeated where the defendant changed his position in reliance on the payment. He considered that 'the State justifiably altered its position by spending the taxes thus collected and by arranging its fiscal and taxation policies and programmes accordingly', so that it would be unjust to require the State to make full restitution.[323] Therefore, in *Murphy*, the unlawfully exacted taxes were

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[319] *Murphy* [1982] IR 241 (SC) 314-315. Reproduced by Murray CJ in *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88 [105].
[320] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105.
[321] *Ibid,* [104].
[322] *Murphy* [1982] IR 241 (SC) 317.
[323] *Ibid,* 318-319.

recoverable pursuant to recognised restitutionary causes of action and relief was withheld upon application of recognised restitutionary defences; it did not establish a general constitutional right for redress for the consequences of an unconstitutional statute.

Subsequent cases have interpreted *Murphy* to take account of the restitutionary principles that were developed and applied in that case. In *A*, Denham J expressly recognised that the cause of action by which the plaintiffs in *Murphy* sought to recover the money was restitutionary in nature and that the State was entitled to retain the money on the basis that it had received the money in good faith and had spent it in reliance upon the security of its receipt.[324] Similarly, in *Blehein v Minister for Health and Children*, Laffoy J acknowledged the restitutionary basis on which relief was denied in *Murphy*:

> In broad terms, the rationale of that finding was the application of what Henchy J referred to as one of the first principles of the law of restitution on the ground of unjust enrichment - that the defendant should not be compelled to make restitution, or at least full restitution, when, after receiving the money in good faith, his circumstances have so changed that it would be inequitable to compel restitution.[325]

In *McDonnell v Ireland*, Keane J held, relying on *Murphy*, 'the fact that the provisions struck down were invalid *ab initio* does not have, as a necessary consequence, the vesting of a cause of action in the plaintiff'.[326] In *Murphy* the plaintiffs were not entitled to relief as a direct result of the invalidity of the relevant provisions of the Income Tax Act, 1967. Instead, once the statutory provisions were declared to be invalid, the money was paid without statutory authority. The law of restitution permitted recovery on the basis of duress *colore officii*, a cause of action based on the unjust enrichment principle, which is 'a distinctive legal concept'[327] and is conceptually distinct from a declaration of constitutional invalidity. However, there is another strand of Irish constitutional jurisprudence that takes a more expansive view of Henchy J's decision in *Murphy*, treating it as conferring a broad discretion on the court to refuse relief from the consequences of an unconstitutional statute[328] and

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[324] *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88, [148]. Hereafter *A*.
[325] *Blehein v Minister for Health and Children* [2010] IEHC 329 [6.6].
[326] *McDonnell v Ireland* [1998] 1 IR 134 (SC) 160.
[327] *Corporation of Dublin v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 481.
[328] See, for example, *An Blascaod Mór Teoranta v Commissioners of Public Works in Ireland (No 4)* [2000] 3 IR 565 (HC) 589; *M(C) v M(T)* [1988] ILRM 456 (HC) 470-471; *JW v JW* [1993] 2 IR 476 (SC) 495. See also the decision of Barron J in *McDonnell v Ireland* [1998] 1 IR 134 (SC).

ignoring the principled restitutionary framework set out by Henchy J in *Murphy*. The leading case in this line of jurisprudence is *A v The Governor of Arbour Hill Prison.* [329]

(ii) *A v The Governor of Arbour Hill Prison*

In *A*, the applicant had been convicted for unlawful carnal knowledge pursuant to section 1(1) of the Criminal Law Amendment Act, 1935. This provision failed to provide for a defence of honest and reasonable mistake and was held to be unconstitutional by the Supreme Court in *CC v Ireland.* [330] Following *CC*, the applicant brought *habeas corpus* proceedings. He claimed that his detention was contrary to law, as the provision under which he had been convicted had been held to be unconstitutional and was therefore void *ab initio.* In the High Court, Laffoy J held that the applicant had been convicted pursuant to a void statute and his detention was not in accordance with law.[331]

On appeal, the Supreme Court reaffirmed that the Act was unconstitutional. However, it distinguished between the validity of the statute and the validity of acts done under the statute.[332] Murray CJ held that the retroactive effect of a declaration of invalidity was not absolute and that, relying on *Murphy*, transcendent considerations such as 'the public interest, the common good and social order' could limit the retrospective effect of a declaration of invalidity:

> As Henchy J pointed out above for centuries the law has known general principles and transcendent considerations, such as the public interest, which is another way of saying the common good, restricting retrospectivity, especially the setting aside of judicial decisions already finally decided, even though the law on which they are founded is later held to be invalid.[333]

Murray CJ thus interpreted *Murphy* as authority for the proposition that relief from the consequences of an unconstitutional statute is subject to the discretion of the court, which can refuse relief as a matter of public policy. This necessarily and implicitly treats the relief in *Murphy* as flowing directly from the finding of constitutional invalidity. This is an overly simplistic analysis of Henchy J's decision. It is also at odds with Murray CJ's judgment in the

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[329] *A* [2006] IESC 45, [2006] 4 IR 88.
[330] *CC v Ireland* [2006] IESC 33, [2006] 4 IR 1.
[331] *A* [2006] IESC 45, [2006] 4 IR 88 [98].
[332] *Ibid,* [87] and [122].
[333] *Ibid,* [40]. See also *Redmond v Minister for the Environment* [2004] IEHC 24, [2006] 3 IR 1 (SC) [3].

Health Amendment Bill case, where he characterised the transcendent considerations identified in *Murphy* as established defences to valid claims.[334]

Murray CJ identifies the public interest as one of the transcendent considerations alluded to by Henchy J in *Murphy*.[335] However, it is not clear from Henchy J's statement that this is what he intended. Henchy J states that many of the defences indentified by him can be 'grouped under the heading of public policy'. Far from identifying a general defence of 'public policy', Henchy J simply observes that many of these defences derive from the application of public policy. In *Murphy*, public policy considerations, such as the integrity of the public purse, were relied upon to justify an expansive application of the change of position defence. Relying on public policy as justification for a generous application of an established defence is considerably different to holding public policy, without more, to be an acceptable defence to a claim. In this regard, the approach of Hardiman J in *A*, who acknowledged that specific defences such as estoppel, acquiescence, and delay may be 'central to the achievement of the common good and of that justice and true social order',[336] is to be preferred to that of Murray CJ. However, Hardiman J also referred to unenumerated 'considerations of a more public and general nature', which he deemed to be included in the 'transcendent considerations' referred to by Henchy J in *Murphy* and, upon application of which, relief may be denied.[337]

A is not the first decision in which *Murphy* was treated as broader authority than it purports to be. In *JW v JW*, Egan J relied on *Murphy* as a basis for holding that 'because of a person's conduct or because of the irreversible course events have taken, what was done on foot of the condemned statutory provision might not necessarily be relied on as a ground for nullification.'[338] Similarly, in *Redmond v Minister for the Environment* Herbert J referred to 'transcendent considerations' that might make specific forms of redress unavailable, but did not give any indication as to what he considered those considerations to be.[339] In *An Blascaod Mór Teoranta v The Commissioners of Public Works in Ireland (No 4)*, Budd J

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[334] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105.
[335] See also, *Iarnród Éireann v Ireland* [1996] 3 IR 321 (HC) 364.
[336] *A* [2006] IESC 45, [2006] 4 IR 88 [246]-[250]. This analysis was also adopted by Carroll J in *McDonnell v Ireland* [1998] 1 IR 134 (HC) 139-140. See also *Corporation of Dublin v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 481.
[337] *Ibid,* [252].
[338] *JW v JW* [1993] 2 IR 476 (SC) 495.
[339] *Redmond* [2004] IEHC 24, [2006] 3 IR 1 [3].

appeared to consider, relying on *Murphy*, that the courts had a wide discretion to grant redress to persons disadvantaged by an unconstitutional statute.[340]

Conclusions

Therefore, it is clear that *Murphy* was not a case wholly decided on constitutional principles. To say that the relief issued as a result of the declaration of constitutional invalidity is to miss a step in the proper analysis of the case. The declaration of constitutional invalidity, by invalidating the taxing provision *ab initio*, removed the statutory basis on which the money had been paid. Once it appeared that the money had been paid without statutory authority, the principle against unjust enrichment required that the State should not retain the benefit. However, the principle against unjust enrichment is not an autonomous, self-executing, principle but instead manifests itself through recognised causes of action.[341] The cause of action within which the principle against unjust enrichment operated in *Murphy* was duress *colore officii*. Similarly, relief was not restricted by exercise of judicial discretion, but through the application of the change of position defence. Thus, *Murphy* does not establish a general constitutional right of recovery of unlawfully exacted taxes, nor does it establish a general right to relief from the consequences of an unconstitutional measure.

Judicial development of the principles identified in *Murphy* has given rise to two conflicting strands of authority. The first—which includes Denham J's judgment in *A*, Murray CJ's decision in the *Health Amendment Bill* case, Laffoy J's judgment in *Bleinhein*, Keane J's judgment in *McDonnell v Ireland*, and his decision as Chief Justice in *Desmond Kelly v The Minister for the Environment*—expressly acknowledges that *Murphy* concerned relief granted on the basis of established restitutionary principles and that this relief was denied through the application of the change of position defence; an established defence to claims in restitution. The second strand of authority—which includes the decision of the Chief Justice in *A*, Barron J's decision in *McDonnell v Ireland*, and Herbert J's decision *Redmond v Minister for the Environment*—treats *Murphy* as establishing that constitutional invalidity gives rise to an automatic right to redress, subject to a broad judicial discretion to withhold relief. If the latter approach is correct and Irish law *does* recognise a general right to redress for unconstitutional acts, then it is possible that Ireland is moving in a similar

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[340] *An Blascaod Mór Teoranta (No 4)* [2000] 3 IR 565 (HC) 589.

[341] *Corporation of Dublin v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 484. See also O'Dell, 'Bricks and Stones and the Structure of the Law of Restitution' (1998) 20 Dublin University Law Journal (ns) 101.

direction to that taken by the Supreme Court of Canada in *Kingstreet*, under which constitutional invalidity gives rise to a right to restitution. As a matter of legal principle, the former interpretation is to be preferred for three reasons.[342]

First, a general public law ground of redress, whether restitutionary or otherwise, is inconsistent with the holding in *Pine Valley Developments v Minister for the Environment* that an ultra vires act does not give rise to relief. O'Higgins CJ stated that a right to damages only arose where the ultra vires act constituted a recognised tort, where it was actuated by malice or improper purposes, or where the 'authority knows that it does not possess the power which it purports to exercise.'[343] To the extent that *A* presupposes a general right to redress from the consequences of invalidity, it is inconsistent with *Pine Valley*. Second, if such a general right to redress is developed, subject to a discretion to refuse relief on the part of the courts, this could undermine the right to restitution of unlawfully exacted taxes pursuant to the *Woolwich* principle, by supplanting it with a general discretionary remedy of the type envisaged in *A*.[344] Third, discretionary, public law, relief could not be appropriate in the context of restitution of taxes levied in violation of principles of European Community law, as the *San Giorgio* principle requires that such taxes are recoverable as of right. If discretionary relief was to be available for ultra vires and unconstitutional levying of taxes, this would create the need for two separate regimes, one a discretionary constitutional basis for recovery, the other a claim for restitution as of right. There appears to be no justification for the adoption of such a bifurcated approach. In particular, it would be difficult to explain why constitutional invalidity gave rise to a discretionary, and therefore weaker, form of relief than other bases of invalidity.

Conclusions

Several conclusions can be drawn from the points made in this Chapter. First, the *Woolwich* principle has been adopted as a matter of Irish law. However, in common with

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[342] The former interpretation has been preferred by a significant body of academic commentary: see, O'Dell, 'Restitution' (n 317) 660; Scannell, 'The Taxation of Married Women. *Murphy v Attorney General*' in O'Dell (ed) *Leading Cases of the Twentieth Century*. See also Hogan and Gwynn Morgan, *Administrative Law in Ireland*, (4th edn Roundhall, Dublin 2010) 1018-1027. Abroad, *Murphy* is also regarded as a leading Irish case on restitution and, more specifically, the defence of change of position: Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' (n 2) 167; Jones, 'Some Thoughts on Change of Position' in Burrows and Roger (eds), *Mapping the Law: Essays in Honour of Peter Birks* (OUP, Oxford 2006) at footnote 54.

[343] *Pine Valley* [1987] 1 IR 23 (SC) 36, quoting Wade, *Administrative Law* (5th edn Clarendon Press, Oxford 1982) 673. See also Henchy J's comments in the same case at 40; *Glencar Exploration plc v Mayo County Council (No 2)* [2002] 1 IR 84 (SC) 149-150.

[344] Discussed above at 245 *et seq.*

English law, several issues must be resolved in order to clarify the scope of the cause of action. In particular, it is not clear whether the *Woolwich* principle responds only to unlawful *demands* in Irish law, or if it responds to all kinds of unlawful exactions, whether underpinned by a demand or not. Furthermore, the Irish courts have yet to clarify whether the nature of the public body or the nature of the transaction will engage the *Woolwich* principle; what types of invalidity will engage the principle, and the relationship between the *Woolwich* principle and statutory regimes for recovery. However, at this stage, it is clear that the approach of the Irish courts is likely to be different in certain regards to that adopted by the English courts. For example, the Irish courts are likely to take a more flexible approach to jurisdictional issues than the English courts, in light of the flexible approach traditionally adopted by the Irish courts in relation to procedural exclusivity in public law. Furthermore, the decision of the Supreme Court in *Harris v Quigley*, coupled with common law and constitutional presumptions against interference with vested rights, means that the Irish courts will be slow to hold that the existence of a statutory regime for recovery has supplanted common law rights to restitution of overpaid tax, in the absence of a statutory intention that this should be the case.

Second, although the Irish courts have occasionally lapsed into language reminiscent of an absence of basis approach, they have not yet considered whether the law of restitution in general, and restitution from public authorities in particular, should adopt an approach that turns on the absence of a legal basis for the payment. This Chapter argued that such an approach should not be adopted.

Third, this Chapter considered the development of a public law regime for recovery and argued that such regimes should not govern recovery of unlawfully exacted taxes. The public law regimes suggested by the Court of Appeal in *DMG* and by the Irish Supreme Court in *A* were based on misinterpretations of existing authorities. There is no support for such regimes in Ireland or in England as a matter of authority. Moreover, public law bases for restitution of overpaid tax are generally premised on the idea that the private law cannot accommodate such claims. However, arguments adduced to support this proposition are unconvincing. The law of restitution and the *Woolwich* principle are relatively recent arrivals on the legal landscape and, as a result, some teething problems are to be expected.[345] Indeed,

[345] *DMG* [2005] EWCA Civ 78, [2006] Ch 243 [289]; *Boake Allen Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25, [2006] STC 606 [159]-[162]; *FII Group Litigation* [2008] EWHC 2893 (Ch), [2009] STC 254 [245]; *FII Group Litigation* [2010] EWCA Civ 103 [158] and [164].

it may be too soon to conclusively determine whether or not the private law of restitution is appropriate to deal with claims against the state. On this analysis, claims that a public law regime is necessary are at best premature and at worst misconceived.

Furthermore, the public law regimes surveyed in this paper are beset with conceptual difficulties. The scope of these regimes is unclear: it is often unclear clear what kinds of legislative invalidity or what charges will engage a public law right to restitution.[346] Moreover, the regimes' relationship with other related areas of law—specifically their relationship with rights to recovery under traditional unjust factors and with other forms of redress for ultra vires acts—has yet to be clarified in any of the models considered in this paper. Until these difficulties are addressed, public law rights of recovery cannot offer a viable alternative to an approach based on traditional unjust factors.

Fourth, this Chapter argued that acknowledging the existence of a public law regime for restitution of overpaid tax will raise important practical issues must be addressed before a public law regime can be adopted. For example, the limitation periods and restrictions attendant on claims for judicial review may impermissibly fetter the right to restitution and, where a charge is contrary to EU law, the public law regime may need to be disapplied in order to provide an effective remedy. Moreover, the limitations on the forms of relief that are available in public law claims may restrict the courts' ability to effect full restitution, particularly if compound interest would ordinarily be available in claims for restitution.

Finally, it should be noted that the principle against unjust enrichment may bleed into principles of administrative law. This has arisen where the applicant seeks judicial review of the exercise of a statutory discretion to make a repayment of overpaid tax. In *ex parte Chetnik* Lord Goff held that the exercise of a statutory duty to repay overpaid tax should be exercised in accordance with the principles of restitution:

> it should be of assistance to those considering the exercise of the discretion, conferred by the section, to have regard to the general principles of the law of restitution in their search for guidance in the exercise of the power, though always bearing in mind that those principles may be modified, expressly or impliedly, by the terms of the statute.[347]

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[346] *Hislop v Canada (Attorney General)* [2007] SCC 10, 278 DLR (4th) 385 [108]; *Barbour v University of British Columbia* [2009] BCSC 425, 310 DLR (4th) 130 [69].

[347] *R v Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd* [1988] AC 858 (HL) 880.

Similarly, in *Dolan v Neligan*, Walsh J held that, in adjudicating claims for repayment of overpaid tax pursuant to section 25 of the Customs Consolidation Act, 1876, the Customs Commissioners were obliged to adopt a 'judicial approach' and that section 25 imposed an 'obligation to decide the matter by objective standards and to act judicially.'[348] This suggests that the courts will scrutinise very carefully cases in which the taxing authority exercises its discretion to refuse repayment. Similarly, in *Royal Insurance Australia*, a majority of the High Court of Australia held that, where the taxing authority possessed a statutory discretion to repay overpayments, as well as an independent duty to refund the money arising in the law of restitution, the authority could not exercise its discretion to refuse repayment.[349] Mason CJ held that, although the Commissioner had a discretion to refuse to repay, he would be reluctant to allow her to exercise that discretion to refuse a claim for repayment, unless there were particular reasons, such as a change in position on the part of the State to justify that conclusion.[350] Thus, principles of administrative law may, in certain circumstances, be moulded to take account of the principle against unjust enrichment.

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[348] *Dolan v Neligan* [1967] IR 247 (SC) 276.

[349] See *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 64.

[350] *Ibid,* 64-65. Birks, '"When Money is Paid in Pursuance of a Void Authority"—a Duty to Repay?' [1992] Public Law 580, 584; Butler, 'Restitution of Overpaid Taxes, Windfall Gains, and Unjust Enrichment: *Commissioner of State Revenue v Royal Insurance Australia Ltd*' (1994-1995) 18 University of Queensland Law Journal 318, 319-320; McInnes, 'Mistaken Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance*' (n 54) 212.

Chapter 7: General Defences

Defences to claims for restitution can be divided into two categories. First, there are defences that are specific to the law of restitution. These are founded upon restitutionary principles and deny a specific element of a cause of action in restitution. These defences are considered in Chapter 8. The second category of defences encompasses general defences that also apply to restitutionary claims. These defences tend to be founded on broad considerations of public policy. It is this latter category with which this Chapter is concerned.

Part I of this Chapter considers the doctrine of *res judicata*, which has been frequently invoked in Irish law as a defence to claims for restitution. Part II discusses statutory limitation periods in claims for overpaid tax. It considers which provisions of Ireland's Statute of Limitations 1957 apply to claims for restitution. It also discusses the circumstances in which statutory limitation periods may be extended or curtailed. In particular, it assesses limitations upon the state's power to impose restrictive limitation periods in respect of claims for unlawfully exacted tax. These limitations can be derived from the common law, EU law, or may arise under the Irish Constitution. Part III considers the equitable doctrine of laches. It analyses recent developments in Irish law, which have seen the courts permit defendants to invoke laches as a defence to claims for relief at law, and will argue that these developments are based on a misinterpretation of how laches was applied in *Murphy v Attorney General.*[1] It also considers the suggestion that the Irish courts may adopt a more generous formulation of the *laches* doctrine, where prompted to do so by fiscal chaos concerns.

The methodological approach of this Chapter differs from that of previous chapters, as it refers only to English and Irish law. There are several reasons for this change of approach. First, as is common to many areas of the law, Irish law is heavily influenced by English authorities. As discussed in Chapter 1, many, if not most, Irish cases rely heavily on English cases when crafting principles of the law of restitution and have adopted many of the doctrines developed in that jurisdiction. In light of the close relationship between the two jurisdictions and the willingness of Irish judges to follow English precedent, English law provides the most appropriate jurisdiction with which to compare Irish law.

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

Second, this Chapter is concerned with general defences, many of which do not raise controversial issues when raised in response to claims for restitution of overpaid tax. Many jurisdictions have not had cause to consider these defences in the specific context with which this Thesis is concerned and do not further our understanding of these issues. In contrast, there has been extensive litigation in respect of restitution of overpaid taxes in England, and so the English courts have had the opportunity to address many of the issues raised in this Chapter.

Third, English and Irish law share features that do not apply to Canada or Australia. For example, both Ireland and England are subject to principles of EU law, and courts in both jurisdictions must have regard to the principles of the ECHR. These considerations have had a significant impact on claims for restitution of overpaid tax. In particular, principles of EU law have imposed significant limitations on the extent to which Member States can rely on limitation periods to limit claims for restitution of taxes levied in breach of EU law. Thus, these shared concerns allow considerable scope for dialogue between the two jurisdictions.

I. Res Judicata

The doctrine of *res judicata* provides that, where a court of competent jurisdiction has ruled on a matter, this ruling is to be regarded as conclusive between the parties.[2] Thus, where a restitutionary claim has been adjudicated by a court of competent jurisdiction, it will not be open to the parties to re-litigate the matter.

The rationale traditionally advanced for *res judicata* is the public interest in finality of litigation.[3] However, in truth, the doctrine is underpinned by several complementary polices, both public and private.[4] First, *res judicata* advances the public interest in the finality of litigation[5] and the 'need to prevent conflicting judgments on the same facts becoming a matter of public record.'[6] Second, it protects private interests, by ensuring that litigants are

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[2] Delany and McGrath, *Civil Procedure in the Superior Courts* (2nd edn Thomson Round Hall, Dublin 2005) 807. See also Handley, *Spencer Bower, Turner and Handley: Res Judicata* (3rd edn Butterworths, London 1996) 9-10.

[3] *The Indian Endurance* [1993] AC 410 (HL) 415.

[4] Watt 'Laches, Estoppel and Election' in Birks and Pretto (eds) *Breach of Trust* (Hart Publishing, Oregon 2002) 367. See also *Johnson v Gore Wood & Co (No1)* [2002] 2 AC 1 (HL) 30.

[5] See *Belton v Carlow* [1997] 1 IR 172 (SC) 182; *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 479; Virgo, *Principles of the Law of Restitution* (2nd edn OUP, Oxford 2006) 671; Handley, *Spencer Bower, Turner and Handley: Res Judicata* (n 2) 14.

[6] Watt 'Laches, Estoppel and Election' (n 4) 367.

protected from a multiplicity of suits.[7] Keane J noted these complementary policy concerns in *The Bricklayers' Hall*:

> The justification of the doctrine is normally found in the maxim interest *rei publicae ut sit finis litium* and it is important to bear in mind that the public interest referred to reflects, in part at least, the interest of all citizens who resort to litigation in obtaining a final and conclusive determination of their disputes. However severe the stresses of litigation may be for the parties involved - the anxiety, the delays, the costs, the public and painful nature of the process - there is at least the comfort that at some stage finality is reached. Save in those exceptional cases where his opponent can prove that the judgment was procured by fraud, the successful litigant can sleep easily in the knowledge that he need never return to court again.[8]

Res judicata is a broad principle that covers a number of distinct, though related, doctrines.[9] These doctrines—cause of action estoppel, issue estoppel, and abuse of process—were described by May LJ in *Specialist Group International Ltd v Deakin*:

> If a claim has been explicitly determined in previous concluded proceedings between the same parties, that claim cannot be raised again, other than on an appeal, unless there is fraud or collusion [cause of action estoppel]. If a necessary element of a claim has been explicitly determined in previous concluded proceedings between the same parties, that issue cannot be raised again, if, as is likely but not inevitable, it would be an abuse to raise that issue again [issue estoppel]. This may also extend to an implicitly necessary element of the previous determination. ... If a claim or issue has not been determined in previous concluded proceedings between the same parties, there may nevertheless be circumstances in which, as a matter of public and private interest on a broad merits-based procedural judgment, it would be an abuse for a party to raise that claim or issue. Such circumstances may, depending on the facts, exist

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[7] *Kildare v Keogh* [1971] IR 330 (SC) 344 (McLoughlin J dissenting). For a considered analysis of the justifications for the *res judicata* principle, see McDermott, *Res Judicata and Double Jeopardy* (Butterworths, Dublin 1999) Chapter 3.

[8] *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 479. See also *WWF World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445 [74]; Delany and McGrath, *Civil Procedure in the Superior Courts* (n 2) 807-808.

[9] *Gribbon v Lutton* [2001] EWCA Civ 1956, [2002] QB 902 [49].

> where the litigant could and should have raised the matter in question in earlier concluded proceedings [abuse of process].[10]

The third doctrine, abuse of process, is also known as the rule in *Henderson v Henderson.*[11] However, although three distinct rules have been identified as forming part of the *res judicata* doctrine, McDermott has noted that the Irish courts tend to simply state that a party is bound by *res judicata*, without identifying whether or not the case concerns cause of action estoppel or issue estoppel.[12]

The doctrine of *res judicata* enjoys a long pedigree in the law of restitution. In *Moses v Macferlan*, the claimant recovered the money paid to the defendant pursuant to promissory notes in an action for restitution in the Court of Common Pleas.[13] The parties had been engaged in related litigation before the Court of Conscience and the defendant had sought to advance a defence of *res judicata* based on those proceedings. The Court of Common Pleas did not consider that the decision of the Court of Conscience in the previous proceedings between the parties prevented it from permitting recovery of the sums sought by the claimant. As a result, the case has, in the past, been considered to be one that undermines the doctrine of *res judicata.*[14] However, the Court of Common Pleas considered that its decision was consistent with that of the Court of Conscience, which

> decreed upon the indorsement of the notes by the plaintiff: which indorsement is not now disputed. The ground upon which this action proceeds, was no defence against that sentence.
>
> It is enough for us, that the commissioners adjudged "they had no cognizance of such collateral matter." We can not correct an error in their proceedings; and ought to suppose what is done by a final jurisdiction, to be right. But we think, "the commissioners did right, in refusing to go into such collateral matter." Otherwise, by

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[10] *Specialist Group International Ltd v Deakin* [2000] EWCA CIV 777 [23]. See also *J S Bloor (Measham) Ltd v Calcott (No 2)* [2002] 1 EGLR 1 (Ch) [17]-[18]. On the relationship between cause of action estoppel and issue estoppel see *Thoday v Thoday* [1964] P 181 (CA) 197-198; Delany and McGrath, *Civil Procedure in the Superior Courts* (n 2) 825.

[11] *Henderson v Henderson* (1843) 3 Hare 100. For a modern restatement of the rule see *Johnson v Gore Wood & Co (No1)* [2002] 2 AC 1 (HL) 30. In an Irish context see *Nelson v Couch* 15 CB (NS) 99, 108 (Court of Common Pleas); *Russell v Waterford and Limerick Railway Co* (1885) 16 LR Ir 314, 321 (Court of Exchequer); *Cox v Dublin City Distillery (No 2)* [1915] 1 IR 345, 372 (Irish Court of Appeal); *AA v Medical Council* [2003] 4 IR 302 (SC) 315-316; *Carroll v Ryan* [2003] 1 IR 309 (SC) 317.

[12] McDermott, *Res Judicata and Double Jeopardy* (n 7) 12.

[13] *Moses v Macferlan* (1760) 2 Burrow 1005.

[14] *Philips v Hunter* (1795) 2 H Bl 402, 416; *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 483.

way of defence against a promissory note for 30s. they might go into agreements and transactions of a great value: and if they decreed payment of the note, their judgment might indirectly conclude the balance of a large account.

The ground of this action is not, "that the judgment was wrong:" but, "that, (for a reason which the now plaintiff could not avail himself of against that judgment,) the defendant ought not in justice to keep the money." And at Guildhall, I declared very particularly, "that the merits of a question, determined by the commissioners, where they had jurisdiction, never could be brought over again, in any shape whatsoever."[15]

Many modern commentators now accept that *res judicata* had no application in *Moses*,[16] as the matter of the promissory notes was not, and, indeed, could not be, considered by the Court of Conscience. The Court of Common Pleas was instead concerned with an action for breach of contract, independently of the litigation commenced by Macferlan. It was the institution of the proceedings before the Court of Conscience that gave rise to the breach of contract and hence to the cause of action in restitution for recovery of the sums obtained by way of judgment in those proceedings.[17] As noted by Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd*:

the doctrine of *res judicata* had no application to this action in the King's Bench; there was no attempt by Moses to relitigate a cause of action that had merged into the judgment for Macferlan in the proceeding in the Court of Conscience. Nor was there any issue estoppel, given the denial of jurisdiction in the Court of Conscience to deal with issues arising under the agreement.[18]

In *Murphy v Attorney General*, Henchy J explicitly recognised that the doctrine of *res judicata* was one of several factors that could bar relief in an action for restitution,[19]and the doctrine has been invoked as a defence to claims for restitution in several cases. In *White v Spendlove*, the plaintiff instituted proceedings claiming the recovery of a deposit that she had paid on property sold by the defendant. She claimed the sum as money had and received by the defendant to her use, as the money had been paid on a consideration that had failed.

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[15] *Moses v Macferlan* (1760) 2 Burrow 1005, 1009.
[16] Birks, *Unjust Enrichment* (2nd edn OUP, Oxford 2005) 233; Edelman and Bant, *Unjust Enrichment in Australia* (OUP, Melbourne 2006) 369.
[17] Birks, *Unjust Enrichment* (n 16) Chapter 10, 233; Edelman and Bant, *Unjust Enrichment in Australia* (n 16) 369.
[18] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2002) 208 CLR 516 [80].
[19] *Murphy v Attorney General* [1982] IR 241 (SC) 313.

However, in previous proceedings, the plaintiff failed to rely on failure of consideration when she sought rescission of the agreement that she had entered into with the vendor. The Supreme Court held that the plaintiff's claim for money had and received was based on substantially the same cause of action as was litigated in the first set of proceedings. Therefore, she was precluded from bringing a second claim.[20] Meredith J, in his dissenting judgment, considered that the claim in restitution could not have arisen in the previous proceedings for rescission as it was inconsistent with the factual basis of the plaintiff's claim in that action. Until the judge in the first set of proceedings had determined that no contract had been concluded between the parties, the question of total failure of consideration 'did not, and could not, arise until there was found to be no agreement.'[21] However, the decision of the majority is explicable as an application of the rule in *Henderson v Henderson*, rather than an application of either cause of action estoppel or issue estoppel; the plaintiff should have raised all possible arguments relevant to her claim, even if the arguments were raised in the alternative to a claim for rescission.

The leading Irish case that applies *res judicata* to a restitution claim takes a robust approach to *res judicata* and the interests that it seeks to protect.[22] In *The Bricklayers' Hall*,[23] the plaintiff corporation sought to compulsorily purchase the defendant's building on Cuffe Street. When arbitration proceedings were commenced, two alternatives were put forward as a basis for calculating the compensation payable by the Corporation. The first sum was to be awarded where the building would not be reinstated. The second, larger, sum envisaged that the facade of the building would be retained and reinstated on a reconstructed building on a smaller site. The arbitrator awarded the larger sum to the defendant, on the basis that the building was to be reinstated. When the defendant failed to reinstate the building, the Corporation sought restitution of the difference between the larger sum and the smaller sum that could have been awarded. Keane J, delivering the judgment of the Supreme Court, held that recovery was barred by the doctrine of *res judicata*:

> I think it is unnecessary to determine whether the retention by the union of the entire compensation constituted an unjust enrichment of them, because I am satisfied that those two considerations—public policy as reflected in the doctrine of res judicata and

[20] *White v Spendlove* [1942] 1 IR 224 (SC) 234 (O'Sullivan CJ), 238 (Murnaghan J) and 256 (O'Byrne J).
[21] *Ibid*, 243.
[22] O'Dell, 'Restitution and *Res Judicata* in the Irish Supreme Court' (1997) 113 LQR 245, 249.
[23] *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468 (SC). Hereafter 'the *Bricklayers Hall* case'.

> the exclusive role of the Oireachtas in legislation—are such as to render any such unjust enrichment, in the circumstances of the present case, irreversible.

This decision has been the subject of considerable criticism. Commentators have questioned the application of *res judicata* to the facts of the case, as it is difficult to identify the basis on which the doctrine could operate. There was no cause of action estoppel, as the first decision did not concern a claim for restitution.[24] Furthermore, the restitution claims could not have been barred by issue estoppel, when the facts giving rise to the claim in restitution, in this case a total failure of consideration, could not have arisen until after the award had been made.[25] Until the defendant had received the award *and* failed to reinstate the buildings, it was not open to the plaintiff to argue that it had been unjustly enriched. McDermott has argued that:

> The judgment of Keane J flies in the face of the trend towards extending the exceptions and making the doctrine more flexible... the *Building and Allied Trade Union* case requires careful reconsideration when the issue next comes before the Supreme Court.[26]

Recent English cases have applied the *res judicata* doctrine as a bar to claims in restitution. In *Amin v Amin*, *res judicata* limited restitutionary relief to a level specified in past proceedings. Warren J held himself to be bound by the approach to quantification he had laid down in an earlier decision in the same action.[27] In *WWF World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc*, the Court of Appeal was called on to consider whether or not it was an abuse of process for the claimant to seek an award of *Wrotham Park* damages, where it failed to make such a claim in the original trial of the action, where gain-based damages were sought. The Court of Appeal held that to allow such a claim would undermine the interest of finality in litigation:

> The federation was entitled to proceed on the basis that, a claim to an award of *Wrotham Park* damages not having been sought in 2001, such a claim was not being pursued in these proceedings. The flaw in the judge's reasoning, as it seems to me, lies in his failure to appreciate that the claim to Wrotham Park damages (if it were to be

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[24] McDermott, *Res Judicata and Double Jeopardy* (n 7) 171

[25] O'Dell, 'Restitution and *Res Judicata* in the Irish Supreme Court' (n 22) 249. Virgo, *Principles of the Law of Restitution* (n 5) 671; McDermott, *Res Judicata and Double Jeopardy* (n 6) 171.

[26] McDermott, *Res Judicata and Double Jeopardy* (n 7) 171. See also O'Dell, 'Restitution and *Res Judicata* in the Irish Supreme Court' (n 22) 249; Virgo, *Principles of the Law of Restitution* (n 5) 671.

[27] *Amin v Amin* [2009] EWHC 3356 [394]-[396].

raised at all) should have been raised before Jacob J in conjunction with the claim to an account of profits. [28]

The abuse of process doctrine was also considered in *Test Claimants in the ACT Group Litigation (Class 4) v The Commissioners for Her Majesty's Revenue and Customs.* Henderson J held that the traditional approach to pleading is to be followed as closely as possible in group litigations:

> The purpose of group litigation is to promote the orderly and efficient resolution of multiple claims which involve common issues of law or fact. It is not intended to provide test claimants with a laboratory in which they can try out one new argument after another, until they finally hit on one which meets with the court's approval.[29]

However, he dismissed the abuse of process point. He considered that there was a strong public interest in determining the issues raised, that the issues were capable of resolution by short submissions, that these were unlikely to prejudice the Revenue Commissioners, and that it was likely that the Commissioners would have to face the arguments in other proceedings brought within the GLO. Furthermore, he noted that the arguments

> could not in practice have been run until after the ECJ had given judgment in *ACT Class IV*; and although they could in theory have been raised in *Pirelli II*, it is hardly surprising, and not a matter for criticism, that they did not occur to the claimants' advisers in the short interval between the judgment of the ECJ in December 2006 and the hearing before Rimer J in February 2007.[30]

This decision demonstrates that the *res judicata* doctrine is particularly pertinent in large group litigations seeking recovery of overpaid taxes. The flexible approach adopted by Henderson J is desirable for several reasons. First, where there are a large number of group litigations proceeding through the courts simultaneously, it may not be possible to raise an argument until a particular issue has been resolved in the course of another hearing within that GLO or in a related GLO. This was the case in *Test Claimants in the Act Group Litigation (Class 4)*, where one of the new arguments sought to be raised by the claimants could not have been raised until after the ECJ had handed down its judgment in a decision

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[28] *WWF World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286, [2008] 1 WLR 445 [74]. Hereafter *WWF*.
[29] *Test Claimants in the Act Group Litigation (Class 4), Test Claimants in the Act Group Litigation (Class 2) v The Commissioners for Her Majesty's Revenue and Customs* [2010] EWHC 359 (Ch) [87].
[30] *Ibid,* [87]-[89].

related to the group litigation.[31] Second, it is desirable that all issues and arguments relevant to the group litigation are fully considered. If not, the group litigation will fail to fulfil its purpose of deciding related cases as thoroughly and expeditiously as possible. Furthermore, as Henderson J observed, refusal to admit a claim in the group litigation will not protect a defendant from similar claims made by litigants who have refused to join the group litigation.[32] Finally, where the claims related to taxes levied in breach of Community law, permitting *res judicata* to bar claims may itself constitute a breach of Community law.[33] Therefore, the protective policies that underpin *res judicata* lose much of their force in the context of group litigation. This approach is consistent with the flexible approach adopted in recent Irish cases, which have counselled against a crude, mechanistic approach to the rule in *Henderson v Henderson*.[34]

II. Limitation Periods

The fixing of limitation periods reflects the view that it is desirable that litigants should bring claims promptly. Delay in bringing claims can adversely affect the conduct of litigation, as 'fading memories, unavailability of witnesses, through death or for other reasons, the destruction of evidence or changes in circumstances'[35] can give rise to injustice to defendants seeking to defend themselves against stale claims. Statutory limitation periods involve a legislative balancing of the plaintiff's right to sue, the defendant's right to be protected from stale claims,[36] and the public interest in the finality of litigation.[37] As such, they constitute 'a practical and pragmatic device which is, by definition, arbitrary.'[38]

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[31] *Ibid*, [89].
[32] *Ibid*, [88].
[33] It has been held that the principle of res judicata of itself is not contrary to European law: *Society of Lloyd's v Levy* [2004] EWHC 1860 (Comm), [2004] 3 CMLR 56 [32]; *Arklow Holidays Ltd v An Bord Pleanála* [2007] IEHC 327 [5.10]-[5.13]. However, the Opinion of AG Léger in Case C-453/00 *Kühne & Heitz NV v Productschap voor Pluimvee en Eieren* [2004] ECR I-837 [66] suggests that a more stringent approach may be taken to *res judicata* in a Community context.
[34] *Carroll v Ryan* [2003] 1 IR 309 (SC) 318; *AA v The Medical Council* [2003] 4 IR 302 (SC) 316-317; *SM v Ireland* [2007] IESC 11, [2007] 3 IR 283 [40]-[42]; *Arklow Holidays Ltd v An Bord Pleanála* [2007] IEHC 327 [4.1]. See also *Johnson v Gore Wood & Co (No1)* [2002] 2 AC 1 (HL) 31.
[35] *White v Dublin City Council* [2004] 1 IR 545 (SC) [79].
[36] *Hegarty v O'Loughran* [1990] 1 IR 148 (SC) 156 (Finlay CJ) and 157 (Griffin J); *Brady v Donegal County Council* [1989] ILRM 282 (HC) 286; *White v Dublin City Council* [2004] 1 IR 545 (SC) [64]; *Ulster Investment Bank Ltd v Rockrohan Estate Ltd* [2009] IEHC 4. See also McLean, 'Limitation of Actions in Restitution' (1989) 48 CLJ 472, 473.
[37] *Tuohy v Courtney* [1994] 3 IR 1 (SC) 48. See also O'Dell, 'Claims to Recover Unlawful Health Charges' in O'Dell (ed) *Older People in Modern Ireland: Essays on Law and Policy* (Firstlaw, Dublin 2006) 471-472; Kerr and Brady, *The Limitation of Actions* (2nd edn The Incorporated Law Society of Ireland, Dublin 1994) 1;

Determining the appropriate limitation period for restitutionary claims is complicated by several considerations.[39] First, restitution is a legal response to a number of disparate events. Many, although not all, of the limitation periods prescribed in the Statute of Limitations 1957 respond to specific causes of action, rather than the legal response to such actions.[40] Therefore, different limitation periods may apply according to whether restitution is sought to reverse unjust enrichment or sought in respect of a wrong. This is particularly relevant to restitution from public authorities, as the limitation period for claims will vary according to whether they are claims in restitution for unjust enrichment or claims for damages for breach of statutory duty or constitutional torts. In particular, the appropriate limitation period to be applied to claims under the *Woolwich* principle may depend on whether the cause of action is considered to be founded on the principle against unjust enrichment or on a wrong.[41] Second, in certain circumstances, the Statute of Limitations prescribes limitation periods in respect of specific forms of relief.[42] Therefore, in certain cases, two limitation periods may be applicable in respect of a restitutionary claim, for example, where an account is sought from the defendant as a means of obtaining restitution.[43] Section A of this Part will consider the limitation periods applicable to claims for restitution. Section B will consider the circumstances in which these limitation periods may be extended. Section C will consider the public law limitations that affect the setting of statutory limitation periods, particularly those that have been applied in claims for restitution of overpaid tax.

A. Limitation Periods Applicable to Restitutionary Claims

In order to fully understand how limitation periods apply to claims for restitution from public authorities, it will be necessary to consider several statutory limitation periods under the Statute of Limitations 1957, which are considered in section (i). Limitation periods applicable to equitable claims are discussed in section (ii). Specific limitation periods that apply to overpaid taxes are considered in section (iii).

(i) Statute of Limitations 1957

McGee, *Limitation Periods* (5th edn Sweet and Maxwell, London 2006) 18; Rose, 'Lapse of Time: Limitation' in Birks and Rose (eds) *Lessons of the Swaps Litigation* (Mansfield Press, London 2000) 348-349.

[38] Kerr and Brady, *The Limitation of Actions* (n 37) 3.

[39] See *Portman Building Society v Hamlyn Taylor Neck (a firm)* [1998] 4 All ER 202; Rose, 'Lapse of Time: Limitation' (n 37) 348-349.

[40] See, generally, Part II of the Statute of Limitations 1957.

[41] See Chapter 8 at 300-302.

[42] See section 11(4) of the Limitation Act 1957, which applies to claims for account.

[43] *Murphy v Attorney General* [1982] IR 241 (SC).

Several limitation periods are potentially relevant to claims in restitution. First, section 11(1)(b) of the Statute of Limitations provides for a limitation of six years in respect of claims 'founded on quasi contract'. This is the most appropriate provision to govern restitutionary claims founded on the principle against unjust enrichment.[44] Where a claim is for restitution for wrongs, the most appropriate limitation period is that applicable to the wrong.[45] Section 11(2) of the 1957 Act provides for a six-year limitation period in respect of torts, including constitutional torts,[46] and breach of duty, including breach of statutory duty.[47] Where a restitution claim involves a claim for an account, as in *Murphy v Attorney General*, applicable limitation periods may be supplanted by section 11(4), which provides that: 'An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.'[48] It is unclear whether this provision is confined to the common law action of account or whether it applies also to a claim for account in equity.[49] Each of these relevant limitation periods provides for a six year limitation period. Therefore, in practical terms, irrespective of the precise limitation period that is to be applied, the limitation period to be applied to most, if not all, restitutionary claims, including equitable claims for account, whether founded on a wrong or on the unjust enrichment principle, will be a period of six years.

In contrast to the 1957 Act, England's Limitation Act 1980 does not provide for a specific statutory limitation period for restitution or 'quasi-contract' claims. However, in *Westdeutsche*, Hobhouse J considered that the term 'simple contract' in section 5 of the 1980 Act was sufficiently broad to encompass restitutionary claims.[50] He justified this expansive interpretation of section 5 by observing that:

> The alternative to the view of the Court of Appeal would have to be that the intention of the legislature in 1939 was that there should be no limitation period for any

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[44] O'Dell, 'Claims to Recover Unlawful Health Charges' (n 37).
[45] See also, Rose, 'Lapse of Time: Limitation' (n 37) 355.
[46] *McDonnell v Ireland* [1998] 1 IR 134 (SC) 156-158.
[47] Statute of Limitations, section 11(2)(b). See *Tate v The Minister for Social Welfare* [1995] 1 IR 418 (HC) 439.
[48] Under section 23 of the Limitation Act 1980 (UK), the relevant limitation period is the one applicable to the claim that is the basis of the duty to account. See *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 (CA) 415.
[49] Swadling also makes this observation in relation to the analogous limitation period in section 2(2) of the Limitation Act 1939 (UK): Swadling, 'Limitation' in Birks and Pretto (eds) *Breach of Trust* (Hart Publishing, Oregon 2002) 333. It is presumed that section 2(2) of the 1939 Act prompted Irish drafters to enact an equivalent in section 11(4).
[50] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 (QBD) 942.

common law action based upon quasi contract. Such an omission would be clearly contrary to the general purpose of the Act.[51]

In *Boake Allen Ltd v Revenue and Customs Commissioners*, Sedley LJ queried the propriety of including restitutionary claims within section 5 but concluded that it had been done to avoid the result of a limitation-free cause of action.[52] McGee has suggested that this view should be treated with caution:

> In the first place, the principle clearly is that in the absence of a statutory limitation period the action never becomes barred. There is no reason to strain the construction of the statute, as appears to have happened here, in order to avoid such a consequence. ... In the second place, this case should not be regarded as establishing that every action for money had and received is a contractual claim for limitation purposes. Here the parties had purported to enter into a contract, so there was at least some contractual aspect to the case, but in other cases of money had and received... it would be quite implausible to argue for s 5.[53]

(ii) Equitable Claims

The application of limitation periods to equitable claims is particularly problematic: [54]

> The [limitation] statutes often apply piecemeal, and to an uncertain extent, to equitable claims. It is thus often difficult to determine which approach to delay—statutory or equitable—applies to equitable claims, and to what effect.[55]

Where a claim is for relief within equity's concurrent jurisdiction, the limitation period applicable to the relevant cause of action will apply. Therefore, where a claim is for equitable relief in respect of a cause of action governed by the 1957 Act, the statutory limitation period applicable to that cause of action will apply, notwithstanding that the claim is for equitable relief.[56] Thus, claimants will not be able to 'side-step' the statutory limitation period by claiming equitable relief.[57] For claims within equity's exclusive jurisdiction, two approaches are available. Where an equitable claim is analogous to a common law claim, the limitation

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[51] *Ibid*, 942.
[52] *Boake Allen Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25, [2006] STC 606 [96].
[53] McGee, *Limitation Periods* (n 37) 58-59. Footnotes omitted. See also, Rose, 'Lapse of Time: Limitation' (n 37) 354.
[54] See, generally, Rose, 'Lapse of Time: Limitation' (n 37); Swadling, 'Limitation' (n 49).
[55] Edelman and Bant, *Unjust Enrichment in Australia* (n 16) 364.
[56] See, by analogy, *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 (CA) 415.
[57] See also Rose, 'Lapse of Time: Limitation' (n 37) 367; Swadling, 'Limitation' (n 49) 323.

period applicable to the common law claim will be applied by analogy.[58] Where a claim arises within equity's exclusive jurisdiction that is not analogous to a common law claim, no statutory limitation period will apply, although the claim, like all equitable claims, will be subject to the doctrine of laches, discussed below.[59]

(iii) Limitation Periods and the State.

Section 3 of the 1957 Act provides that the Act 'shall apply to proceedings by or against a State authority in like manner as if that State authority were a private individual'.[60] However, section 3(2) provides that the Act will not apply to 'any proceedings for the recovery of any sum due in respect of a tax or duty which is for the time being under the care and management of the Revenue Commissioners, or interest thereon'. Claims for recovery of overpaid tax are governed by specific limitation periods in the taxing statutes. Section 946 of the Taxes Consolidation Act 1997 ('TCA') confers a power on the Revenue Commissioners to regulate the periods within which appeals or claims in respect of Capital Gains Tax assessments may be brought or made.

Section 865 of the TCA 1997[61] establishes a general statutory right of recovery in respect of taxes governed by the Tax Acts and the Capital Gains Tax Acts.[62] This provision extends to taxes paid that were not due as well as taxes paid on the basis of an erroneous assessment.[63] It confers a limitation period of four years on claims for recovery of taxes in respect of chargeable periods 'beginning on or after 1 January 2003'[64] and on claims for repayment in respect of chargeable periods prior to 31 December 2002, where brought after 31 December 2004.[65] Where a claim is made in respect of chargeable periods ending on or before 31 December 2002, and brought on or before 31 December 2004, the relevant limitation period is 10 years.[66] However, these limitation periods can be displaced by other limitation periods governing the recovery of taxes recoverable under section 865.[67]

B. Extension of limitation periods

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[58] McLean, 'Limitation of Actions in Restitution' (n 37) 490-492.
[59] *Ibid*, 492-493. See, however, Swadling, 'Limitation' (n 37) 324.
[60] Section 3(1).
[61] Inserted by section 17 of the Finance Act 2003.
[62] Section 865(1).
[63] Section 865(2).
[64] TCA, Section 865(4)(c).
[65] Section 865(4)(b).
[66] Section 865(4)(a).
[67] Section 865(5). In addition, in certain cases, there will be specific appeal mechanisms for assessments of the Revenue Commissioners. This is the case in respect of capital gains tax (TCA, Section 945), income tax, and corporation tax (TCA, Section 933).

The Statute of Limitations 1957 provides for a statutory extension of established limitation periods in certain circumstances. Therefore, statutory limitation periods will not run where the claimant is under a disability,[68] or seeks relief from the consequences of mistake,[69] or where the right of action has been concealed by the defendant's fraud.[70] These provisions have yet to be judicially considered in the context of restitutionary claims from public authorities.[71] However, section 71(1) of the 1957 Act, which provides for the extension of a limitation period where the right of action has been concealed by the defendant's fraud, may be relevant in restitution claims against the state. In the *Health Amendment Bill* case, Hardiman J, in his questions to counsel, observed that the fact that the Department of Health knew that it was 'conning' people, by imposing invalid health charges, could have implications under the Statute of Limitations.[72]

Similarly, section 72 of the 1957 Act, which provides for the extension of limitation periods where the plaintiff is seeking relief from the consequences of mistake, is likely to have a significant impact on claims for restitution from public authorities, particularly if the mistake of law rule is conclusively abolished in Irish law.[73] Section 72(1) provides:

> Where, in the case of any action for which a period of limitation is fixed by this Act, the action is for relief from the consequences of mistake, the period of limitation shall not begin to run until the plaintiff has discovered the mistake or could with reasonable diligence have discovered it.

This provision has been interpreted as restricting relief to cases where the cause of action is founded on the plaintiff's mistake.[74] There is sparse Irish authority for this view, and commentators appear to have reached this conclusion by considering how similarly worded

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[68] Section 49, Statute of Limitations, 1957.
[69] Section 72(1), Statute of Limitations, 1957.
[70] Section 71(1), Statute of Limitations, 1957. Furthermore, outside the specific statutory extensions of the limitation periods, a limitation period may not operate where there is a running account between the parties. In *Kleinwort Benson v Sandwell BC*, Hobhouse J held that, in considering a claim for restitution of ultra vires payments, all payments made under a swaps agreement had to be taken into account, including those made outside the limitation period: *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*; *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 (QBD) 941. This exception is unlikely to be relevant to public authorities outside private commercial transactions, as public payments of taxes and other charges are unlikely to involve transactions in which payments will go both ways.
[71] O'Dell, 'Claims to Recover Unlawful Health Charges' (n 37) 473-477.
[72] *Re Article 26 and the Health (Amendment)(No 2) Bill 2004* [2005] 1 IR 105 (SC)146. Hereafter *Health Amendment Bill*.
[73] See Chapter 5 at 150-155.
[74] See Kerr and Brady, *The Limitation of Actions* (n 37) 197; O'Dell, 'Claims to Recover Unlawful Health Charges' (n 37) 477.

provisions have been interpreted in England and in New Zealand.[75] Although early English cases adopted a broad interpretation of 'relief for the consequences of mistake',[76] the extension of limitation periods for mistake has subsequently been confined to cases in which the mistake 'is an essential ingredient of the cause of action'.[77] This approach has been the subject of considerable criticism, as there is nothing in the wording or the legislative development of section 32(1)(c) to require such a narrow interpretation.[78] In *DMG*, a majority of the House of Lords declined to depart from this interpretation,[79] although some of their lordships doubted the correctness of this narrow interpretation of section 32(1)(c).[80] In *Europcar UK Ltd v Revenue and Customs Commissioners*, Henderson J concluded that the narrow interpretation of the provision was consistent with the wording of section 32(1)(c) and with subsequent legal authority.[81]

The Irish courts are likely to follow the restrictive approach adopted in England when interpreting section 72. Indeed, such an approach may already be evident in the decision of Peart J in *Kearns v McCann Fitzgerald*. In considering the circumstances that may fall within section 72 of the Statute of Limitation, Peart J did not expressly confine the provision to circumstances in which the plaintiff's cause of action was founded on a mistake. However, in each example that he gave of a relevant mistake, the cause of action was founded on a mistake:

> Section 72 of the Act here is clearly intended to apply to a situation where a plaintiff seeks relief from the consequences of a mistake in the context for example of a

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[75] *Ibid*, 197.
[76] See the oft-cited case *Re Diplock* [1948] Ch 465 (CA) 514-515. See also Lord Hope's comments in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 417. See Rose, 'Lapse of Time: Limitation' (n 37) 377.
[77] *Phillips-Higgins v Harper* [1954] 1 QB 411 (CA) 419. See Hacker, 'Still at the Crossroads' (2007) 123 LQR 177, 180.
[78] See McLean, 'Limitation of Actions in Restitution' (n 36) 494-495; Edelman, 'Limitation Periods and the Theory of Unjust Enrichment' (2005) 68 MLR 848, 851. See also Hedley, 'Case Comment: Tax Wrongly Paid – Basis of Recovery – Limitation' (2005) 64 CLJ 296, 299; Burrows, 'Restitution in Respect of Mistakenly Paid Tax' (2005) 121 LQR 540, 544; Hacker, 'Still at the Crossroads' (n 77) 180.
[79] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [146] (Lord Walker) and [91] (Lord Scott). Hereafter *DMG*. See also, *Europcar UK Ltd v Revenue and Customs Commissioners* [2008] EWHC 1363 (Ch), [2008] STC 2751 [60]-[61]; Hacker, 'Still at the Crossroads' (n 77) 179.
[80] See comments in *DMG* [2006] UKHL 49, [2007] 1 AC 558 [22] (Lord Hoffmann) and [146] (Lord Walker).
[81] *Europcar* [2008] EWHC 1363 (Ch), [2008] STC 2751 [63]-[64], referring to *Malkin and another v Birmingham City Council* CCRTF 98/1628/2 (CA).

contract entered into as a result of a mistake and where the action is seeking relief by way of rescission or rectification.[82]

To follow the restrictive approach adopted in England would be unfortunate. A narrow interpretation is not justified by the express terms of section 72, the language of which could support a more expansive interpretation.[83] Furthermore, in light of the criticisms levelled at the narrow interpretation of section 32(1)(c), it seems ill-advised to adopt an approach that is considered undesirable and unnecessary.

In England, the extension of limitation periods for mistaken payments has been particularly controversial in the context of restitution from public authorities. This is due, in part, to the decisions of the House of Lords in *Kleinwort Benson*[84] and in *DMG.*[85] In *Kleinwort Benson*, the House of Lords abolished the mistake of law bar in respect of restitutionary claims.[86] In *Deutsche Morgan Grenfell*, the House of Lords confirmed that a plaintiff seeking recovery of unlawfully exacted taxes was not confined to the *Woolwich* principle, but could instead rely on mistake of law.[87] As a result, claimants seeking recovery of unlawfully exacted taxes may circumvent the application of statutory limitation periods by relying on section 32(1)(c) of the Limitation Act 1980, which provides that where 'the action is for relief from the consequences of a mistake', the limitation period will not run until the claimant has discovered the mistake or could, with reasonable diligence, have discovered it. In *Kleinwort Benson*, the House of Lords recognised that the application of section 32(1)(c) to restitution claims in respect of money paid over a long period of time ran the risk of undermining security of receipt.[88] This observation takes on added force where restitution is sought of unlawful taxes,[89] as recovery of large sums from the exchequer may disrupt the public finances.

These problems may be less serious in Ireland for two reasons. First, in *Murphy*, the Irish Supreme Court demonstrated that it was open to arguments based on the security of public finances and, motivated by such concerns, adopted a broad conception of the change

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[82] *Kearns v McCann Fitzgerald* [2008] IEHC 85.
[83] See above at 267-268.
[84] *Kleinwort Benson* [1999] 2 AC 349 (HL).
[85] *DMG* [2006] UKHL 49, [2007] 1 AC 558 .
[86] See Chapter 5 at 150-151.
[87] See Chapter 6 at 228-230.
[88] *Kleinwort Benson* [1999] 2 AC 349, 389 (Lord Goff) and 417 (Lord Hope).
[89] See *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 [200] (Lord Mance).

of position defence, so that the plaintiffs were prevented from recovering in respect of the period prior to the commencement of proceedings. Second, the Irish courts possess an independent jurisdiction to dismiss claims for delay, even when the claim was commenced within the statutory limitation period.[90] This provides the courts with a broad discretion to refuse relief even though a limitation period has not expired.

The English legislature has responded to the cumulative effect of the decisions in *Kleinwort Benson* and *DMG* by enacting sections 320 and 321 of the Finance Act 2004. Section 320 excludes the operation of section 32(1)(c) of the 1980 Act 'in relation to a mistake of law relating to a taxation matter under the care and management of the Commissioners of Inland Revenue.'[91] This provision is retroactive in its effect, applying to all claims made on or after November 20th 2003. This has the effect of confining claims for the recovery of overpaid tax to a six year limitation period, irrespective of the cause of action on which the claim is based.[92] Section 107 of the Finance Act 2007 extends the limitation period in sections 320 and 321 to all claims for recovery of tax, not simply those based on mistake.[93] Concerns have been raised that these limitation periods are contrary to Community law, as they were 'introduced retrospectively and no transitional period was put in place.'[94] In addition to these concerns, there is a risk that the provisions may fall foul of European law on the basis that they have been enacted in response to a specific judgment, specifically, that of Park J in *DMG*.[95] These concerns highlight the need for legislatures to respect the restrictions placed on them when enacting retroactive limitation periods, whether these restrictions arise by virtue of European law, or common law, or arising under the constitution.

C. Restrictions on Limitation Periods

As noted above, restrictions on limitation periods may derive from European law, common law, or constitutional law. The ECJ has held that Member States are entitled to enact limitation periods in respect of the recovery of taxes and that set limitation periods promote

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[90] *O'Domhnaill v Merrick* [1984] IR 151 (SC).
[91] Section 320(1) of the Finance Act, 2004 (UK).
[92] See sections 320 and 321 of the Finance Act 2004.
[93] See Chowdry, 'Finance Act Notes: Limitation Period in Old Actions for Mistake of Law Relating to Direct Tax' [2007] British Tax Review 577, 580.
[94] Chowdry, 'The Revenue's Response: A Time Bar on Claims' (2005) 121 LQR 546, 547. In *FII Group Litigation v Revenue and Customs Commissioners* [2010] EWCA Civ 103 [227], the Court of Appeal noted that the lack of a transitional period in sections 320 and 321, rendered them contrary to EU law but this conclusion was not central to the Court's decision.
[95] *Deutsche Morgan Grenfell Group Plc v Inland Revenue Commissioners* [2003] EWHC 1779 (Ch), [2003] 4 All ER 645. Chowdry, 'Finance Act notes: Limitation Period in Old Actions for Mistake of Law Relating to Direct Tax' (n 93) 579-580. It has also been judicially acknowledged: *DMG* [2006] UKHL 49, [2007] 1 AC 558 [36] (Lord Hope).

the interests of certainty and finality.[96] However, limitation periods must conform to the principles of equivalence and effectiveness[97] and should not 'render virtually impossible or excessively difficult the exercise of rights conferred by Community law.'[98] To this end, the ECJ has held that a limitation period of three years in respect of recovery of taxes not due would constitute a reasonable limitation period.[99] In *Aprile Srl*, the Court held that this limitation period should run from the date of the payment of the taxes, but did not consider whether a postponement period would be necessary where the plaintiff had been mistaken as to his legal rights.[100] It is not permissible for a limitation period to be enacted to specifically limit the effect of a judgment of the ECJ, [101] nor may a limitation period restrict access to the court to litigants who instituted proceedings before a judgment of the European Court of Justice was handed down.[102] However, retroactive limitation periods are permissible if they include 'transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the original legislation.'[103] In this regard, the ECJ has held that provisions that retrospectively curtail limitation periods, without providing for a transitional period, offend the principle of effectiveness and breach the litigant's legitimate expectations.[104] In *Grundig Italiana SpA v Ministero delle Finanze*, the ECJ indicated that a transitional period of six months would be considered 'reasonable'.[105]

National law also places restrictions on the legislature's ability to impose retroactive limitation periods. First, common law canons of interpretation lean against interpreting limitation periods so that they operate retroactively. Retrospective legislation that affects vested rights is regarded by the Irish courts as 'prima facie unjust'[106] and it is presumed that

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[96] Case C-343/96 *Dilexport* [1999] ECR I-579 [26].
[97] This point was accepted in *Tate v The Minister for Social Welfare* [1995] 1 IR 418 (HC) 441-442.
[98] Case C-231/96 *Edis v Ministero delle Finanze* [1998] ECR I-4951 [35]; Case C-260/96 *SPAC v Ministero delle Finanze* [1998] ECR I-4997[19]; Case C-228/96 *Aprile Srl v Amministrazione delle Finanze dello Stato* [1998] ECR I-7141 [19].
[99] Case C-231/96 *Edis* [1998] ECR I-4951 [35]; Case C-260/96 *SPAC* [1998] ECR I-4997[19]; Case C-228/96 *Aprile* [1998] ECR I-7141 [19].
[100] Case C-228/96 *Aprile* [1998] ECR I-7141 [19].
[101] Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise* [2002] ECR I-6325 [36].
[102] Case 309/85 *Barra v Belgium and Another* [1988] ECR 355 [19]; Case C-228/96 *Aprile* [1998] ECR I-7141 [24]; Case C-343/96 *Dilexport* [1999] ECR I-579 [37].
[103] Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise* [2002] ECR I-6325 [38]; Case C-255/00 *Grundig Italiana SpA v Ministero delle Finanze* [2002] ECR I-8003 [37].
[104] C-396/98 *Schlossstrasse* [2000] ECR I-4279 [47]; Case C-62/00 *Marks & Spencer plc v Commissioners of Customs & Excise* [2002] ECR I-6325 [40] and [45]. See also *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners* [2008] UKHL 2, [2008] 1 WLR 195 [4]-[5].
[105] Case C-255/00 *Grundig Italiana* [2002] ECR I-8003 [40].
[106] *Hamilton v Hamilton* [1982] IR 466 (SC) 474; *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [110]. Glover, 'Restitutionary Recovery of Taxes after the *Royal Insurance* Case: Commentary' in McInnes (ed)

such legislation operates prospectively only, unless a contrary construction cannot be avoided.[107] In addition, the right to sue has been held to be a constitutionally protected property right.[108] Although limitation periods are typically considered to be procedural rather than substantive in nature,[109] vested causes of action have been declared to be a form of constitutionally protected property.[110] Therefore, retroactive limitation periods that seek to interfere with existing claims will constitute an interference with the plaintiff's property rights and, in order to be constitutional, must accord with proportionality principles and/or be in accordance with the principles of social justice.[111] Insofar as the Constitution appears to prevent any disproportionate retroactive interference with vested rights, the protection that it affords to litigants appears to be more extensive than that available under European law, which simply requires that retroactive limitation periods contain adequate transitional provisions.

A key issue that has arisen in the context of limitations periods is the extent to which limitation periods that are *prima facie* incompatible with constitutional or European law can be saved. Thus, where a provision is incompatible with constitutional or European law—either because it constitutes a disproportionate interference with constitutional property rights, or because it infringes European law for failing to provide for a transitional period—what can be done to save the legislation? State authorities have argued that it is open to the courts to interpret a limitation period so as to make it compatible with European or constitutional law. This has been roundly rejected by both the English and Irish courts of final appeal.

Restitution: Developments in Unjust Enrichment (LBC Information Services, Sydney 1996) 135. Footnotes omitted.

[107] *Hamilton v Hamilton* [1982] IR 466 (SC) 474-475. In *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners*, Lord Scott also considered rights accruing under a limitation period to be vested rights but did not elaborate on the nature of those rights: *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners* [2008] UKHL 2, [2008] 1 WLR 195 [19].

[108] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [111], [121]. See also *Cahill v Sutton* [1980] 1 IR 269 (SC) 272. In this case, Finlay CJ did not express a considered view as to the status of the right to sue as a property right, but proceeded on the assumption that it was. In an number of other cases the Attorney General has conceded that the right to litigate is a property right: *Brady v Donegal County Council* [1989] ILRM 282 (SC); *O'Brien v Keogh* [1972] IR 144 (SC).

[109] *Ronex Properties Ltd v John Laing Construction Ltd* [1983] QB 398 (CA) 404; *Vincent v Bromley LBC* [1994] EG 193 (CA). See Kerr and Brady, *The Limitation of Actions* (n 37) 4.

[110] *Health Amdendment Bill* [2005] IESC 7, [2005] 1 IR 105 [111] and [121]. O'Dell has observed that the crucial distinction is whether the limitation period affects substantive rights or simply regulates matters of procedure: 'where limitation periods are understood to regulate not the substantive law but merely matters of procedure, then amending them would not necessarily be caught by the presumption against retrospective effect. ... courts which have found that limitation periods do indeed have substantive effect, have as a consequence been prepared to strike them down as unconstitutional.' See O'Dell, 'Claims to Recover Unlawful Health Charges' (n 37) 481. See also Kerr and Brady, *The Limitation of Actions* (n 37) 6.

[111] See, generally, Chapter 2 at 47-49.

In *Hegarty v O'Loughran*, Finlay CJ held that to interpret the Statute of Limitations 1957 as including a 'discoverability' requirement, so that the limitation period for breach of contract did not run until the damage suffered was discoverable, would amount to impermissible judicial legislation.[112] Similarly, in *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners*, the House of Lords rejected a suggestion that section 80(4) of the Value Added Tax Act, 1994, which retroactively reduced a limitation period in respect of claims for overpaid VAT, could be judicially interpreted to provide for a transitional period where none was provided in the legislation. It might be thought that interpreting section 80(4) in this way would count as implementing the principle of conforming interpretation in European law. However, Lord Scott rejected this suggestion for reasons broadly similar to those adopted by Finlay CJ in *Hegarty v O'Loughran*:

> There are, to my mind, several objections to the proposition. First, it is not the function of judges to legislate. Second, the principle that people must be expected to know the law and conduct their affairs in accordance with the law can hardly apply to a judicial amendment to primary or secondary legislation that, until it is made known in the judge's pronounced judgment, is held *in pectore*. The objection to retrospective legislation would apply here too. Third, the important principle of certainty can hardly be satisfied. The terms of the judicial amendment might change as the case travelled up the appellate chain. And the ability of this House to depart from previous decisions would need to be kept in mind.[113]

It would therefore appear that, although the principle of conforming interpretation is a flexible one, there are limits to what it can achieve.

The English Revenue Commissioners have also sought to save unlawful limitation periods through administrative action. Following the decision of the ECJ in *Marks and Spencer II*, the Customs and Excise Commissioners adopted a transitional period for the institution of claims.[114] However, it is not clear that an administrative measure, such as that adopted by the Customs and Excise Commissioners, can remedy a defect in primary legislation. When this issue was considered in *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners*, their Lordships were divided as to whether such a measure was

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[112] *Hegarty v O'Loughran* [1990] 1 IR 148 (SC) 156.
[113] *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners* [2008] UKHL 2, [2008] 1 WLR 195 [19].
[114] *Business Brief 22/02* [2002] STI 1148 and *Business Brief* 27/02 [2002] 42 STI 1356.

valid. Lord Walker and Lord Scott took the view that the failings of the limitation period could not be remedied by administrative action.[115] However, Lord Neuberger considered that an extra-statutory concession, provided it was adequately communicated to taxpayers, would be appropriate.[116]

A further problem with the administrative measure adopted by the Revenue Commissioners in *Fleming* was that the transitional period was to operate retrospectively. Chowdry has documented the problems that such an approach would present:

> [T]axpayers, or their advisers, would have to appreciate that a right subsists. Obviously, however, they cannot know that they have such a right at the time when it accrues to them if it is only conferred retrospectively. Or, to put this another way, the necessary transitional period cannot now be introduced retrospectively because the taxpayers' right to claim under the transitional arrangements would have expired before they ever had the chance to exercise them, contrary to the principle of effectiveness.[117]

This argument was accepted by the House of Lords. Lord Hope held:

> To be compatible with EU law, taxpayers were entitled to be told in advance of any transitional arrangements that would enable them to submit late accrued claims for the deduction of input tax despite the introduction of the time limit. They were entitled to be given sufficient notice to familiarise themselves with the new regime, including the period of grace that was to be allowed for the submission of accrued claims during a transitional period...[118]

This point was echoed by Lord Neuberger, who accepted that a transitional period that was retrospective in effect 'would mean that the supposed remedy for the failure to accord a transitional provision would be little more than hypothetical. [119] In *Fleming*, the House of Lords also rejected the Commissioners' argument that they could extend the restrictive

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[115] *Fleming (trading as Bodycraft)* [2008] UKHL 2, [2008] 1 WLR 195 [22] (Lord Scott), [61] (Lord Walker).
[116] *Ibid*, [2008] UKHL 2, [2008] 1 WLR 195 [107].
[117] Chowdry, 'The Revenue's Response: A Time Bar on Claims' (n 94) 549.
[118] *Fleming (trading as Bodycraft)* [2008] UKHL 2, [2008] 1 WLR 195 [11]. Chowdry, 'The Revenue's Response: A Time Bar on Claims' (n 94) 549.
[119] *Ibid*, [85].

limitation periods on a discretionary, case by case basis, as such an approach offended the principle of legal certainty.[120]

III. Laches

In addition to statutory limitation periods, the doctrine of laches protects defendants against stale claims. The leading statement on laches in Irish law is that of Henchy J in *Murphy v Attorney General*:

> "Laches essentially consists of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim." What is a "substantial lapse of time" must depend on the circumstances of the particular case.[121]

Thus, a defendant who wishes to invoke laches will have to establish both a significant delay and circumstances that will make it unjust for the plaintiff to enforce his rights. Although mere delay will rarely be sufficient to establish the defence,[122] there is no requirement of fault on the part of the plaintiff to establish the defence.[123] In considering whether laches will bar a claim, the courts will consider a number of factors, including, 'the period of the delay, the extent to which the defendant's position has been prejudiced by the delay and the extent to which that prejudice was caused by the actions of the plaintiff.'[124]

The doctrine of laches has been traditionally confined to equitable claims and claims for equitable relief within equity's concurrent and auxiliary jurisdictions.[125] This remains the case in England. In *Habib Bank Ltd v Habib Bank AG Zurich*,[126] Oliver LJ attempted to develop a more flexible approach in relation to laches. In response to an argument by counsel that the doctrines of laches and acquiescence applied only to the assertion of equitable rights, Oliver LJ held:

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[120] *Ibid*, [11].
[121] *Murphy v Attorney General* [1982] IR 241 (SC) 318, quoting Megarry and Barker (eds), *Snell's Principles of Equity* (27th edn Sweet and Maxwell, London 1973) 35.
[122] *Cahill v Irish Motor Traders Association* [1966] IR 430 (HC) 449; *Byrne v Dublin City Council* [2009] IEHC 122. See also *Nelson v Rye* [1996] 1 WLR 1378 (HL) 1392; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 (HL) 1279.
[123] *McBrearty v North Western Heath Board & Others* [2010] IESC 27; *Manning v Benson and Hedges Ltd* [2004] IEHC 316 [28].
[124] *Nelson v Rye* [1996] 1 WLR 1378 (HL) 1392.
[125] See, for example, *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 (HL); *Tito and Others v Waddell (No 2)* [1977] Ch 106 (Ch).
[126] *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265 (CA).

> I believe that the law as it has developed over the past 20 years has now evolved a far broader approach to the problem than that suggested by Mr Aldous and one which is in no way dependent upon the historical accident of whether any particular right was first recognised by the common law or was invented by the Court of Chancery.[127]

However, subsequent cases have confined this flexible approach to the doctrine of acquiescence[128] and the House of Lords has confirmed that laches is confined to equitable claims.[129]

Recent Irish cases have allowed defendants to invoke laches as a defence to claims for relief at law. However, this development is based on a misinterpretation of how laches was applied in *Murphy v Attorney General.* Therefore, it is first necessary to consider how the defence was invoked in that case. In *Murphy*, the plaintiffs sought to recover their overpaid taxes on two bases: they claimed that the state was liable to account for the money as a constructive trustee (a claim in equity) and that the money was recoverable as money had and received (a claim at law). Although Henchy J was satisfied that both claims were made out, recovery of the money was restricted in relation to both claims. First, Henchy J held that the right to recover in respect of the years before proceedings were issued was extinguished by laches. Second, the State had changed its position on faith of the receipt of the taxes, making it inequitable to require restitution.

It is not clear from Henchy J's judgment to which cause of action he intended the doctrine of laches to apply. Henchy J discussed both causes of action in tandem, before going on to consider the available defences. In relation to the claim for an account, Henchy J characterised this as an exercise of the courts' equitable jurisdiction[130] and it is likely that he intended laches to apply to this equitable claim only. There are two reasons for this. First, laches was not traditionally applicable to common law claims and Henchy J did not explicitly consider whether the doctrine should be extended to such claims. Second, the change of position defence was specifically held to apply to both claims, whether at law or in equity. Therefore, in the absence of a considered justification for the extension of the doctrine, it cannot be said with certainty that Henchy J considered that laches was available in response

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[127] *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 1 WLR 1265, 1285.
[128] See, *Perlman v Rayden* [2004] EWHC 2192 (Ch) [74]-[75]. See also *Harris v Williams-Wynne* [2005] EWHC 151 [37] (Ch).
[129] *Fisher v Brooker* [2009] UKHL 41, [2009] 1 WLR 1764 (Lord Neuberger). This was also affirmed by Patten LJ in *Lester v Woodgate* [2010] EWCA Civ 199 [22]. See also *Perlman v Rayden* [2004] EWHC 2192 (Ch) [75].
[130] *Murphy* [1982] IR 241 (SC) 315.

to the action for money had and received, and his comments in relation to laches should be confined to his consideration of the equitable claim. Nevertheless, in many of the cases that consider *Murphy*, the separate and independent defences of laches and change of position have been elided and *Murphy* has been cited as authority for the proposition that laches is available in response to common law claims.

In *O'Rourke v Revenue Commissioners*,[131] the plaintiff sought restitution of overpaid income tax. When assessing the plaintiff for PAYE purposes, the defendants had treated him as coming under Schedule E of the Income Tax Act 1967, when he should have been assessed under schedule D of the Act. In his analysis of the *Murphy* decision, Keane J treated Henchy J's discussion of authorities from England, New Zealand, and the United States as referring to the doctrine of laches.[132] Those authorities— specifically section 94B of the New Zealand Judicature Act, 1908 and §142 of the American *Restatement of Restitution*— concerned codified forms of the distinct and independent defence of change of position. However, although Keane J does not observe the distinction maintained in Henchy J's judgment between laches and change of position, he does not apply a defence premised on delay, but instead applies the expansive change of position defence developed in *Murphy*.[133]

McDonnell v Ireland is another case that confuses laches and change of position, although no clear *ratio* can be derived as to the applicability of laches. The defendant argued that the plaintiff's claim for damages for violation of his constitutional rights was statute barred, or could be met by laches. Although the judges characterised the claim as a common law claim, either as a constitutional tort[134] or as a breach of contract claim,[135] they were divided as to whether laches was available in response to a common law claim. Barrington J explicitly confined laches to claims for equitable relief.[136] Keane J did not consider the laches argument, but instead held that the action was founded on tort and, as such, was barred by the Statute of Limitations 1957.[137] Barron J, applying the doctrine of laches to the claim, purported to follow the decision of Henchy J in *Murphy*. However, his interpretation of that judgment elides two separate defences discussed by Henchy J in that judgment. It is necessary to reproduce what Barron J had to say about the defence in full:

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[131] *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC).
[132] *Ibid*, 15-17.
[133] *Ibid*, 18.
[134] *McDonnell v Ireland* [1998] 1 IR 134 (SC) 156-159 (Keane J) and 146 (Barrington J).
[135] *Ibid*, (Barron J)
[136] *Ibid*, 46.
[137] *Ibid*, 56-160.

Having considered various equitable principles related *inter alia* to *laches* , estoppel and restitution, Henchy J concluded this aspect of his judgment at p. 320 as follows:-

"Whether the taxpayer's action be framed as a common-law action in quasi-contract for money had and received, or as an equitable claim for restitution of money by which the State was unjustly enriched, there is ample authority for the conclusion that the radical change of circumstances of the kind I have indicated would be sufficient to defeat, at least in part, the taxpayers' claim: see Jones's Change of Circumstances in Quasi-Contract (1957) 73 LQR 48.

In this case, whether the claim be treated as one in quasi- contract or as one in equity, I would consider the enforceable cause of action to have arisen at the beginning of the tax year 1978-9."

In the instant case, apart from the basic finding of invalidity *ab initio* there are other factors which existed in *Murphy v The Attorney General*. Admittedly, that case in its conclusion limited the date at which the cause of action to remedy what had occurred was found to have arisen. But the same principles should be applied to limit the period within which equitable relief should be permitted after such a cause of action has arisen. There was a *bona fide* belief on the part of the defendants' predecessors in title that the plaintiff was no longer entitled to be employed in the postal service, a belief fostered by the absence of any claim to the contrary. Taking the definition of *laches* accepted by Henchy J in *Murphy v The Attorney General* at p. 318 as "*Laches* essentially consists of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim", I would hold that in the absence of a prompt challenge following the refusal of the plaintiff's first application for reinstatement made in 1975, any right to equitable relief would have been barred by *laches*.[138]

However, Henchy J's reference to "the radical change of circumstances" is in fact a reference to the change of position defence. It immediately follows his discussion of change of position as embodied by section 94B of the New Zealand Judicature Act, 1908 and §142 of the American *Restatement of Restitution*. Therefore, these comments are more appropriately viewed as Henchy J's conclusions on change of position, not laches. The manner in which his

[138] *Ibid*, 162-163. Internal citations omitted.

conclusion is worded, referring as it does to a "radical change in circumstances", is more appropriate to change of position, rather than laches, where the courts typically consider the change of circumstances in terms of hardship or detriment to the defendant.[139] However, Barron J further confused matters by confining his consideration of laches to the award of equitable relief.[140]

What conclusions can be drawn from an analysis of these cases? It has not been conclusively determined that laches applies to claims where no equitable relief is sought. Some cases, such as Barron J's judgment in *McDonnell v Ireland*, appear to consider that the doctrine can apply in an exclusively common law context. Other cases, such as *Murphy v The Minister for the Marine*,[141] *Byrne v Dublin City Council*,[142] and the judgment of Barrington J in *McDonnell*, have explicitly confined the doctrine to claims for equitable relief. *McDonnell v Ireland* is uniquely confusing. Two of the judges, Barrington and Barron JJ, appear to take directly opposing views as to the applicability of laches to common law claims without acknowledging the differences in their respective approaches. Furthermore, Barron J appears to make an abrupt *volte face* at the conclusion of his analysis and confines the doctrine of laches to claims for equitable relief. Much of this confusion can be attributed to misinterpretations of Henchy J's decision in *Murphy*. Once it is understood that *Murphy* concerned two claims for relief—one common law claim for restitution and one equitable claim for an account as a constructive trustee—and two defences—a common law defence of change of position and the equitable bar of laches— it becomes hard to defend the contention that laches was specifically applied in response to the common law restitutionary claim. Instead, the basic rule continues to apply; laches is only available in relation to claims for *equitable* relief.

However, there are several other points that must be noted. First, even if laches is confined to equitable claims and claims for equitable relief, the use of the constructive trust as a response to unjust enrichment claims in Ireland means that there will be greater scope for laches to operate in Ireland than in other common law jurisdictions. This issue is discussed further in Chapter 9. Second, although Henchy J does not explicitly extend laches to common law claims, it could be argued that fiscal chaos concerns prompted Henchy J to take a

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[139] *Nelson v Rye* [1996] 1 WLR 1378, at 1396; *P & O Nedlloyd BV v Arab Metals Co (No. 2)* [2006] EWCA Civ 1717, [2007] 1 WLR 2288, [61].
[140] *McDonnell v Ireland* [1998] 1 IR 134 (SC) 163.
[141] *Murphy v Minister for the Marine* [1996] 3 IR 517 (HC) 523.
[142] *Byrne v Dublin City Council* [2009] IEHC 122.

particularly strict approach to the doctrine. He referred to the strict approach to laches taken by the American courts in relation to the repayment of taxes and held that, due to the potential unfairness and fiscal disruption that could be caused by repayment of the taxes:

> payment of PAYE taxes during the whole of a tax year, without instituting proceedings to have the taxes invalidated on the ground of unconstitutionality, should be held to defeat a claim made later to recover the taxes paid during that year.[143]

Therefore, it is possible that laches may be pressed into service to bar common law claims for the recovery of overpaid tax.

However, this approach is inconsistent with that of other jurisdictions, which have taken a restrictive approach to defences to claims for restitution of overpaid tax. For example, in *FII Group Litigation*, Henderson J held that the strong public law principles underpinning the *Woolwich* principle should operate to bar the change of position defence where restitution was sought pursuant to that principle.[144] Similarly, in *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd*, Mason CJ held that the passing on defence should not be applied where it would subvert the principles underpinning the *Woolwich* principle.[145] These restrictions on the availability of restitutionary defences may be justified by analogy with cases in which the state has sought restitution of *ultra vires* payments, where the courts have taken a restrictive approach to defences.[146] A similar approach may be taken to laches, particularly as there is authority that suggests that laches cannot be imputed to the state except in limited circumstances.[147] This approach should be mirrored in cases where a private citizen seeks restitution from the state and should also extend to attempts by the state to deny recovery through the doctrine of laches. However, the generous approach to laches adopted by the Irish Supreme Court in *Murphy* suggests that the Irish courts will be sensitive to the state's arguments on the basis of fiscal chaos and will not restrict the defence where relied upon against taxpayers.

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[143] *Murphy v Attorney General* [1982] IR 241 (SC) 319.

[144] *FII Group Litigation* [2008] EWHC 2893 (Ch), [2009] STC 254 [340]. See also O'Dell and Whyte, 'Is This a Country for Old Men and Women?—*In Re Article 26 and the Health Amendment (No 2) Bill 2004*' (2005) 12 Dublin University Law Journal (ns) 368. Compare Jones, 'Some Thoughts on Change of Position' in Burrows and Roger (eds) *Mapping the Law: Essays in Honour of Peter Birks* (OUP, Oxford 2006) 72.

[145] *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, at 69 (HCA).

[146] *Auckland Harbour Board v R* [1924] AC 318 (PC) 326. It was by a similar analogy with *Auckland Harbour Board* that Lord Goff held that ultra vires payments could be recovered by private citizens as of right: *Woolwich* [1996] AC 70 (HL) 177. See further Chapter 8 at 301.

[147] *Attorney-General v Bradford Canal Proprietors* (1866) LR 2 Eq 71 (Ch). See further, Meagher, Heydon, and Leeming (eds) *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th ed, Lexis Nexis Butterworths, 2002) 1038.

Third, there may be nothing wrong in principle with a doctrine that bars common law claims for delay.[148] Watt has argued that the doctrine of laches has been distorted as a result of being confined to equitable claims:

> [t]he courts have tended to categorize laches as an equitable doctrine rather than as a procedural doctrine (largely due to confusion between laches and acquiescence). Having been thus confined to the equitable sphere, equitable language and paradigms have held sway in the formulation and application of the doctrine. The outcome is an inappropriate emphasis on unconscionability and insufficient emphasis upon important issues of policy which ought to be weighed in the balance when deciding whether or not to bar a stale action.[149]

Thus, it is not necessarily desirable that the doctrine of laches should be confined to equitable claims. However, any extension or reform of the doctrine should be done explicitly and in accordance with established principles. *Murphy* is not an appropriate authority on which to base this reform.

Furthermore, principled analysis of this proposed reform may highlight possible difficulties attendant upon extending laches to common law claims. For example, most common law claims are subject to statutory limitation periods.[150] Therefore, any extension of laches to common law claims would need to reconcile the equitable doctrine with statutory limitation periods. This concern is unlikely to trouble the Irish courts, who are willing to permit laches to bar claims that have been commenced within the relevant statutory limitation period.[151] In *Toal v Duignan*, Finlay CJ said that such judicial discretion to dismiss cases for delay was necessary in the interest of the constitutional separation of powers:

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[148] Watt, 'Laches, Estoppel and Election' (n 4) 365.

[149] *Ibid*, 376. McLean has previously argued that a more flexible approach should be taken in relation to restitutionary claims: McLean, 'Limitation of Actions in Restitution' (n 36) 481-482.

[150] See the Statute of Limitations 1957.

[151] *O'Domhnaill v Merrick* [1984] IR 151 (SC) 158-159; *Toal v Duignan (No 2)* [1991] ILRM 140 (SC) 152; *Manning v Benson and Hedges Limited* [2004] IEHC 316 [28]. However, in these cases it is not clear whether the courts are applying the equitable doctrine of laches as a separate doctrine or whether these cases are merely examples of 'an inherent power to stay proceedings where the passage of time would effect unfairness, even where the limitation period has not expired': Kerr and Brady, *The Limitation of Actions* (n 37) 18. The traditional view taken by the English courts is that the doctrine of laches is precluded where an express statutory limitation period applies to the plaintiff's claims: *In Re Pauling's Settlement Trusts (No 1)* [1962] 1 WLR 86, 115 (Ch). Affirmed *In Re Pauling's Settlement Trusts* [1964] Ch 303 (CA). See also *In re Loftus* [2006] EWCA Civ 1124, [2007] 1 WLR 591. However, this approach has been recently refined by the Court of Appeal. In *P & O Nedlloyd BV v Arab Metals Co and others (No 2)*, Moore-Bick LJ clarified that this reference to laches was confined to laches in the sense of 'mere delay' and did not apply to situations where the defendant had suffered detriment as a result of the delay: [2006] EWCA Civ 1717, [2007] 1 WLR 2288 [61].

> It seems to me that to conclude otherwise is to give to the Oireachtas a supremacy over the courts which is inconsistent with the Constitution.[152]

However, Finlay J's argument ignores that statutory limitation periods represent a legislative balancing of the plaintiff's right to litigate with the defendant's right to be protected from state claims.[153] If the Oireachtas has exercised its exclusive legislative discretion by laying down statutory limitation periods, a general judicial discretion to abbreviate this in individual cases may be a usurpation of the legislative function. This approach also offends legal certainty and legitimate expectations. As Lord Walker observed in *Fleming (trading as Bodycraft) v Revenue and Customs Commissioners:* 'If you know the time of the last bus or tube you are in a much better position to organise your evening than if you do not know when public transport stops.'[154]

These concerns may be irrelevant, as the Irish legislature has approved the extension of a delay doctrine to claims commenced within a statutory limitation period. The Statute of Limitations envisages that laches will apply to claims commenced within the statutory limitation period. Section 5 of the Act provides that '[n]othing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise', suggesting the existence of a judicial discretion to apply the doctrine of laches to claims commenced within the relevant limitation period.[155] This discretion was preserved in section 3 of The Statute of Limitations (Amendment) Act 2000. In addition, claims for account are governed by a statutory limitation period of their own,[156] and this has not prevented the courts from applying the doctrine of laches to such claims. For example, in *Murphy*, the doctrine of laches barred the plaintiffs' claim for an account, notwithstanding that the claim had been commenced within the limitation period.

The traditional view taken by the English courts is that the doctrine of laches is precluded where an express statutory limitation period applies to the plaintiff's claims.[157] However, this approach has been recently refined by the Court of Appeal. In *P & O Nedlloyd*

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[152] *Toal v Duignan* (No 2) [1991] ILRM 140 (SC).
[153] See *Tuohy v Courtney* [1994] 3 IR 1 (SC) 48.
[154] *Fleming (trading as Bodycraft)* [2008] UKHL 2, [2008] 1 WLR 195 [67]. See also Lord Neuberger's comments at [85].
[155] See, however, Delany, *Equity and the Law of Trusts in Ireland* (5th edn Roundhall, Dublin 2011) Chapter 1.
[156] Statute of Limitations 1957, section 11(4).
[157] *In Re Pauling's Settlement Trusts* [1962] 1 WLR 86 (Ch) 115. Affirmed *In Re Pauling's Settlement Trusts* [1964] Ch 303. See also *In re Loftus* [2006] EWCA Civ 1124, [2007] 1 WLR 591. See also, Watt, 'Laches, Estoppel and Election' (n 4) 355. McLean has previously argued that a more flexible approach should be taken in relation to restitutionary claims: McLean, 'Limitation of Actions in Restitution' (n 36) 481-482.

BV v Arab Metals Co and others (No 2), Moore-Bick LJ clarified that this reference to laches was confined to laches in the sense of 'mere delay' and did not apply to situations where the defendant had suffered detriment as a result of the delay:

> I can see no reason in principle why, in a case where a limitation period does apply, unjustified delay coupled with an adverse effect of some kind on the defendant or a third party should not be capable of providing a defence in the form of laches even before the expiration of the limitation period.[158]

Therefore, it appears that in England, significant delay will operate to bar a claim commenced within the relevant limitation period where the delay will prejudice the defendant, an approach that is slightly narrower than the Irish approach discussed above.

The legislature, in providing for limitation periods, seeks to strike a balance between preventing the prosecution of stale claims, promoting the commencement of proceedings without delay and ensuring that a plaintiff is not unduly denied access to the courts. As a result, this balance should not be disrupted other than in exceptional circumstances.[159] Where the courts apply the doctrine of laches, they are disrupting this equilibrium and encroaching on the legislative function. Therefore, they should only do so where there is a risk of significant injustice to one of the parties. Accordingly, the approach of Moore-Bick LJ in *Arab* Metals is to be preferred to that of the Irish courts. However, generally mere delay, in the absence of any detriment suffered by the defendant will not be sufficient to bar a claim[160] and so it is not clear whether the distinction proffered by Moore-Bick LJ in *P&O Nedlloyd* can be sustained.

Conclusions

A number of conclusions may be drawn from this Chapter. First, the Irish courts are, unsurprisingly, willing to permit defendants to rely upon general defences that are not specific to the law of restitution in response to restitutionary claims. Second, as is common with many of the other doctrines considered in this thesis, the Irish courts have given little consideration to the precise parameters of the general defences considered in this Chapter. In particular, it is unclear whether section 72 of the Statute of Limitations 1957 is confined to

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[158] *P & O Nedlloyd BV v Arab Metals Co and others (No 2)* [2006] EWCA Civ 1717, [2007] 1 WLR 2288 [61].
[159] This view was also expressed in *Birkett v James* [1978] 1 AC 297, 322. See also *Sweetman v Shepherd* [2007] EWHC 137 (QB) [69].
[160] *Nelson v Rye* [1996] 1 WLR 1378 (CA) 1392. See, in the Irish context, *Cahill v Irish Motor Traders Association* [1966] IR 430 (HC) 449.

claims where the claimant's cause of action is founded on a mistake, or whether the doctrine of laches is confined to equitable claims. Further judicial guidance on these issues would be welcome.

Third, little thought has been given to whether the defences considered in this Chapter should be tailored where relied upon in a restitutionary context or, more relevantly, whether the public policy considerations that underpin restitution from public authorities mandate that the defences should be applied differently, or should not be applied at all, where restitution is sought from the state. To date, the Irish and English courts have not relied on public policies specific to restitution from the state in developing their approach to the defences discussed in this Chapter. Although Henderson J took a flexible approach to *res judicata* in *Test Claimants in the Act Group Litigation (Class 4)*, his approach appears to have been motivated by a concern to preserve the efficacy of the group litigation process, rather than a concern to ensure that restitution claims against the state were not unduly restrained by the *res judicata* doctrine. Similarly, restrictions on retrospective and unreasonably short limitation periods appear to be motivated by general common law, European law, and constitutional law considerations, rather than more specific restitutionary considerations. The influence of public policy concerns has yet to be fully considered in the context of the doctrine of laches. However, Henchy J's decision in *Murphy* suggests that the Irish courts will take a strict approach to laches where relied upon by the state, having greater regard to the concern of preventing fiscal chaos than to the public law imperative that the state should not be unjustly enriched. Defences specific to restitutionary claims have been heavily influenced by public policy considerations where relied upon by the state in response to claims for overpaid tax. It is to these defences that we now turn in Chapter 8.

Chapter 8: Defences Specific to Restitutionary Claims

The crystallisation of the parameters of many restitutionary causes of action means that focus has shifted to restitutionary defences as the new battleground upon which restitution claims against the state are fought in the courts. The previous chapter discussed general defences that may respond to restitutionary claims. This chapter considers defences that have been specifically developed to respond to claims for restitution. These defences fall into two categories. First, many defences specific to restitutionary claims will deny an element of the cause of action.[1] Second, some suggested defences to restitutionary claims are not based on a principled denial of an element of the claim but are based on policy concerns of security of receipt and, in the context of restitution from public authorities, upon the fiscal stability of the state.

Parts I to III of this Chapter considers cases falling within the first category. The change of position defence operates to deny that the defendant has been enriched. Part I considers the change of position defence and the closely related defences of 'counter restitution impossible' and 'honest receipt.'

Part II discusses the passing on defence, which denies the second element of a cause of action in restitution. Passing on acknowledges that, while the defendant was enriched, this enrichment was not at the plaintiff's expense. Part II considers common law forms of the passing on defence and demonstrates that these defences have been rightly rejected, as they are inconsistent with a principled analysis of the law of restitution and are unworkable in practice. However, many jurisdictions have enacted statutory forms of the passing on defence. Part II considers two specific statutory defences, section 20(5) of Ireland's Value Added Tax Act 1979 and section 80(3) of England's Value Added Tax Act 1994.

Part III considers English, Irish, and Australian cases that provide that voluntary payments may not be recoverable by way of restitution. These defences focus on the 'unjust' nature of the defendant's enrichment and are based on the premise that, where the plaintiff's intention to benefit the defendant has not been vitiated, the enrichment of the defendant is not unjust. Part III demonstrates that, although defences premised upon the voluntary nature of

[1] See O'Dell, 'Restitution' [1997] *Byrne and Binchy's Annual Review of Irish Law*.

the plaintiff's payment have been recognised as a matter of law, the coercive nature of taxation means that the state will rarely be able to rely on such defences to resist a claim of restitution of overpaid tax.

Part IV considers policy motivated defences to claims for restitution. One such defence has been considered in Part II of Chapter 2, which discussed the legitimacy of relying on fiscal chaos concerns as a basis for denying restitutionary relief and considered whether a 'fiscal chaos' defence should be adopted as a matter of law. Part IV considers the settled law defence and the defence of honest receipt. These defences respond specifically to claims for mistake of law, as concerns of disruption of the public finances are particularly prevalent where restitution is sought of taxes paid by mistake of law.[2]

An important issue for consideration in this Chapter is the influence of public law principles as a restrictive force on the development of restitutionary defences. In particular, principles of constitutional and EU law may influence the development of defences to claims for restitution of overpaid tax. Part I, which considers the change of position defence, argues that the generous standards of proof and causation that have been applied to the state in Ireland and in England may constitute an interference with the right to property, whether protected under the Irish Constitution or under the ECHR. It suggests that the traditional approach to change of position may be modified to take account of these concerns. Similarly, Part II, which deals with the passing on defence, considers the relationship between the passing on defence and principles of EU law such as the principles of equivalence and effectiveness. It demonstrates that EU law has been instrumental in shaping statutory forms of the passing on defence in Ireland and in England.

I. Change of Position

The change of position defence provides that a defendant will not be required to make restitution where his 'position is so changed that he will suffer an injustice if called upon to repay or to repay in full.'[3] This traditional change of position defence is considered in Section A. However, there are two defences that are so closely related to the change of position defence, that they are considered along with the traditional defence. The first is the defence of counter restitution impossible, which can be considered as a specific instance of the change of position defence. This defence is discussed in Section B. The second defence, which has

[2] See Chapter 5 at 163-168.
[3] *Lipkin Gorman v Karpnale* [1991] 2 AC 548 (HL) 579. Hereafter *Lipkin Gorman*.

been suggested in recent cases involving restitution of overpaid tax, is the exhaustion of benefits defence, which is discussed in Section C.

A. Change of Position

The change of position defence was first judicially recognised by the House of Lords as a defence to restitution claims in *Lipkin Gorman v Karpnale*.[4] In that case, the defendant gambling club, in paying out winnings on Cass's successful bets, had changed its position and so had a partial defence to the plaintiff's claim for restitution. However, the defence was recognised as forming part of Irish law as early as the 1980s. In *Murphy v Attorney General*, Henchy J recognised that the change of position defence would be available in respect of claims for restitution of unconstitutionally levied taxes:

> It is one of the first principles of the law of restitution on the ground of unjust enrichment that the defendant should not be compelled to make restitution, or at least full restitution when, after receiving the money in good faith, his circumstances have so changed that it would be inequitable to compel him to make full restitution.[5]

The change of position defence protects the defendant's interest in the security of his receipt, by ensuring that he would not be required to make restitution where it would be unjust for him do so, having changed his position on the basis of his receipt.[6] In protecting security of receipt, the defence had a radical liberalising effect on the development of restitutionary causes of action. As Lord Goff noted in *Lipkin Gorman,* recognition of the change of position defence allowed the courts to take a more generous approach 'to the recognition of the right to restitution, in the knowledge that the defence is, in appropriate cases, available'.[7] Although the defence allowed restitutionary causes of action to be drawn more widely, the House of Lords did not embrace a wide conception of the change of position defence initially. Lord Goff emphasised that the defence would not be widely

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[4] *Lipkin Gorman* [1991] 2 AC 548 (HL). In Australia see *Australia and New Zealand Banking Group Ltd. v Westpac Banking Corporation* (1988) 164 CLR 662 (HCA) 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 384-386; *Ethnic Earth Pty Ltd v Quoin Technology Pty Ltd (in liq) (No 3)* [2006] SASC 7 94, 229 ALR 615 [85]-[87]. However, in *Western Areas Exploration Pty Ltd v Streeter and Others (No 3)* (2010) 234 FLR 265 (FCA) [40], Hennan J held that 'the status of the defence has not been entirely settled.'

[5] *Murphy v Attorney General* [1982] IR 241 (SC) 319. Hereafter *Murphy*.

[6] See Lee, 'Changing Position on Change of Position' [2007] RLR 135, 137-138.

[7] *Lipkin Gorman* [1991] 2 AC 548 (HL) 581. See also Burrows, *The Law of Restitution,* (3rd edn OUP, Oxford 2011) 526-527. In Australia see *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 385. Hereafter *David Securities*.

available and was 'likely to be available only on comparatively rare occasions.'[8] This view has been significantly relaxed, as will be discussed below.

The traditional test for change of position, discussed in Section (i), has caused difficulties where the courts have sought to apply it in response to restitution claims against public authorities. Recent authorities suggest that the standards of proof and causation applicable to individual defendants cannot be applied where the defence is raised in response to a restitution claim against the state.[9] Section (ii) considers the standard of causation adopted in restitution claims against public authorities and considers whether those standards constitute unconstitutional interference with claimants' rights to property.

(i) Elements of the Change of Position Defence

In *Philip Collins Ltd v Davis,* Jonathon Parker J identified four principles as being applicable to change of position. First, it is for the defendant to establish the change of position defence. Second, the expenditure relied on by the defendant must not have been made in ordinary course of things; to satisfy the requirements of the change of position defence, the expenditure incurred by the defendant must be 'extraordinary'.[10] Third, there must be a causal link between the receipt of the enrichment and the overpayment. Fourth, the defence operates pro tanto and can only be relied upon by the defendant to the extent to which he has dissipated the enrichment.[11]

There has been considerable elision of the factors identified by Jonathon Parker J in *Davis*. In particular, the requirement of 'extraordinary expenditure' may be reconceptualised as a matter going to causation. Therefore, it may be simpler to formulate the test for change of position in terms of causation, asking 'did the receipt of the enrichment cause the defendant to change his position?' However, such a development risks abandoning a principled approach in favour of a broad, unconscionability based approach.

In *Commerzbank AG v Gareth Price-Jones*, Munby J rejected the view that the change of position defence was made up of constituent elements, preferring instead to redefine the principles set out in previous cases as significant factors leading to the

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[8] *Lipkin Gorman* [1991] 2 AC 548 (HL) 580.

[9] See also, Williams, *Unjust Enrichment and Public Law* (Hart Publishing, Oxford 2010) 142-146.

[10] See *Dextra Bank v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) [38] (Hereafter *Dextra Bank*); *Dwyer v Commonwealth Bank of Australia* (1995) 31 ATR 48 (NSWCA).

[11] *Philip Collins Ltd v Davis* [2000] 3 All ER 808 (Ch) 827. Bant has suggested a fifth limb to the test, arguing that the defence should only be available where the change in the defendant's position is irreversible: Bant, 'Payment Over and Change of Position: Lessons From Agency Law' [2007] LMCLQ 225, 233. See also Bant, '*Restitutio in Integrum* and the Change of Position Defence: Lessons from Rescission' [2007] RLR 13, 34.

conclusion that the defence had been made out.[12] He identified one question to be the 'only potentially determinative question that ever has to be asked': '[H]as the position of the payee so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full?'[13] He concluded that any attempt to refine this question 'is likely to be not merely unnecessary but fraught with potential difficulty.'[14] Similarly, in *Niru Battery Manufacturing Co and another v Milestone Trading Ltd,* Clarke LJ held that 'the essential question is whether it would be inequitable or unconscionable, and thus unjust, to allow the recipient of money paid under a mistake of fact to deny restitution to the payer.'[15]

This discretionary, unconscionability-based, approach should be rejected, as it undermines the parameters upon which the defence has been traditionally formulated and empties the change of position defence of all content. [16] It also gives rise to a greater risk of untrammelled judicial discretion when applying the defence and is inconsistent with Lord Goff's direction that 'where recovery is denied, it is denied on the basis of legal principle.'[17] The broad test advocated by the Court of Appeal in *Niru Battery* has already led to problems of application. For example, in *Russell Vaught v Tel Sell UK Limited,* Judge Richard Seymour QC held that the size sum sought to be recovered, relative to the respective resources of the plaintiff and the defendant, was a relevant consideration to the decision as to a change of position defence should succeed.[18] Liability in restitution is strict, based on the unjust enrichment of the defendant. Therefore, the relative resources of the parties should be irrelevant. As noted by the Court of Appeal in *Scottish Equitable v Derby,* the financial difficulties experienced by the defendant were irrelevant in deciding whether or not he should be entitled to rely on the change of position defence.[19]

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[12] *Commerzbank AG v Gareth Price-Jones* [2003] EWCA Civ 1663 [55].
[13] *Ibid,* [56].
[14] *Ibid,* [56].
[15] *Niru Battery Manufacturing Co and another v Milestone Trading Ltd* [2004] 1 QB 985 [148]-[149]. Hereafter *Niru Battery*. See also *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 [48] (Munby J); *Datasat Communications Limited v Swindon Town Football Company Limited* [2009] EWHC 859 (Comm) [108]; *Papamichael v National Westminster Bank Plc* [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341.
[16] Burrows argues that the broad unconscionability test adopted in *Niru Battery* 'tells us almost nothing': Burrows, 'Clouding the Issues on Change of Position' [2004] CLJ 276, 277-278; Lee, 'Changing Position on Change of Position' (n 6) 139.
[17] *Lipkin Gorman* [1991] 2 AC 548 (HL) 578. See also, *South Tyneside MBC v Svenska International plc* [1995] 1 All ER 545 (QBD) 558; *Philip Collins Ltd v Davis and another* [2000] 3 All ER 808 (Ch) 827.
[18] *Russell Vaught v Tel Sell UK Limited* [2005] EWHC 2404 (QB) [177]
[19] *Scottish Equitable v Derby* [2001] All ER 818 (CA) 827. See also *Mahme Trust Reg v Nezhet* [2002] EWHC 1543 (Ch) [143].

The House of Lords has attempted to steer the defence back to the path of principle. In *Sempra Metals,* Lord Scott, reaffirmed that the change of position defence was not discretionary:

> The decision might, in the ordinary use of language, depend on where the judge thought the equities lay, what the judge thought was fair (see the discussion about change of position in *Goff & Jones, The Law of Restitution.* But this would not turn the remedy into a discretionary one.[20]

However, it is unclear to what extent this constitutes a retraction from the Court of Appeal's approach in *Niru Battery.* Although it affirms that neither the remedy nor the defence are discretionary, it confirms that the judge may consider where the equities lie when deciding whether to allow the change of position defence to succeed. In *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners,* Henderson J noted Lord Goff's injunction in *Lipkin Gorman* that 'the defence of change of position has to be firmly based on legal principle, and is not a matter for the general discretion of the court.'[21] He suggested that the Court of Appeal's emphasis on equitable considerations in *Niru Battery* might be 'difficult to reconcile with the underlying logic of Lord Goff's approach in *Lipkin Gorman*, and with the rejection by the Privy Council in *Dextra Bank* of a balance of fault test.'[22] He sought to confine the judgment of the Court of Appeal in *Niru* by interpreting that decision as going no further than stating that the test of bad faith required a court to determine whether it would be inequitable or unconscionable for the recipient of money under a mistake of fact to deny restitution of the payer.[23]

Restrictions on the operation of the defence: bad faith and wrongdoing

In *Lipkin Gorman,* Lord Goff identified two restrictions on the change of position defence:

> It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as where the defendant has paid away the money with knowledge of the

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[20] *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 [153]. Internal citations omitted.
[21] *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* [2008] EWHC 2893 (Ch) [313]. Hereafter *FII Group Litigation.*
[22] *Ibid,* [333].
[23] *Ibid,* [332].

facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer.[24]

There would appear to be considerable overlap between the concepts of wrongdoing and bad faith. In *Barros Mattos Junior and others v MacDaniels Ltd*, Laddie J held that bad faith comprised cases such as knowing receipt and dishonest assistance—cases 'where the defendant is not innocent of the claimant's rights.'[25] In contrast, 'wrongdoing' comprised cases where the defendant was unaware of the misappropriation from the claimant, but where his change of position was wrongful.[26] As this explanation does little to clarify the distinction between the two cases, it is necessary to consider how subsequent cases have treated the categories of bad faith and wrongdoing.

Wrongdoing

In *Lipkin Gorman,* Lord Goff held that the change of position defence would not be open to a wrongdoer.[27] However, it is unclear in what circumstances a defendant will be precluded from relying on the defence. In *FII Group Litigation,* Henderson J adopted a very narrow conception of wrongdoing, holding that it was restricted to situations 'where the cause of action relied upon by the claimant involves wrongdoing (in the sense of some recognised legal wrong) on the part of the defendant.'[28] This analysis is problematic. Liability in restitution for unjust enrichment is strict. Save in the exceptional case of duress, wrongful conduct does not form part of any restitutionary cause of action. Restitution for wrongs is an award of gain based damages for a recognised wrong. The concerns relating to security of receipt do not operate here and so there should not be any scope for the operation of the change of position defence. Therefore, if Henderson J is correct, the wrongdoer bar would be extremely limited in its scope. Furthermore, Henderson J's approach may lead to inconsistent results. For example, an innocent defendant who has been guilty of a strict liability tort may be denied the defence when sued for restitution of gains made in respect of that wrong, whereas a negligent defendant who is sued in unjust enrichment will be able to rely on the defence. It is more likely that the reference to 'wrongdoer' refers to wrongdoing in the sense of morally culpable conduct, so that the defence is available where the wrong in question is a

[24] *Lipkin Gorman* [1991] 2 AC 548 (HL) 580. See also *Niru Battery* [2002] EWHC 1425 [136]-[140].
[25] *Barros Mattos Junior and others v MacDaniels Ltd* [2005] 1 WLR 247, 253. Hereafter *Barros Mattos.*
[26] *Ibid.*
[27] *Lipkin Gorman* [1991] 2 AC 548 (HL) 580.
[28] *FII Group Litigation* [2008] EWHC 2893 [337].

mere technical wrong.[29] This approach is consistent with outcome of *Lipkin Gorman,* where the defendant was entitled to rely on the defence even though it had committed the tort of conversion.[30]

It is unclear whether or not the state will be considered a wrongdoer where it has exacted taxes or other charges without statutory authority. As discussed below, in *FII Group Litigation,* it was accepted between the parties that defence was not available as a response to a claim under the *Woolwich* principle.[31] Henderson J reached this conclusion by characterising the *Woolwich* claim as one involving the commission of a legal wrong, so that the defendant, as a wrongdoer, could not rely on the defence.[32] Similarly, in *Littlewoods,* Vos J held that the defendant's wrongdoing stemmed from the unlawful nature of the tax.[33] This reasoning is unconvincing:

> Often, the fact that a tax is not supported by valid legislation will simply mean that the tax is invalid, not that it inherently constitutes a breach of some independent duty.[34]

In *Murphy v Attorney General,* the Irish Supreme Court expressly accepted that the State had received the money in good faith and that the invalidity of the tax did not preclude the defendant from relying on change of position.[35] This approach is also consistent with the Supreme Court's decision in *Pine Valley,* where Henchy J held that an ultra vires act by a state actor did not give rise to an action for damages 'unless he acted negligently, or with malice (in the sense of spite, ill-will or suchlike improper motive), or in the knowledge that

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[29] Jones, 'Some Thoughts on Change of Position' in Burrows and Roger (eds) *Mapping the Law: Essays in Honour of Peter Birks* (OUP, Oxford 2006) 76. Compare, Hedley, *A Critical Introduction to Restitution,* (Butterworths, London 2001) 343.

[30] Compare *Barros Mattos* [2005] 1 WLR 247, where the technical illegality involved in the breach of exchange controls was sufficient to prevent the plaintiffs from relying on the defence. However, Laddie J's reliance on the doctrine of illegality in *Barros Mattos* has been the subject of some criticism: Halliwell, 'The Effect of Illegality on a Change of Position Defence' [2005] Conveyancer 357, 361.

[31] *FII Group Litigation* [2008] EWHC 2893 (Ch) [304].

[32] *Ibid,* [339].

[33] *Littlewoods* [2010] EWHC 1071 (Ch), [2010] STC 2072 [105]-[107].

[34] Bant, 'Restitution from the Revenue and Change of Position' [2009] LMCLQ 166, 172. See also, Goymour and Virgo, 'Unlawful Tax: Tantalizing Glimpses of Restitution' (2010) 69 CLJ 232, 235; Shiers and Williams, '*FII GLO (Chancery)* and *FJ Chalke:* Tax and Restitution Developing Hand in Hand' [2009] British Tax Review 365, 375; Williams, *Unjust Enrichment and Public Law* (n 9) 148-149.

[35] *Murphy* [1982] IR 241 (SC) 319. See also Jones, 'Some Thoughts on Change of Position' (n 29) 73. This should be contrasted with situations where the state authority was aware of the invalidity of the legislation on which the charge is based. See *Re Article 26 and the Health (Amendment)(No 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105. Bant has argued that a recipient should demonstrate reasonable reliance on its security of receipt for the change of position defence to be made out and that an assumption by the Revenue that all taxes are lawful does not constitute such reasonable reliance: Bant, *The Change of Position Defence* (Hart Publishing, Oxford 2009) 151-155. However, the Irish courts are unlikely to be responsive to this argument, in light of the presumption of constitutionality enjoyed by statutes.

the decision would be in excess of the authorised power'.[36] However, although the receipt of ultra vires taxes does not mean that the state is a wrongdoer, it may be precluded from relying on the defence where the cause of action relied upon by the claimant is premised on wrongful behaviour. Thus, where the plaintiff establishes a claim on the basis of duress, the state may not be entitled to rely on the change of position defence, as the illegitimate pressure by which it obtained the benefit renders it a wrongdoer and precludes the application of the defence. This is particularly important in Ireland, as the *Woolwich* principle has not wholly supplanted the compulsion cause of action.[37]

Bad faith

Lipkin Gorman establishes that the change of position defence will not be open to a defendant who has acted in bad faith.[38] However, it is unclear whether Lord Goff considered that bad faith operated to bar an established change of position defence, or if the requirement of good faith is a prerequisite before the defence can be established. The courts' approach to this issue has been inconsistent. In *Maersk Air Ltd v Expeditors International (UK) Ltd*, Alton J treated the defendant's good faith as a prerequisite for the change of position defence, rather than treating bad faith as a bar to the defence.[39] In *Niru Battery,* Sedley LJ held that Lord Goff in *Lipkin Gorman* did not intend to establish a dichotomy between good faith and bad faith, but instead intended the good faith requirement to indicate an innocent change of position so that the 'reference to "one who has changed his position in bad faith" is therefore not a bright line but an illustration of the kind of case in which it would be inequitable to allow a change of position defence to succeed.'[40] However, in *Rose v AIB Group (UK) plc* Deputy Judge Nicholas Warren QC treated the concepts as setting up just such a dichotomy.[41] The latter approach is to be preferred, as the former could be interpreted by future cases as meaning that innocent receipt will be sufficient to establish the defence, something that English jurisprudence rightly rejects. [42] Lee has suggested that bad faith operates to break the causal link between the receipt and the change of position, so that the bad faith of the payee rather than the mistake of the payor 'is considered to be the (legal) cause of the

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[36] *Pine Valley Developments Limited v Minister for the Environment* [1987] 1 IR 23 (SC) 40.
[37] See, *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC) 10. Hereafter *O'Rourke.*
[38] *Lipkin Gorman* [1991] 2 AC 548 (HL) 580. See also *K & S Corporation Ltd v Sportingbet Australia* [2003] SASC 96, 86 SASR 312 [159].
[39] *Maersk Air Ltd v Expeditors International (UK) Ltd* [2003] 1 Lloyd's Rep 491 [49].
[40] *Niru Battery* [2004] 1 QB 985 (CA) [182]-[183].
[41] *Rose v AIB Group (UK) plc* [2003] EWHC 1737 (Ch), [2003] 1 WLR 2791 [44]
[42] See also, Goff and Jones, *The Law of Restitution* (Common Law Library, 7th edn Thomson Sweet and Maxwell, London 2007)[40-013]

disenrichment.'[43] If this premise holds true in respect of recipients who change their position in bad faith, it should also hold true for wrongdoers.

It is clear from *Lipkin Gorman* that a person who paid away the money, when he had notice of the facts giving rise to the plaintiff's claim in restitution, will not have acted in good faith.[44] However, beyond this clarification, the parameters of bad faith are uncertain. In *Niru Battery,* Moore-Bick J held that, while bad faith was to be determined on a case by case basis, the concept was 'capable of embracing a failure to act in a commercially acceptable way and sharp practice of a kind that falls short of outright dishonesty as well as dishonesty itself.'[45] This test was adopted by the Court of Appeal in *Abou Rahmah v Abacha,* [46] although the Court was divided as to how it should be applied. Rix LJ held that the public interest in deterring banks from engaging in international money laundering entailed that it was not commercially acceptable for a bank to open an account for persons that it suspected of money laundering. He would have denied the bank the defence, as it entertained suspicions at the time of the opening of the account that its clients might be involved in money laundering; it was immaterial that the bank entertained no such suspicions in relation to the dishonest transactions in question.[47] On the other hand, Arden LJ held it was not for the court, in deciding whether a change of position was made out, to 'punish a defendant for conduct which is unrelated to the transactions on which the cause of action of the claimant is based'.[48] She held that a lack of good faith could only operate to deprive the defendant of the defence of change of position where this bad faith related to the initial receipt of the money or to the manner in which the money was subsequently spent.[49]

There are several problems with the 'commercial acceptability' test adopted by the courts in *Niru Battery* and in *Abacha.* First, relying on a test of commercial acceptability for

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[43] Lee, 'Dishonesty and Bad Faith After *Barlow Clowes*: *Abou-Rahmah v Abacha*' [2007] Journal of Business Law 209, 211.

[44] *Lipkin Gorman* [1991] 2 AC 548 (HL) 580. See also *Cressman v Coys of Kensington (Sales) Ltd (McDonald, Part 20 defendant)* [2004] EWCA Civ 47, [2004] 1 WLR 2775 [41]; *Niru Battery* [2004] 1 QB 985 (CA) 1001 (Clarke LJ). In *Jones v Churcher,* Judge Havelock-Allan QC extended this example, holding that the concept of good faith requires a person who has doubts that the payment was intended to make an inquiry into the circumstances of the payment before paying the money away: *Jones v Churcher* [2009] EWHC 722 (QB) [46], [2009] 2 Lloyd's Rep 94.

[45] *Niru Battery* [2002] EWHC 1425 (Comm) [135].

[46] *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492 [51]. Hereafter *Abacha.*

[47] *Ibid,* [51]-[55] and [58]. See also *Barros Mattos* [2005] 1 WLR 247 (Ch) [40] and [44].

[48] *Abacha* [2006] EWCA Civ 1492 [84].

[49] *Ibid,* [84]. See also, Virgo, 'Assisting the Victims of Fraud: the Significance of Dishonesty and Bad Faith' (2007) 66 CLJ 22, 24. Conversely, Ellinger has suggested that good faith should relate to the change of position rather than to the receipt of the funds: Ellinger, 'False Certification and its Consequence (Case Comment)' (2005) 121 LQR 51, 54.

determining whether the defendant acted in bad faith is uncertain, as judges have considerably different views on what constitutes commercially acceptable conduct. This is evident from the conflicting views of the judges in *Abacha* itself. Second, it is unclear whether or not a test of 'commercial acceptability' could operate in a non-commercial context. Third, it is difficult to determine from case law if the courts have adopted an objective or a subjective approach to bad faith. Traditionally, the concept of bad faith corresponded with objective dishonesty.[50] However, this equation has been thrown into doubt by the decisions of recent cases on dishonest assistance.[51] Virgo observes that the test as formulated by Moore-Bick J in *Niru*

> suggests an objective standard of commercial acceptability which does not have regard to the defendant's perceptions of what that standard is. This approach was endorsed by the Court of Appeal [in *Niru*], yet, confusingly, that court went on to refer specifically to the unconscionability test as well. This suggests that bad faith is to be interpreted subjectively, with regard to the defendant's own conscience.[52]

Papamichael v National Westminster Bank Plc suggests that bad faith incorporates a subjective element, consistently with *Niru.* Judge Chambers QC held that the concepts of 'good faith, conscience and dishonesty...to a greater or lesser degree involve findings of a subjective nature.'[53] He also suggested that a defendant should have actual notice of matters that went to his good faith to defeat the change of position defence, but held that actual notice included 'wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make.'[54] However, in *Jones v Churcher* Judge Havelock-Allan QC held that there was no rigid test as to whether the change of position defence would be defeated by actual or imputed notice.[55] He added that a person who has doubts about whether a benefit is intended for him must enquire into the circumstance of the payment to rely on the defence, which

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[50] Birks, 'Change of Position: the Two Central Questions' (2004) 120 LQR 373, 377. See also Lee, 'Dishonesty and Bad Faith After *Barlow Clowes: Abou-Rahmah v Abacha*' (n 43) 212.

[51] *Royal Brunei Airlines Sdn Bhd v Tan Kok Ming* [1995] 2 AC 378 (PC) 387 (Lord Nicholls); *Twinsectra Ltd v Yardley* [2002] 2 AC 164 (HL) [20] (Lord Hoffmann) [32], (Lord Hutton), [118]-[121] (Lord Millett); *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2006] 1 WLR 1476 (PC) [10], [15]-[16] (Lord Hoffmann); *Abacha* [2006] EWCA Civ 1492 [68]-[69] (Arden LJ); Birks, 'Change of Position: the Two Central Questions' (n 50) 376. See also Virgo, 'Assisting the Victims of Fraud: the Significance of Dishonesty and Bad Faith' (n 49) 23; Virgo, 'The Role of Fault in the Law of Restitution' in Burrows and Rodgers (eds) *Mapping the Law: Essays in Honour of Peter Birks* (OUP, Oxford 2006) 86.

[52] Virgo, 'The Role of Fault in the Law of Restitution' (n 51) 88.

[53] *Papamichael v National Westminster Bank Plc and Another* [2003] EWHC 164 (Comm), [2003] 1 Lloyd's Rep 341 [181].

[54] *Ibid,* [208]-[209].

[55] *Jones v Churcher* [2009] EWHC 722 (QB), [2009] 2 Lloyd's Rep 94 [99].

suggests that he considered that constructive notice of a claim to the money would be sufficient to defeat the defence.[56]

It is unclear whether the bad faith restriction on the change of position defence will ever be held to apply to the State. It has been noted in the context of judicial review of administrative actions that there is 'a marked reluctance to attach a label of bad faith to the activities of administrative authorities'[57] and it is likely that this reluctance will extend to findings of bad faith in the context of change of position. Moreover, if bad faith is only relevant where it is related to the defendant's receipt of the money or change of position, this will further limit the role of bad faith where relied upon by the state. The state will be relying on public expenditure as the basis for its change of position defence. It is difficult to conceive of any kind of public expenditure that is likely to have been made in bad faith. However, there is no reason why the state cannot be considered to have *received* money in bad faith in certain circumstances. For example, it is likely that the Irish State would be held to have received health charges under the Health Act 1970 in bad faith, as the State continued to levy charges for health care on elderly citizens, even though it was aware that those charges were unlawful.[58]

Role of relative fault in the change of position defence

It has been suggested that the change of position defence encompasses a reasonableness requirement. Some commentators have argued that there is no strong case for protecting defendants who fail to take reasonable precautions to protect themselves and that a reasonable reliance requirement 'encourages parties to take steps to avoid the costs of mistakes'.[59] Bant notes that a reasonable reliance requirement exists in the law of restitution inasmuch that the defendant 'must have a reasonable basis for changing his position'.[60] She suggests that the recognised requirement of good faith is 'simply part of the greater requirement of reliance.'[61] However, the requirement of good faith does not encompass a requirement of *reasonable* reliance. Other commentators have argued that encompassing a

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[56] Similarly in *MGN Ltd v Teresa Horton* [2009] EWHC 1680 (QB), Tugendhat J held that the defendant could not rely on the change of position defence because she was aware of, or had closed her eyes to, the fact that her husband was making payments to her business in order to launder sums misappropriated from his employer.
[57] Delany, *Judicial Review of Administrative Action* (2nd edn Roundhall, Dublin 2009) 75. See also Woolf Jowell and Le Seur, *de Smith's Judicial Review* (6th edn Thomson Sweet and Maxwell, London 2007) [5-082].
[58] *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105 [74], [105].
[59] Bant, 'Restitution from the Revenue and Change of Position' (n 34) 171.
[60] Bant, 'Payment Over and Change of Position: Lessons from Agency Law' (n 11) 236. See also Lee, 'Changing Position on Change of Position' (n 6) 140.
[61] Bant, 'Payment Over and Change of Position: Lessons from Agency Law' (n 11) 237.

relative fault requirement 'undermines the strict nature of liability for unjust enrichment'[62] and that adopting such an approach was likely to lead to 'arbitrary and inscrutable allocations of the loss.'[63] The Privy Council in *Dextra Bank* rejected the contention that relative fault had a role to play in the change of position defence. It observed that the right to restitution was not barred by negligence or by carelessness,[64] and that it would therefore be inconsistent to introduce fault requirements into the change of position defence.[65]

The Irish courts have not yet considered what role fault may play in the change of position defence. The courts' willingness to embrace a relative fault analysis will depend on what the Irish courts consider to be the primary rationale of the change of position defence.[66] If the courts adopt an enrichment-focused conception of the defence, there is little scope for including consideration of the relative fault of the parties within the defence. However, if the courts consider the primary rationale for the defence is to prevent injustice, the fault of both parties may take on an increased relevance. As noted above, the Supreme Court in *Murphy* considered that the defence sought to encompass both rationales, and did not ascribe primacy to either.[67] However, even if the Irish courts were to adopt an approach premised on relative fault, it is unclear how this would operate in relation to the state, in light of the disparity of position between the State and the individual. In *Rogers v Louth County Council* Griffin J held that a citizen who had overpaid a State authority could rely on the exception to the mistake of law bar in *Kiriri Cotton Co Ltd v Dewani*,[68] as the individual could not be said to be *in pari delicto* with the state.[69] The state's superior position means that it is not *in pari delicto* with a taxpayer who pays tax under a mistake of law. If Irish law embraces a conception of the change of position defence that involves consideration of relative fault, the State may be precluded from relying on the change of position defence, if it is considered to be more at fault than the taxpayer.

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[62] Virgo, 'Enrichment: The Case of the Cherished Mark' (2004) 63 CLJ 280, 282; See also, Burrows, *The Law of Restitution* (2nd edn Butterworths, London 2002) 524. Compare now, Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2011) 541.

[63] Birks, 'Change of Position: the Two Central Questions' (n 50) 376.

[64] See also Goff and Jones, *The Law of Restitution* (n 42) [40-013].

[65] *Dextra Bank v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) [45]. See also *Abacha* [2006] EWCA Civ 1492 [79] (Arden LJ); *Jones v Churcher* [2009] EWHC 722 (QB) [62]. However, see Watts, 'Rescission of Guarantees for Misrepresentation and Actionable Non-Disclosure' (2002) 61 CLJ 301, 305; Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2011) 541. Virgo has argued that the subsequent decision of the Court of Appeal in *Cressman and another v Coys of Kensington (Sales) Ltd* appears to attach relevance to the fault of the defendant: Virgo, 'Enrichment: The Case of the Cherished Mark' (n 62) 282.

[66] See below at 317-318.

[67] *Murphy* [1982] IR 241 (SC) 318-319.

[68] *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 (PC) 204.

[69] *Rogers v Louth County Council* [1981] IR 265 (SC) 270-271.

(ii) Change of Position, Causation, and Property Rights

An important element of the change of position defence is that the defendant must demonstrate that the receipt of the enrichment from that plaintiff caused him to change his position. Two approaches can be taken in relation to establishing causation—one broad and one narrow.[70] The narrow view requires that the defendant changed his position in good faith and in reliance upon the receipt from the claimant.[71] The wider view simply requires that the change in position was causally linked to the payment.[72] It encompasses situations where the defendant has suffered a loss that he would not have suffered if he had not received the property.[73] The wide conception of the defence has been adopted by the English courts,[74] which have also adopted an expansive conception of causation.[75] It is not clear what formulation of the defence is preferred by the Irish courts. Henchy J's consideration of the matter in *Murphy* was inconclusive. He held that the defence will be available where the defendant's 'circumstances have so changed that it would be inequitable to compel him to make full restitution.'[76] This formulation of the defence suggests a wider approach, as it appears that it is unnecessary for the defendant to have changed his position in reliance on the payment. However, Henchy J preferred the approach of the New Zealand Judicature Act, which adopts a narrow, reliance-based, approach, to the wide approach advocated by §142 of the American *Restatement of Restitution*.[77] In light of this apparent contradiction, it is not possible to state with any certainty which approach has been adopted by the Irish Courts.

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[70] *Scottish Equitable v Derby* [2001] EWCA 369, [2001] All ER 818, 827. See also *Cressman v Coys of Kensington (Sales) Ltd (McDonald, Part 20 defendant)* [2004] EWCA Civ 47, [2004] 1 WLR 2775 [41]; Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2011) 529-531. However, Bant argues that the broad and narrow versions of the defence present a 'false dichotomy' and contends that the distinction is better understood as one between 'independent' and 'defendant instigated' changes in position: Bant, 'Restitution from the Revenue and Change of Position' (n 34) 170.

[71] *Storthoaks (Rural Municipality) v Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1, [1976] 2 SCR 147 (SCC); *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA).

[72] §142 of the Restatement of Restitution (2d).

[73] Burrows, *The Law of Restitution* (n 62) 528-529.

[74] *Philip Collins Ltd v Davis and another* [2000] 3 All ER 808 (Ch) 827. See also *Scottish Equitable plc v. Derby* [2001] EWCA 369, [2001] 3 All ER 818 [30] and [31]; *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 [43] (Mummery LJ) and [59] (Munby LJ). In *Abacha* [2006] EWCA Civ 1492 [46], Rix LJ held that a wide conception of the defence is appropriate in light of the fact that liability in restitution for unjust enrichment is strict.

[75] See *Scottish Equitable plc v Derby* [2001] EWCA 369, [2001] All ER 818, 827; *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 [43] (Mummery LJ) and [58] (Munby LJ); *Charles Terence Estates Ltd v Cornwall Council* [2011] EWHC 2542 (QB) [98].

[76] *Murphy v Attorney General* [1982] IR 241 (SC) 319.

[77] *Ibid*, 319.

A generous conception of the defence is appropriate in claims between private parties, as liability in restitution for unjust enrichment is strict. [78] However, this approach has also been applied in cases where the state has invoked the change of position defence, without considering if such a standard is appropriate to apply to public bodies. Recent English decisions point to a deferential standard of proof being applied to public authorities seeking to establish the defence. The courts have taken a broad approach to the issue of expenditure and causation, assuming that, once the public body in question has in place a programme of expenditure, the defence has been made out.

The approach of Henderson J in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners* demonstrates a particularly expansive approach to causation where the state relies on change of position.[79] He noted that, although *Lipkin Gorman* established that change of position applied only to expenditure incurred in reliance upon the receipt of the enrichment, the courts will not impose an exacting standard of proof on someone who relies on the defence. Government expenditure was predicated on expected tax revenues and, as such, expenditure was undertaken that would not have been undertaken at the level at which it did if the payments of tax were not relied upon.[80] Henderson J also noted that the overpaid taxes were received in good faith and were spent in the public interest. This approach is similar to the expansive approach to change of position adopted by the Irish Supreme Court in *Murphy v Attorney General*. Henchy J accepted that 'the State justifiably altered its position by spending the taxes thus collected and by arranging its fiscal and taxation policies and programmes accordingly.'[81] However, the approach of the English and Irish courts is at odds with that of other jurisdictions. In *Storthoaks (Rural Municipality) v Mobil Oil Canada Ltd*,[82] the Canadian Supreme Court rejected the change of position defence invoked by the municipality, as the money received by it had been placed in a general account used for everyday expenditure and, in the absence of extraordinary expenditure, the municipality could not have been said to have changed its position in reliance on the receipt.[83]

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[78] *Abacha* [2006] EWCA Civ 1492 [46]. See also *Scottish Equitable plc v Derby* [2001] EWCA 369, [2001] 3 All ER 818 [30]-[31].

[79] However, Henderson J explicitly rejected that fiscal chaos considerations had anything to do with his formulation of the defence: *FII Group Litigation* [2008] EWHC 2893, [2009] STC 254 [347].

[80] *Ibid,* [344].

[81] *Murphy* [1982] IR 241 (SC) 320.

[82] *Storthoaks* (1975) 55 DLR (3d) 1, [1976] 2 SCR 147 (SCC).

[83] *Ibid,* [53].

The expansive approach to causation adopted by Henderson J in *FII Group Litigation* was followed by Hamblen J in *Bloomsbury International Limited & Ors v Sea Fish Industry Authority & Anor:*

> A causal connection must be shown, on at least a 'but for' basis between the receipt and any expenditure or change of position upon which the defendant wishes to rely. However, in the context of government expenditure, there is no need to demonstrate a precise link between particular receipts and particular items of expenditure and that it is reasonable to infer that planned expenditure would not have taken place at the level which it did but for the availability of the tax receipts which were taken into account in fixing departmental budgets.[84]

Hamblen J concluded that it was sufficient that the defendant could establish that it had 'arranged its budgeting and planned its expenditure on the basis that it was entitled to receive and spend those monies.'[85] However, the recent decision of Vos J in *Littlewoods*[86] suggests that the presumption of expenditure adopted in *FII Group Litigation* and *Bloomsbury International* can be rebutted. Vos J accepted expert evidence, which stated that the state's budgeting and expenditure decisions were not likely to have been affected by the expectation of receipt of the tax revenues paid by the claimant.[87]

The approach adopted in relation to the state in *Murphy, FII Group Litigation,* and *Bloomsbury International* is no different to the expansive approach adopted in relation to people who adjust their expenditure to match their income.[88] The problem is not that the current approach of the courts is more favourable to the state but rather that the standards of proof and causation that apply to individual defendants cannot be transposed to cases in which the state is the defendant.[89] This approach turns the burden of proof applicable to reliance and causation on its head insofar as it relates to the state. It creates a presumption in

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[84] *Bloomsbury International Limited & Ors v Sea Fish Industry Authority & Anor* [2009] EWHC 1721 (QB) [137].
[85] *Ibid,* [141].
[86] *Littlewoods* [2010] EWHC 1071 (Ch), [2010] STC 2072 .
[87] *Ibid,* [114].
[88] *Philip Collins Ltd v Davis* [2000] 3 All ER 808 (Ch) 829. See also, Shiers and Williams, '*FII GLO (Chancery)* and *FJ Chalke*: Tax and Restitution Developing Hand in Hand' (n 34) 376. Lee has suggested that the generous approach afforded to individual defendants may need to be reconsidered: Lee, 'Restitution from the Revenue: Exacting Principles from the Court of Appeal' [2010] RLR 75. However, such a radical change in approach may significantly undermine defendants' security of receipt, so that a more restrictive approach to defences may require a return to a more restrictive approach to restitutionary causes of action. See *Lipkin Gorman* [1991] 2 AC 548 (HL) 581.
[89] See also, Williams, *Unjust Enrichment and Public Law* (n 9) 142-146.

favour of change of position by assuming that all government expenditure is caused by the receipt of the enrichment.[90] Even in cases where the change of position defence was rejected, such as *Littlewoods,* it was because the claimant positively established that the receipt of the enrichment had no effect on the defendant's budgetary decisions.[91] This assumption is based on a false premise, as it assumes that the state only spends money when it has tax revenues available to it. This is patently not the case, as illustrated by Ireland's burgeoning national debt.[92] However, the fact that the state has alternative means of raising funds has been rejected as a means of rebutting the presumption.[93]

As discussed above, restitution from public authorities has become a specific genus of cases in the law of restitution *because* of its interrelationship with public law principles.[94] These public law principles have already affected the availability of the change of position defence where claimants seek to rely on the *Woolwich* principle as a ground for restitution. In *FII Group Litigation,* it was accepted between the parties that the defence was not available as a response to a claim under the *Woolwich* principle.[95] Henderson J held that this conclusion could be reached by characterising the *Woolwich* claim as one involving the commission of a legal wrong, as the defence is not available to wrongdoers.[96] He also acknowledged that the strong public law principles underpinning the *Woolwich* principle should operate to bar the change of position defence where restitution was sought on that basis.[97] The latter justification is preferable to the former. As noted above, the state should be not regarded as a wrongdoer for the purposes of the change of position defence.[98] The desire to characterise the state's behaviour as wrongful may originate from a judicial desire to engage the established wrongdoer exception to the change of position defence, identified by

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[90] Bant, 'Restitution from the Revenue and Change of Position' (n 34) 170-171, footnotes omitted.
[91] *Littlewoods* [2010] EWHC 1071 (Ch), [2010] STC 2072 [120].
[92] See E Oliver, 'Ireland risks becoming "the next Argentina", says Wolf' *Tribune* (08 November 2009) <http://www.tribune.ie/article/2009/nov/08/ireland-risks-becoming-the-next-argentina-says-wol/>
[93] *FII Group Litigation* [2008] EWHC 2893 (Ch), [2009] STC 254 [345].
[94] See, generally, Chapter 2.
[95] *FII Group Litigation* [2008] EWHC 2893 (Ch), [2009] STC 254 [304]. See also *Bloomsbury International* [2009] EWHC 1721 (QB) [134]. On this concession, see Williams, *Unjust Enrichment and Public Law* (n 9) 137-138.
[96] *FII Group Litigation* [2008] EWHC 2893 (Ch), [2009] STC 254 [339]. See also, Butler, 'Restitution of Overpaid Taxes, Windfall Gains, and Unjust Enrichment: *Commissioner of State Revenue v Royal Insurance Australia Ltd*' (1994-1995) 18 University of Queensland Law Journal 318, 324; McInnes, 'Mistaken Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance*' (1996) Monash University Law Review 209, 239-240.
[97] *Ibid* [340]. See also O'Dell and Whyte, 'Is This a Country for Old Men and Women?—*In Re Article 26 and the Health Amendment (No 2) Bill 2004*' (2005) 27 Dublin University Law Journal 368. Compare Jones, 'Some Thoughts on Change of Position' (n 29) 72. See also Chen-Wishart, 'Unjust Factors and the Restitutionary Response' (2000) 20 Oxford Journal of Legal Studies 557, 559.
[98] Discussed above at 291-293.

Lord Goff in *Lipkin Gorman.*[99] However, this focus on wrongdoing is unfortunate, as it obscures the public law principles underpinning this restriction of change of position so that the restrictions remain focused on the nature of the cause of action, rather than on the nature of the defendant.

On the other hand, Henderson J's second reason is entirely consistent with the principles underpinning restitution from public authorities. There is a strong public interest in restitution of unlawfully exacted taxes. If this policy is sufficiently important to require restitution as of right under the *Woolwich* principle, the change of position defence should not subvert this policy.[100] This point was accepted by Mason CJ in *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd*, where he held that the passing on defence should not be applied where it would subvert the principles underpinning the *Woolwich* principle:

> It would be subversive of an important constitutional value if this Court were to endorse a principle of law which, in the absence of such circumstances, authorized the retention by the executive of payments which it lacked authority to receive and which were paid as a result of causative mistake.[101]

Change of position also allows the state to retain money exacted without parliamentary authority and the principles underpinning *Woolwich* should similarly require a restrictive approach to the defence. This conclusion is defensible in principle and by analogy with established authority. In *Auckland Harbour Board v R,* the Privy Council adopted a restrictive approach to defences where restitution was sought by the state for money paid by the state *ultra vires.*[102] This approach should be mirrored in cases where a private citizen seeks restitution from the state. It was by a similar analogy with *Auckland Harbour Board* that Lord Goff held that *ultra vires* payments could be recovered by private citizens as of right.[103] In the *FII* case, Henderson J held that the change of position defence would not be available where the *Woolwich* principle was relied on by litigants. However, if the public law principles behind the *Woolwich* principle justify a total restriction on the change of position defence where the *Woolwich* principle is relied upon, they also justify a restrictive approach

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[99] *Lipkin Gorman* [1991] 2 AC 548 (HL) 580. See also, *Littlewoods* [2010] EWHC 1071 (Ch), [2010] STC 2072 [108].
[100] See also Bant, *The Change of Position Defence* (n 35) 169, 187 and 203.
[101] *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 69.
[102] *Auckland Harbour Board v R* [1924] AC 318 (PC) 326.
[103] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL) 177.

to change of position where restitution is sought from the state on the basis of other unjust factors.[104]

Constitutional Property Rights

The right to property is guaranteed by Article 40.3.2° and Article 43 of the Irish Constitution. The right to property is not absolute[105] and the state can place restrictions on the right to property where the restriction is 'in accordance with the principles of social justice' and is required by the common good.[106] An interference with property will be deemed to violate the constitution where it constitutes an 'unjust attack' on the individual's right to property.[107] In considering whether an interference constitutes an 'unjust attack' on constitutional rights in general,[108] and on property rights in particular, the Irish Courts have adopted a proportionality test not dissimilar to that developed by the ECtHR.[109] For an interference with a person's rights to be proportionate, and therefore constitutionally permissible, it must be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations. It must impair the right as little as possible, and be such that its effects on rights are proportionate to the objective.[110]

This test has been consistently referred to—if not consistently applied—in cases involving restrictions on property rights.[111] On occasion, the courts have adopted a more deferential rationality standard of review, considering whether 'the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights.'[112] More recent decisions appear to adopt a possible third approach, considering whether or not the interference has been in accordance with the

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[104] See also, Shiers and Williams, '*FII GLO (Chancery)* and *FJ Chalke:* Tax and Restitution Developing Hand in Hand' (n 34) 374.

[105] Hogan and Whyte, *JM Kelly: The Irish Constitution* (4th edn LexisNexis Butterworths, Dublin 2003) [7.7.01].

[106] *Buckley v Attorney General* [1950] IR 67 (SC) 82-83. See also Casey, *Constitutional Law in Ireland* (3rd edn Roundhall Sweet and Maxwell, Dublin 2000) 677.

[107] *Blake v Attorney General* [1982] IR 117 (SC) 135; *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 (SC) 366. Hereafter *Employment Equality Bill*.

[108] The courts have also adopted a proportionality analysis when assessing the constitutionality of provisions of the criminal law (*Heaney v Ireland* [1994] 3 IR 593 (HC); *Cox v Ireland* [1992] 2 IR 503 (SC)) and of measures restricting freedom of expression (*Murphy v IRTC* [1999] 1 IR 12 (SC)).

[109] See, for example, *James v UK* (App no 8793/79) (1986) 8 EHRR 123 [50].

[110] *Heaney* [1994] 3 IR 593 (HC) 607, relying on the Canadian case *Chaulk v R* [1990] 3 SCR 1303 (SCC) 1335-1336.

[111] See *Daly v Revenue Commissioners* [1995] 3 IR 1 (HC) 11; *Re Article 26 and Part V of the Planning and Development Bill* [2000] 2 IR 321 (SC) 349-350 (hereafter *Planning and Development Bill*); *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105 [88] (hereafter *Health Amendment Bill)*; Doyle, *Constitutional Law: Text, Cases and Materials* (Clarus Press, Dublin 2008) [6–39].

[112] *Tuohy v Courtney* [1994] 3 IR 1 (SC) 47.

principles of social justice.[113] The approach of the courts in relation to this issue has been somewhat incoherent, [114] and it is unclear whether these standards can be used interchangeably[115] or if all standards can be applied at the same time.[116] In fact, it is not unusual for the courts to refer to all three standards, without indicating why the ultimate application of one, rather than another, is justified.[117]

Common law rules are required to conform to constitutional principles[118] and it would be difficult to understand why proportionality principles should not apply to a judicial measure that permits the *ex post* retention of illegally expropriated property. The change of position defence, insofar as it relates to the state, is not one of general application. The application of the defence to the state confers two benefits on the state that are not available to private litigants. First, it confers on the state the benefit of a presumption of expenditure. Second, it presumes that the unjust enrichment has been wholly dissipated, giving rise to a full defence rather than one that operates *pro tanto*. The fact that the plaintiff's claim can be completely extinguished by the defence of change of position amounts to an expropriation of his property rights. Furthermore, the presumption in favour of expenditure means that the state does not have to justify its retention of the money by pointing to any pressing social objective. Mere expenditure of the money and the cost to the state of making restitution is not sufficient to defeat a plaintiff's claim for restitution[119] and so should not be considered a pressing social objective for the purposes of the proportionality principle. If there is no need for the identification of an objective, then it cannot be said that the state has satisfied the court that the retention of the money is rationally connected to the objective. Therefore, the change of position defence fails the first limb of the proportionality test.[120]

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[113] *Employment Equality Bill 1996* [1997] 2 IR 321 (SC) 366; *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105.

[114] See Foley, 'The Proportionality Test: Present Problems' [2008] Judicial Studies Institute Journal 67, 75-76 and 80-81; Doyle, *Constitutional Law: Text, Cases and Materials* (n 111) [6–35]; Walsh, 'The Constitution, Property Rights and Proportionality: A Reappraisal' (2009) 31 Dublin University Law Journal 1, 7-10.

[115] See *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105.

[116] As appears to be suggested in *Bupa Ireland Ltd v Health Insurance Authority* [2006] IEHC 431.

[117] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105; *Bupa Ireland Ltd v Health Insurance Authority* [2006] IEHC 431.

[118] See *W v W* [1993] 2 IR 476 (SC); *McKinley v Minister for Defence* [1997] 2 IR 176 (HC). Similarly, private law concepts have been moulded by the House of Lords to conform with the Convention and, in particular, with the principle of proportionality; see, for example, *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 and *Re S* [2004] UKHL 47, [2005] 1 AC 593.

[119] *Tate v The Minister for Social Welfare* [1995] 1 IR 418 (HC) 432; *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [129] (SC).

[120] However, recent Irish cases indicate a greater judicial willingness to consider protection of exchequer as a legitimate objective. See *J & J Haire & Company Ltd v Minister for Health and Children* [2009] IEHC 562 and

If the court adopts a de facto presumption that the money has been spent by the state and that it has been spent in full, it cannot be said that the retention of the money interferes with the right as little as possible. Therefore, the defence is likely to fail the second limb of the test. Recent cases in which the state has relied on the defence indicate that the courts will assume that the money was spent and was spent in full, so that change of position operated as a complete defence. However, in cases where the defence is relied upon by the private individuals, the defence only operates *pro tanto,* that is, to the extent that the defendant's position has changed as a result of the receipt. For the state to benefit from the operation of the full defence this means that the defence does not interfere with the right as little as possible. The defence could operate only to the extent that the position had been changed, or in light of the difficulties of proof that this would entail, the state should only be able to rely on the change of position defence if it can establish that there was no other way of raising the revenue.

Finally, the effect on rights must be proportionate to the objective sought to be achieved. If the state does not have to justify its expenditure there is no means of ascertaining if this is so. This limb of the test should not be considered to be satisfied where the state simply says that restitution would disrupt the public finances.[121] It is suggested that a severe potential disruption of the public finances would be required before such a justification would be considered acceptable.[122]

The courts have displayed a considerable deference in considering whether an interference with property rights is proportionate[123] and it has been suggested that courts have failed to apply the test in a manner consistent with its formulation.[124] In many cases the courts have placed undue emphasis on the first limb of the test and, once satisfied that the measure in question has a legitimate objective and is designed to meet that objective, will not go on to consider the second and third limbs of the test in any meaningful manner.[125] It has been suggested that the courts have moved away from a consideration of whether the effect

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Dellway Investment Limited v National Asset Management Agency [2010] IEHC 364. Both are discussed in greater detail below at 316-318.

[121] *Tate v Minister for Social Welfare* [1995] 1 IR 418 (HC) 432.

[122] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [129].

[123] Casey, Constitutional law in Ireland (n 106) 663; Walsh, 'The Constitution, Property Rights and Proportionality: A Reappraisal' (n 114) 10-23.

[124] Walsh, 'The Constitution, Property Rights and Proportionality: A Reappraisal' (n 114) 6; Hogan 'The Irish Supreme Court: Major Developments, 1995-1996' (1997) 3 European Public Law 180, 189.

[125] *Planning and Development Bill* [2000] 2 IR 321 (SC) 354; *Bupa Ireland Ltd and another v Health Insurance Authority* [2006] IEHC 431 [293]-[297]; Hogan 'The Irish Supreme Court: Major Developments, 1995-1996' (n 124) 189.

of the measure is proportionate to the objectives pursued, in favour of an assessment of the 'proportionality between the means and the objective'.[126] However, in certain cases, the third and second limbs of the test have been applied. In *John Gilligan v The Criminal Assets Bureau,*[127] McGuinness J emphasised the importance of the requirement that the effects of a measure should impair rights of individuals as little as possible.[128] In that case, the judge expressly considered whether the safeguards in the Proceeds of Crime Act, 1996, which provided for the forfeiture of assets judged to be the proceeds of crime, were sufficient to ensure a minimal impairment of the applicant's rights.[129] Equally, legislation clearly designed to meet a legitimate aim has been struck down where the effects of the measure on the individual's property rights were disproportionate to the aim sought to be achieved. In *Daly v Revenue Commissioners,*[130] Costello P held that the impugned measure, although designed to remedy a transitional problem, 'imposed a *permanent* measure which involves a permanently unfair method of collecting tax.'[131] As a result, the effect of the measure could not be said to be proportionate to the aims sought to be achieved.[132]

Social justice conception of the proportionality principle

In addition to the traditional proportionality analysis, discussed above, the courts have recently considered whether or not interference with property rights is constitutionally justified by assessing whether or not the interference is in accordance with the 'principles of social justice'. In *Re Article 26 and the Health (Amendment) (No 2) Bill 2004,* the Supreme Court outlined this approach as follows:

> For the purposes of its consideration of whether the Bill or any provision thereof is repugnant to the Constitution, the court is satisfied that the correct approach is: firstly, to examine the nature of the property rights at issue; secondly, to consider whether the Bill consists of a regulation of those rights in accordance with principles of social justice and whether the Bill is required so as to delimit those rights in accordance with the exigencies of the common good; thirdly, in the light of its conclusions on these

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[126] Doyle, *Constitutional Law: Text, Cases and Materials* (n 111) [6–41].
[127] *In the matter of the Constitution and in the matter of the Proceeds of Crime Act, 1996: John Gilligan v Criminal Assets Bureau* [1998] 3 IR 185 (HC).
[128] *Ibid,* 240 and 242.
[129] *Ibid,* 242-243. See also *Heaney v Ireland* [1994] 3 IR 593 (HC) 608.
[130] *Daly v Revenue Commissioners* [1995] 3 IR 1 (HC).
[131] *Ibid,* 12. Emphasis in original.
[132] *Ibid,* 12.

issues, to consider whether the Bill constitutes an unjust attack on those property rights.[133]

This test, referring as it does to the text of Article 43, is more faithful to the text of the constitution than the judicially developed proportionality test. Cases that consider whether the interference with property rights is in accordance with the principle of social justice help to determine whether or not it is constitutionally permissible for the defence of change of position to offer a complete defence to a restitution claim. In the *Health Amendment Bill* case, the Supreme Court held that it was contrary to the principles of social justice to extinguish the rights of vulnerable elderly people, without compensation, solely in the financial interests of the State.[134] The Court was strongly influenced by the vulnerability of the social group whose rights were to be expropriated[135] and it is clear that the nature of the group whose property rights are to be affected will be an important factor in considering whether interference with a property right is constitutional under this test.[136]

However, it would appear from the decision of the Supreme Court in *Employment Equality Bill* that a measure will be invalid where it 'attempts to transfer the cost of solving one of society's problems on to a particular group,' [137] irrespective of whether or not that group is considered to be a vulnerable faction of society. This constitutes a strong policy basis on which to preclude the State from relying on the change of position defence.[138] This approach is similar to Wilson J's powerful dissenting judgment in *Air Canada*, who held that fiscal chaos considerations should not be accepted where a small group in society would be obliged to meet the cost of an invalid legislative measure for the benefit of the public purse; the cost should be borne by society as a whole.[139]

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[133] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [119]

[134] *Ibid,* [129].

[135] *Ibid,* [123], [129]. See further, Walsh, 'The Constitution, Property Rights and Proportionality: A Reappraisal (n 114) 30.

[136] *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105 [129]:

> The court does not exclude the possibility that, in certain cases, the delimitation of property rights may be undertaken in the interests of general public policy. However, the invocation of these Articles in circumstances where rights such as arise in this case, rights very largely of persons of modest means, are to be extinguished in the sole interests of the State's finances would require extraordinary circumstances.

[137] *Employment Equality Bill* [1997] 2 IR 321 (SC) 367.

[138] The approach of the Supreme Court has been inconsistent on this point. In *Planning and Development Bill* [2000] 2 IR 321 (SC), the Supreme Court took the contrary view. However, the reasoning in *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 (SC), reflects approach adopted by Hamilton CJ in the *Employment Equality Bill* case

[139] *Air Canada v British Columbia* [1989] 1 SCR 1161 (SCC) [14]. See also *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 68.

Property Rights and Change of Position in England

Property rights have always enjoyed robust protection in English law.[140] However, the manner in which the courts will protect the right to property is in the process of evolution. The common law right to property in England is now buttressed by express rights to property in two human rights charters: the European Convention on Human Rights and Fundamental Freedoms, and the Charter of Fundamental Rights of the European Union. Each document will now be examined in turn to determine whether the constitutional proportionality arguments developed in the previous section can be applied in the context of English property rights.

Change of Position and the ECHR

Article 1 of the First Protocol to the ECHR guarantees the individual's peaceful enjoyment of his possessions, subject to the state's interest in controlling the right to property in the public interest.[141] Like the Irish courts, in determining whether a measure restricting an individual's property rights constitutes a violation of Article 1 of the First Protocol, the European Court of Human Rights (ECtHR), has adopted a proportionality test.[142] In determining whether the measure constitutes a proportionate interference with the right to property, the ECtHR will consider whether the measure was lawful, whether it was justified by the public interest, and whether the means adopted were proportionate to the aim pursued by the Contracting State.[143] This test offers less protection than the means-effects test developed in *Heaney*, as it explicitly adopts a means-ends approach[144]—which requires that the means adopted be proportionate to the objective sought to be achieved—rather than a means-effects approach—which requires a consideration of the impact that a particular measure has on individual rights. In *James v UK,* the ECtHR held that it would not consider whether other, less onerous, alternatives were available to be determinative of whether the measure was proportionate, but would consider it as one other factor to be taken into account

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[140] Lord Hope has observed that '[T]here is no concept in our law that is more absolute than a right of property': *Fisher v Brooker* [2009] UKHL 41, [2009] 1 WLR 1764 [8]. See, generally, Allen, *The Right to Property in Commonwealth Constitutions* (CUP, Cambridge 2000).

[141] *James v UK* (App No 8793/79) (1986) 8 EHRR 123 [37]; *Pressos Compania Naviera v Belgium* (App No 17849/91) (1996) 21 EHRR 301 [33]. See also Janis, Kay and Bradley, *European Human Rights Law* (3rd edn OUP, Oxford 2008) 519.

[142] *Bosphorus Hava Yollari Turizm Ve Ticaret AS v Ireland* (App No 45036/98) (2006) 42 EHRR 1 [149].

[143] *James v UK* (1986) 8 EHRR 123 [50]; *National & Provincial Building Society v UK (*App no 117/1996/736/933-935) (1997) 25 EHRR 127 [80], [105].

[144] *National & Provincial Building Society v UK* (1997) 25 EHRR 127 [80]. See also Janis, Kay and Bradley, *European Human Rights Law* (n 141) 540; Anderson, 'Compensation for Interference with Property' [1999] European Human Rights Law Review 543, 547.

when assessing whether legislation struck a fair balance.[145] Furthermore, states enjoy a particularly wide margin of appreciation in regulating the control of property in the public interest. Such regulation by a state will not constitute a violation of Article 1 of the First Protocol unless its assessment of what is in the public interest is 'manifestly without reasonable foundation'.[146] Harris et al have suggested that this margin of appreciation is so wide that 'an applicant may be driven to seeking protection of his property elsewhere in the Convention.'[147]

In England, the right to possessions is now supplemented by the provisions of the ECHR. Under the provisions of the Human Rights Act 1998, courts must interpret primary and secondary legislation in manner that is compatible with Convention rights where possible to do so.[148] In determining issues that affect Convention rights, courts must also have regard to the jurisprudence of the ECtHR.[149] The Human Rights Act does not refer explicitly to common law doctrines, but compliance with the requirement to interpret legislation in a manner that is compatible with Convention rights[150] will necessarily extend to interpretation of the common law, so that common law doctrines are assessed for compatibility with the Convention.[151]

The English courts have held that the common law right to restitution of unlawfully exacted taxes is reinforced by Article 1 of the First Protocol.[152] If restitution of unlawfully exacted taxes engages Article 1 of the First Protocol, courts should consider the proportionality of measures, including common law defences, that permit the *ex post* expropriation of taxes. If regard is not had to proportionality in this context, any protection afforded by Article 1 of the First Protocol to a party who has paid taxes that are not lawfully due would be rendered nugatory upon application of the change of position defence.

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[145] *James v UK* (1986) 8 EHRR 123 [51]. See also Ulph and Allen, 'Transactions at an Undervalue, Purchasers and the Impact of the Human Rights Act 1998' (2004) Journal of Business Law 1, 30.
[146] *James v UK* (1986) 8 EHRR 123 [46]; *Pressos Compania Naviera v Belgium* (1996) 21 EHRR 301 [37]; *National & Provincial Building Society v UK* (1997) 25 EHRR 127 [80]. See also Janis, Kay and Bradley, *European Human Rights Law* (n 141) 541.
[147] Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (2nd edn OUP, Oxford 2009) 687.
[148] Section 3(1) of the Human Rights Act 1998.
[149] Section 2(1).
[150] Section 2(1).
[151] See *Andreas Soteriou v Ultrachem Limited* [2004] EWHC 983 (QB) (doctrine of illegality).
[152] *R (Child Poverty Action Group) v Secretary of State for Work and Pensions* [2009] EWCA Civ 1058 [34]. See also, D Hoffman, 'The Law of Restitution and the Human Rights Act 1998' [2004] RLR 64.

In giving effect to Convention jurisprudence, the English courts have recognised that property rights jurisprudence involves interaction between three Convention principles. These are the need for a fair balance to be struck between public interests and private rights, the principle of proportionality, and the doctrine of the margin of appreciation.[153] The proportionality principle is the means by which a court seeks to determine whether a fair balance has been struck between individual rights and the general interests of the community. In applying the proportionality test, the courts will consider whether:

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) the measures designed to meet the legislative objective are rationally connected to it; and

(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.[154]

Consistently with Convention jurisprudence, the English courts have held that the proportionality test is a means-ends test.[155] While the means adopted by the legislature must be proportionate to the aim of the measure, this does not mean that the legislature is obliged to adopt the least restrictive means available.[156] However, the proportionality doctrine requires, not only that a justification is offered, but that the measure adopted bears some degree of proportionality to the aim, even if it is not the least restrictive option. The measure must be reasonably necessary, even if it is not absolutely necessary.[157] This approach should apply irrespective of whether the measure takes the form of a legislative provision or a common law doctrine. If the courts adopt a permissive approach to change of position, accepting that the state has changed its position in the absence of any evidence to this effect, the state is not obliged to put forward any justification to satisfy the proportionality doctrine.

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[153] *R (SRM Global Master Fund LP) v Treasury Commissioner* [2009] EWCA Civ 788, [2009] UKHRR 1219 [43].

[154] *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (PC) 80; *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, 547.

[155] *R (SRM Global Master Fund LP) v Treasury Commissioner* [2009] EWCA Civ 788, [2009] UKHRR 1219 [46]. Some cases have adopted a means-effects analysis: *Beaulane Properties Ltd v Palmer* [2005] EWHC 817 (Ch), [2006] Ch 79 [119].

[156] *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816 [70]; *R (Fisher) v English Nature* [2003] EWHC 1599 (Admin), [2004] 1 WLR 503 [46]; *R(Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs and another* [2004] EWCA Civ 1580, [2005] 1 WLR 1267; *Beaulane Properties* [2005] EWHC 817 (Ch), [2006] Ch 79; *Pascoe v First Secretary of State* [2006] EWHC 2356 (Admin), [2007] 1 WLR 885. See also *Bäck v Finland* (2004) 40 EHRR 1184 [52]-[55]. However, this principle may be contingent upon the context in which the measure was adopted: *Smith v Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin), [2008] 1 WLR 394 [42].

[157] *R (Clays Lane Housing Co-Operative Ltd) v The Housing Corporation* [2004] EWCA Civ 1658, [2005] 1 WLR 2229 [25].

Therefore, the approach adopted by the English courts to change of position fails the proportionality test adopted in Convention jurisprudence for the same reason that it would fail the first limb of the Irish proportionality test: if no justification for the retention is tendered by the state, how can the courts assess the legitimacy of the aim, or consider whether the restriction on rights is proportionate to this aim?

Although the common law traditionally afforded robust protection to the right to property, the protection afforded by Article 1 of the First Protocol is weak and qualified.[158] In particular, the right to property is heavily qualified by the wide margin of appreciation afforded to states when adopting measures aimed at facilitating the payment of taxes[159] and remedying social injustice.[160] This weak protection is directed by the wording of Article 1 of the First Protocol itself. Neuberger LJ in *R (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs*, observed that Article 1 of the First Protocol, unlike other Convention provisions, does not require measures adopted by contracting states to be objectively necessary in a democratic society. Instead, it is sufficient that the contracting state deemed the measure to be necessary.[161] It is further compounded by the lacklustre jurisprudence of the ECtHR on property rights. In this regard, the ECtHR is especially reluctant to intervene in matters pertaining to taxation and has taken a particularly deferential approach in determining whether measures restricting restitution of unlawful taxes are contrary to Article 1 of the First Protocol.[162] In *National & Provincial Building Society v UK*, the applicant building society challenged legislation passed in the wake of the *Woolwich* decision that retrospectively validated payments of taxes levied *ultra vires*. The applicants claimed that this retrospective removal of their cause of action constituted an interference with their property rights. The ECtHR reaffirmed that contracting states enjoyed a wide margin of appreciation in the context of taxation. The Court would not interfere with a national legislature's assessment unless it was 'devoid of reasonable foundation'.[163] Although the measure had the effect of extinguishing the applicants' claims for restitution, it did not appear that 'the ultimate aim of the measure was without reasonable foundation having

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[158] See Beatson J's comments in *R (Burnley Borough Council) v The First Secretary of State* [2006] EWHC 798 (Admin) [48].
[159] *National & Provincial Building Society v UK* (1997) 25 EHRR 127.
[160] *James v UK* (1986) 8 EHRR 123 [46]; *Earl Cadogan v Sportelli* [2008] UKHL 71, [2010] 1 AC 226 [48].
[161] *R (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1580, [2005] 1 WLR 1267 [50]-[51].
[162] The power of the state to enforce the payment of taxes has been described as 'practically unlimited': Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (n 147) 692.
[163] *National & Provincial Building Society v UK* (1997) 25 EHRR 127 [80].

regard to the public-interest considerations which underpinned the proposal to legislate with retroactive effect and Parliament's endorsement of that proposal.'[164]

The decision in *National and Provincial* concerned a measure similar to that considered by the Irish Supreme Court in the *Health Amendment Bill* case. Having regard to the different outcomes in these cases, it might be observed that the proportionality requirements in Irish constitutional jurisprudence offer more robust protection for property rights than is available in Convention jurisprudence. However, the Supreme Court noted that the impugned measures in the *National and Provincial* case were designed to prevent a windfall to the building societies who had recouped their loss from their customers.[165] This suggests that the Supreme Court was heavily influenced by the vulnerable nature of the elderly people who had been unlawfully charged for nursing home care in the *Health Amendment Bill* case, and might take a less robust approach to property rights where a measure seeks to prevent a windfall to what the Court perceives to be an 'undeserving' plaintiff.

The approach of the English courts to proportionality in taxation cases is almost as qualified as that of the ECtHR. In *Wilson v First County Trust Ltd (No 2),*[166] Lord Nicholls held that the courts would only interfere with the legislature's choice of means where the legislature had attached insufficient importance to a person's convention right, but that the 'more the legislation concerns matters of broad social policy, the less ready will be a court to intervene.'[167] The English courts have confirmed that the state enjoys a very wide margin of appreciation in respect of the imposition of taxes[168] and that this margin of appreciation extends to the recovery of, as well as the levying of, taxes.[169] In effect, the English courts have treated the margin of appreciation as taking measures relating to taxation beyond the scope of Article 1 of the First Protocol. However, it is not clear why the English courts believe this to be the case or why the state is entitled to rely on the margin of appreciation before the domestic courts. The role of the margin of appreciation is to take account of divergence in practice between different Contracting States to the Convention and so should have no role to play in a domestic context. In *R v DPP ex p Kibelene,* Lord Hope confirmed

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[164] *Ibid,* [81].
[165] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [107]-[108].
[166] *Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816.
[167] *Ibid,* [70].
[168] *Thorpe v Revenue and Customs Commissioners* [2009] EWHC 611 (Ch) [45].
[169] *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306, [2009] Ch 69 [33]. See also Hoffman, 'The Law of Restitution and the Human Rights Act 1998' (n 152) 70.

that the margin of appreciation 'is not available to the national courts when they are considering Convention issues arising within their own countries.'[170] Moreover, even if the text of Article 1 of the First Protocol mandates a deferential approach to measures required to secure the payment of taxes, it is not clear why this approach should extend to the retention of unlawfully exacted taxes.[171] Therefore, it would be inappropriate for the domestic courts to afford a wide margin of appreciation to the legislature where recovery of unlawfully exacted taxes is sought, still less to use the margin of appreciation as a means of wholly removing taxation from the scope of Article 1 of the First Protocol, as the ECtHR has done in the context of taxation. It is open to the courts to take a more rigorous view of the proportionality test where its domestic jurisprudence so demands.[172] There would appear to be ample scope for the English courts to take a more rigorous approach in the context of taxation.

Principles of European Law

In *FII Group Litigation*, Henderson J held that change of position was not available where the claim in restitution was required to give effect to the *San Giorgio* principle in European law.[173] Where the exaction of the money is contrary to EU law, member states are required to disapply provisions of national law that infringe directly enforceable Community rights.[174] Therefore, claimants who can establish that a payment of tax was contrary to EU law will not have their claims defeated by the change of position defence. Although the principle of effectiveness will require the disapplication of the defence in some circumstances,[175] it is conceivable that the change of position defence should also be

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[170] *R v DPP ex p Kibelene* [2000] 2 AC 326 (HL) 380.

[171] See however, *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306, [2009] Ch 69 [33], where Arden LJ held:

> Legislation in relation to claims to recover payments made in error as to whether they are due as tax is subject to the same principles as the taxing legislation itself. Therefore, a wide margin of discretion must be allowed to national authorities in the determination of policy in relation to claims to recover tax.

[172] *R (Clays Lane Housing Co-Operative Ltd) v The Housing Corporation* [2004] EWCA Civ 1658, [2005] 1 WLR 2229 [18].

[173] *FII Group Litigation* [2008] EWHC 2893, [2009] STC 254 (Ch) [307]. Henderson J held that change of position will not be available in response to any claim required to give effect to the *San Giorgio* principle in European law, irrespective of whether this claim is framed as one based on the *Woolwich* principle or on some other ground of restitution, such as mistake. However, on appeal, the Court of Appeal held that all *San Giorgio* claims for restitution fell within the *Woolwich* principle and so it is not clear if Henderson J's statements on the principle of effectiveness add anything further to the law: *FII Group Litigation* [2010] EWCA Civ 103 [173]-[174].

[174] *R v Secretary of State for Transport, Ex p Factortame Ltd* [1990] 2 AC 85 (HL); *Autologic Holdings plc v Inland Revenue Commissioners* [2005] UKHL 54, [2006] 1 AC 118 [16]-[17]; *Fleming (t/a Bodycraft) v Customs and Excise Commissioners* [2008] UKHL 2; [2008] 1 WLR 19 [24].

[175] *FII Group Litigation* [2010] EWCA Civ 103 [190].

disapplied in order to vindicate the right to property in EU law.[176] However, there are three possible problems with this suggestion. First, the right to property at EU law 'is not an absolute right and must be viewed in relation to its social function.'[177] Second, the formulation of the proportionality principle in European law offers less protection to individuals than that adopted in *Heaney*. For example, reflecting the jurisprudence of the CJEU, Article 52.1 of the Charter of Fundamental Rights provides that:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

This test contains no requirement that the effect on the individual be proportionate to the objective sought to be achieved. Therefore, it permits the court to conclude that a measure is proportionate once it is justified by a necessary and genuine objective.[178] It would therefore appear that a *proportionality* requirement forms no part of the proportionality test set out in Article 52.1. Third, the CJEU has held that Member States have a wide margin of appreciation in considering whether a measure is justified.[179] This may lead to a great degree of deference where issues of domestic taxation are involved. However, recent decisions of the CJEU demonstrate that Article 17 still has teeth when protecting the property rights of individuals. In *Kadi,* the Court held that a measure will be disproportionate where it impairs 'the very substance of the right so guaranteed'.[180] The Court held that a regulation freezing the funds of persons suspected to be associated with Al-Qaeda infringed the applicants' right to property, as it restricted their control of property without affording them due process rights.[181] Furthermore, the proportionality doctrine is a generally applicable principle of European law. If Article 17 cannot be relied upon to vindicate property rights in the context

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[176] Article 17 of the Charter of Fundamental Rights of the European Union provides:

> 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
> 2. Intellectual property shall be protected.

[177] Joined cases C-379/08 and C-380/08 *Raffinerie Mediterranee (ERG) SpA, Polimeri Europa SpA and Syndial SpA v Ministero dello Sviluppo economico* [2010] ECR I-2007 [80].

[178] See, for example, Case C-479/04 *Laserdisken* [2006] ECR I-8089 [56]-[59].

[179] Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351 [360].

[180] *Ibid,* [355]. See also Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451 [126].

[181] Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008] ECR I-6351 [369]-[371].

of change of position, the proportionality principle may be relied upon where other community rights are engaged.

Can the change of position defence be adapted to take account of property rights?

As discussed above, applying the standards of proof applicable to change of position in claims between private parties to restitution claims against the state will be problematic. Where a generous standard of proof is adopted, as in *FII Group Litigation* and *Bloomsbury International,* claims for restitution will automatically be defeated by the change of position defence if claimants cannot bring their claims within the *Woolwich* principle.[182] Furthermore, the defence will always be a complete defence insofar as it is relied upon by the state. If the state is deemed to have changed its position by relying on the receipt when planning its programme of expenditure, the defence cannot operate *pro tanto* as the state will have relied on these receipts in their entirety. On the other hand, a more stringent standard of proof, is also problematic, as the state will rarely be able to establish that its programme of expenditure was premised on the receipt of particular revenues.[183] Therefore, the application of the change of position defence to public authorities is likely to be unsatisfactory, no matter which of the above two approaches is taken. This analysis suggests that the change of position defence should be tailored to reflect the unique position of the state. This modified defence should apply to all claims where restitution is sought from the state, irrespective of the cause of action on which they are based. The modified approach is mandated by the public nature of the defendant, rather than the nature of the cause of action relied on by the claimant.

A proportionality element should be incorporated within the defence where it is relied upon by the state. Before the state can rely on change of position, the court should satisfy itself that the adverse fiscal consequences pointed to by the state are sufficiently serious to justify retention of unlawfully expropriated taxes. Although there has been no explicit consideration of a proportionality requirement in the context of the change of position defence, it is clear that Irish judges can, and do, consider whether or not the risk of fiscal disruption is sufficient to justify reliance on judicial or statutory forms of the change of

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[182] See Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' [1993] 6 British Tax Review 442, 458-460.

[183] See, however, *AJ Seversen Inc v Qualicum Beach* [1980] 3 WWR 375 (BCSC), where such a defence was successful. Bouck J distinguished the *Storthoaks* decision on the basis that the money exacted by the defendant council was not intended for general expenditure but instead 'but was paid into a special fund for the purpose of installing a suitable water supply to the plaintiff's lots and others in the area': [1980] 3 WWR 375, [32]-[35]. This issue was not addressed on appeal: *AJ Seversen Inc v Qualicum Beach* (1982) 135 DLR (3d) 122 (BCCA).

position defence, and have been willing to consider what constitutes a real and present threat of fiscal disruption. In *Murphy v Attorney General,* the court was mindful of the fact that the State's fiscal stability could be undermined by restitution claims made by 'tens of thousands of married'[184] couples who had been taxed at extremely high rates of tax[185] over a considerable period. Conversely, in the *Health Amendment Bill* case, the Supreme Court held that the State could not rely on fiscal chaos considerations to justify legislative measures purporting to retrospectively validate unlawfully levied health charges:

> The court accepts that, upon discovery of an unforeseen liability to reimburse patients in the relevant categories, the State may find itself faced with a significant additional financial burden. However, while it is the opinion of the court that the financial burden on the State of making the relevant repayments is a substantial one, it is by no means clear that it can be described as anything like catastrophic or indeed that it is beyond the means of the State to make provision for this liability within the scope of normal budgetary management.[186]

In both cases, the Supreme Court's consideration of the State's submissions on fiscal chaos concerns involved a tacit application of proportionality principles. In each case, the State claimed that restriction of the claimants' rights to recovery was necessary to meet a stated objective: to prevent disruption of the public finances. In each case, the court considered whether or not there was a pressing risk of fiscal disruption and to what extent such a restriction would adversely affect the rights of potential claimants. A proportionality-oriented approach has also been adopted by the Privy Council in *Waikato Regional Airport Limited v The Attorney General.*[187] The Privy Council refused to recognise a defence based on fiscal disruption as 'the amount at stake, although significant for the appellants, cannot possibly be regarded as such as to threaten the disruption of public finances in New Zealand.'[188]

However, it should be noted that recent decisions of the Irish courts point to a more deferential judicial approach in relation to proportionality analysis. This approach is motivated by the precarious position in which the Irish economy finds itself, and suggests

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[184] *Murphy* [1982] IR 241 (SC) 317.
[185] See Scannell, 'The Taxation of Married Women. *Murphy v Attorney General*' in O'Dell (ed) *Leading Cases of the Twentieth Century* (Round Hall Sweet & Maxwell, Dublin 2000).
[186] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [128].
[187] *Waikato Regional Airport Limited v Attorney General* [2003] UKPC 50, [2004] 3 NZLR 1 [82].
[188] *Ibid,* [82].

that fiscal chaos considerations may be incorporated within a proportionality analysis. In *J & J Haire & Company Ltd v Minister for Health and Children* McMahon J held that:

> Article 40.3.2 is not absolute in its terms and obliges the State only to protect the citizen's property rights "as best it may". ...
>
> This phrase, and indeed the word "unjust" in "unjust attack", must be read in the light of the unusual economic crisis that necessitated the introduction of the 2009 Act. ... These economic realities must inform the interpretation of the constitutional phrases in assessing what the State can do and what distributive measures it must take to ensure not only the stability of the economy, but the stability of the State itself. It is also relevant to mention in this context that whatever the State's duty is in relation to property rights under the Constitution, these have always to be balanced against "other constitutional duties" that the State may have to uphold.[189]

Similarly, in *Dellway Investment Limited v National Asset Management Agency*, the High Court was motivated to adopt a very weak formulation of the proportionality test by the risk of disruption to the state's finances posed by an unstable banking system.[190] It held that:

> It is only where the policy position adopted by the Oireachtas is one which could not reasonably be said to be required to achieve the end in question, that the legislation will be found to be inconsistent with the Constitution. [191]

The decisions in *Dellway* and *JJ Haire* indicate that significant deference will be adopted by the courts in relation to controversial economic matters. [192] Thus, the Irish courts may now take a more generous approach to arguments based on fiscal considerations than they did in *O'Rourke* and in the *Health Amendment Bill Case.*

Conclusions on causation and change of position

The change of position defence was developed to do justice between private parties. The manner in which the defence has been applied to the state is unsatisfactory; the courts have presumed that the enrichment received by the state was spent and spent in full. The incorporation of a proportionality requirement would remedy the current injustice caused by

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[189] *J & J Haire & Company Ltd v Minister for Health and Children* [2009] IEHC 562.
[190] *Dellway Investment Limited v National Asset Management Agency* [2010] IEHC 364 [10.14]
[191] *Ibid,* [10.16].
[192] *Ibid,* [10.18].

the defence, as the state will be required to demonstrate that its retention of the money is proportionate to identifiable social objectives and impacts upon rights as little as possible. Therefore, it will only be in cases where there is a risk of serious disruption to the public finances that the defence will succeed. This is consistent with the strong public law principle that the state should not retain money to which it is not entitled.

Incorporating a proportionality requirement into the change of position defence is consistent with the existing elements of the defence—specifically, with the requirement that the defence operate *pro tanto*. However, it is not clear that a proportionality requirement would be consistent with the underlying rationale for the change of position defence. There are two theoretical conceptions of the change of position defence. The enrichment-focused conception views the defence as one that denies 'an essential element of the principle against unjust enrichment'.[193] A defendant who has dissipated the enrichment can no longer be said to be enriched. This approach has been adopted by the High Court of Australia.[194] The justice focused conception considers that the defence is concerned to prevent injustice rather than to deny an element of the unjust enrichment principle.[195] This approach considers that 'where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the claimant restitution.'[196]

The proportionality doctrine can be more easily accommodated within the justice-focused conception of the defence. If an enrichment based conception is adopted, the mere fact that the state has expended the money will be sufficient to establish the defence. If, however, the defence is concerned with preventing injustice, the question of whether the impact on the claimant's rights is proportionate to the social objective sought to be achieved by the state in retaining the money becomes a relevant consideration for the defence. Although the enrichment conception of the defence is more consistent with the structure of the law of restitution, the English courts have favoured the justice based conception of the

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[193] See O'Dell, 'Restitution' [1997] *Byrne and Binchy's Annual Review of Irish Law*, 659.

[194] *David Securities* (1992) 175 CLR 353 (HCA) 385-386. See also *Lipkin Gorman* [1991] 2 AC 548 (HL) 563, where Lord Templeman held that the defence should succeed where the defendant's change of position meant that he was no longer enriched.

[195] See Lee, 'Changing Position on Change of Position' (n 6) 137-138.

[196] *Lipkin Gorman* [1991] 2 AC 548 (HL) 579 (Lord Goff). Similarly in *Dextra Bank* [2002] 1 All ER (Comm) 193 (PC) [38], the Privy Council held that the defence 'should be regarded as founded on a principle of justice designed to protect the defendant from a claim to restitution in respect of a benefit received by him in circumstances in which it would be inequitable to pursue that claim'.

defence.[197] In *Murphy,* Henchy J considered the defence to be motivated by two rationales—protecting the security of receipts and preventing injustice.[198] Therefore, incorporating the proportionality principle would be consistent with the current judicial approach to change of position in Ireland and in England. However, even where an enrichment focused conception is generally adopted in a jurisdiction, the unique position of the state and the difficulties of proof that surround the application of the change of position defence to state bodies mandate a departure from the enrichment-focused conception of the defence. Therefore, in order to ensure that the right to restitution confirmed in the *Woolwich* principle is not rendered nugatory by an overly generous application of the change of position defence,[199] it may have to be conceded that the enrichment conception of the defence is inappropriate insofar as it applies to the state and that the justice-based conception of the defence is most appropriate where restitution is sought from the executive.

B. Counter-restitution impossible

It is a condition of restitution claims that the plaintiff must return any benefits received by him from the defendant.[200] For example, where *restitutio in integrum* of the parties is not possible,[201] rescisssion of a contract will not be granted. Where benefits have passed on both sides, restitution must be mutual,[202] otherwise there is a risk that the plaintiff would be unjustly enriched.[203] The decision of the Irish Court of Appeal in *Re Irish Provident Assurance* provides a particularly relevant example of this phenomenon in the context of ultra vires payments. In that case, the Court refused a claim for restitution of life assurance payments that had been made ultra vires the company in question, holding that counter-restitution of premiums made to the company's predecessor was a prerequisite for restitution and, since such counter-restitution was not possible, the claim should be denied.[204] The issue of counter-restitution is also relevant in the context of restitution for unjust enrichment for

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[197] See *Lipkin Gorman* [1991] 2 AC 548 (HL) 579 (HL); *Dextra Bank v Bank of Jamaica* [2002] 1 All ER (Comm) 193 (PC) [38]; *Charles Terence Estates Ltd v Cornwall Council* [2011] EWHC 2542 (QB) [99].

[198] *Murphy* [1982] IR 241 (SC) 318-319.

[199] *Royal Insurance (*1994) 182 CLR 51 (HCA) 69.

[200] See, for example, *Standard Bank London Ltd v Canara Bank* (Commercial Court, 22 May 2002) [82]-[85].

[201] See *Keaney v Sullivan* [2008] IEHC 372; *Jackson Soanes v Leisure Corp International Limited* (High Court, 8 December 1992).

[202] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 (QBD) 923.

[203] *Spence v Crawford* [1939] 3 All ER 271 (HL) 288-289 (Lord Wright). See also, Virgo, *Principles of the Law of Restitution* (2nd ed OUP, Oxford 2006) 672; Bant, *The Change of Position Defence* (n 35) 93-94.

[204] *Re Irish Provident Assurance* [1913] 1 IR 352 (Pallas CB) and 376-377 (Cherry LJ). See, further, O'Dell 'Incapacity' in Birks and Rose (eds) *Lessons of the Swaps Litigation* (Mansfield Press, London 2000) 146-149.

several reasons. First, there is a close relationship between a requirement of counter restitution and the unjust factor of total failure of consideration.[205] Second, in claims for restitution outside the context of rescission, the courts have sometimes considered benefits paid by the defendant when determining the extent of the enrichment obtained by the defendant and have set off these competing payments to confine the plaintiff's claim to the net sum paid.[206] Third, the counter restitution requirement can be seen as an early example of the change of position defence[207] and so it is considered in tandem with the broader change of position defence.

Rescission at common law took a strict approach to the counter-restitution requirement, requiring precise counter-restitution.[208] However, equity has traditionally taken a more flexible approach to rescission than that of the common law, and has been motivated by the need to achieve practical justice between the parties.[209] As a result, equity will permit the parties to make substantial restitution even where specific restitution is not possible.[210] It has been suggested that this flexible approach should be available at common law as well as in equity[211] and recent case law suggests that a more flexible approach will be followed by the courts.[212] In England, the decision of the Court of Appeal in *Halpern v Halpern* suggests a willingness to consider a more flexible approach in relation to common law claims.[213] In

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[205] See, generally, McKendrick, 'Total Failure of Consideration and Counter-Restitution: Two Issues or One?' in Birks (ed) *Laundering and Tracing* (OUP, Oxford 1995) 232.

[206] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 (QBD) 905; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 681-682. See Bant, '*Restitutio in Integrum* and the Change of Position Defence: Lessons from Rescission' (n 11) 22.

[207] See, however, Bant, *The Change of Position Defence* (n 35) 94-96.

[208] See *Hogan v Healy* [1876] 11 IR CL 119, 121-122; *Fullers' Theatres Ltd v Musgrove* (1923) 31 CLR 524 (HCA) 541; Edelman and Bant, *Unjust Enrichment in Australia* (OUP, Melbourne 2006) 348. The requirement of restitution *in specie* was applied in *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1994] 1 WLR 1271 (CA) 1280. However, on appeal the House of Lords suggested that this requirement, if it indeed existed, would be revisited in an appropriate case: *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) 262.

[209] *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 (HL) 1278; *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 (CA) 458 and 466; *Halpern v Halpern* [2007] EWCA Civ 291, [2008] QB 195 [61]; *Northern Bank Finance Corp Ltd v Charlton* [1979] IR 149 (SC) 205; *Alati v Kruger* (1955) 94 CLR 216 (HC) 223-224; *Vadasz v Pioneer Concrete* (SA) Pty Ltd (1995) 184 CLR 102 (HCA)111; *O'Brien v Australia & New Zealand Bank Ltd* (1971) 5 SASR 347, 359; Bant, '*Restitutio in Integrum* and the Change of Position Defence: Lessons from Rescission' (n 11) 24-26.

[210] *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 (HL) 1278-1279. *Spence v Crawford* [1939] 3 All ER 271 (HL) 288-289.

[211] Virgo, *Principles of the Law of Restitution* (n 205) 673; Edelman and Bant, *Unjust Enrichment in Australia* (n 214) 350; McKendrick, 'Total Failure of Consideration and Counter-Restitution: Two Issues or One?' (n 205) 233-236.

[212] See also, Häcker, 'Rescission and Third Party Rights' [2006] RLR 21, 34.

[213] *Halpern v Halpern* [2007] EWCA Civ 291, [2008] QB 195 [69]-[77]. See also *Smith New Court Securities Ltd v Citibank NA* [1997] AC 254 (HL) 262. In *Spence v Crawford* [1939] 3 All ER 271 (HL) 279-280, Lord Thankerton did not expressly confine the flexible approach adopted in equity to equitable claims. This approach was not shared by Lord Wright at 290.

Ireland, Griffin J's comments in *Northern Bank Finance Corp Ltd v Charlton*[214] suggest that the Irish courts no longer distinguish between rescission at common law and rescission in equity and are willing to extend the flexible principles applied to rescission in equity to common law claims:

> At law, if precise restitution was impossible, the defrauded party had to fall back on his action for damages for deceit. The distinction between the remedies at law and equity to which Lord Blackburn referred is no longer of importance as the High Court has full original jurisdiction and power to determine all matters and questions. As stated by the High Court of Australia ... in *Alati v Kruger* ... even though precise *restitutio in integrum* is not possible it is now sufficient 'if the situation is such that, by the exercise of its powers, including the power to take accounts of profits and to direct inquiries as to allowances proper to be made for deterioration, it can do what is practically just between the parties, and by so doing restore them substantially to the status quo.[215]

This flexible approach is to be welcomed. There appears to be no reason to maintain a stringent requirement of *restitutio in integrum* where it is possible for the courts to take account of the benefits received by the party seeking rescission of the contract. In the same vein, a willingness of the courts to take account of benefits obtained by a plaintiff when valuing the defendant's enrichment means that there is little justification for a strict requirement of *restitutio in integrum* where substantial restitution of the benefits received is possible.[216] If the courts are willing to value services rendered by a plaintiff in a *quantum meruit* claim, there seems little basis for arguing that valuation of similar benefits is not possible for the purposes of determining a requirement of counter restitution. Therefore, the most desirable way for the law to develop is not to impose a defence of 'counter-restitution impossible' but to impose counter-restitution as a prerequisite for relief. Finally, a flexible approach will not displace the requirement of substantial restitution.[217]

The requirement of counter-restitution is of little relevance in claims against public authorities for four reasons. First, the role of counter-restitution impossible as a defence has been limited by the way in which the courts have woven the concept of counter-restitution

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[214] *Northern Bank Finance Corp Ltd v Charlton* [1979] IR 149 (SC).
[215] *Ibid,* 206. See also *Alati v Kruger* (1955) 94 CLR 216 (HCA) 222.
[216] McKendrick, 'Total Failure of Consideration and Counter-Restitution: Two Issues or One?' (n 205) 233.
[217] *Northern Bank Finance* [1979] IR 149 (SC) 208.

into other elements of restitutionary causes of action, particularly in quantifying the enrichment received by the plaintiff and in the context of total failure of consideration. Second, many, if not most, claims for restitution from the state will involve the payment of money in the form of taxes, where the taxpayer does not receive a corresponding benefit. Payments in the nature of tax payments to the state in return for a thing or a service are comparatively rare.[218] Third, much of the work that could be done by counter-restitution impossible is now done by change of position. Indeed, Bant has suggested that counter-restitution impossible 'can be viewed as simply a blunt and somewhat unwieldy early version of the change of position defence, designed to protect defendants to (sic) claims for rescission for unjust enrichment.'[219] Fourth, restitution from public authorities *qua* public authorities is unlikely to give rise to mutuality of payments. In the rare cases where a transaction with the state involves payment of money on both sides, such as the swaps transactions, a netting approach at the stage of establishing the enrichment obviates the need to make counter-restitution. However, this has not stopped judges from pointing to advantages received by taxpayers from the state as a means of buttressing their reasons for denying relief.[220]

C. Exhaustion of Benefits

A new defence, described as an 'exhaustion of benefits defence', was canvassed by the Revenue Commissioners in *Littlewoods*. Vos J explained the defence as follows:

> The exhaustion of benefits defence asserts that the government's annual budget procedures mean that tax receipts are used up in each fiscal year, and no benefit is derived by the government from those receipts thereafter. For that reason, the claimants' measure of recovery should be limited to the benefit of the use of the principal sums for a single fiscal year. [221]

This defence appears to be limited to the use value of money. However, hints of an 'exhaustion of benefits' approach can also be found in Henchy J's expansive approach to

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[218] However, see *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105; *R (Rowe) v Vale of White Horse DC* [2003] EWHC 388 (Admin); *Pacific National Investments Ltd v Victoria (City)* [2004] SCC 75, 245 DLR (4th) 211.

[219] Bant, '*Restitutio in Integrum* and the Change of Position Defence: Lessons from Rescission' (n11) 25. See also McKendrick, 'Total Failure of Consideration and Counter-Restitution: Two Issues or One?' (n 205) 238.

[220] *Murphy* [1982] IR 241 (SC) 320; *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC) [61], holding that the tax did not constitute an unlawful expropriation.

[221] *Littlewoods* [2010] EWHC 1071 (Ch) [97].

change of position. In holding that the state had changed its position in reliance upon the receipts of the taxpayers money, Henchy J observed:

> At the end of each tax year up to and including the tax year 1977-78, those charged by the State with auditing, controlling or planning the finances of the State were, in the absence of any formulated proceedings or any other sound reason for doubting the validity of the taxes in question, entitled to close their books for that year in the justified assurance that, if any of the taxes that had been collected, allocated, spent or been made the basis of projections for future taxation or fiscal policy, were to become at some future date judicially faulted for having been unconstitutionally exacted, restitution of those taxes would not be ordered.[222]

Like the exhaustion of benefits defence canvassed in *Littlewoods,* this analysis proceeds on the assumption that the state only derives a benefit within the tax year in which it received the enrichment and, as such, will only be required to make restitution in respect of that year.

There is some dispute as to how this defence should be characterised. In *Murphy,* Henchy J clearly considered exhaustion of benefits considerations to be relevant to the change of position defence. In *Littlewoods,* Vos J concluded, that: 'insofar as an exhaustion of benefits defence is a species of change of position, it is, as a matter of English law, available to a mistake-based restitutionary claim, but not to a Woolwich based claim.'[223] However, he doubted whether the defence 'is really a defence as such at all. It seems to me to be more an argument as to how the benefit that has accrued to the Commissioners should be calculated for the purposes of assessing the enrichment that is to be the subject of an order for restitution.'[224] Indeed, the manner in which Vos J and Henchy J conceptualise the defence suggest that, although both judges ultimately apply their reasoning in the context of change of position, they are really thinking in terms of the actual benefit received by the state. However, the exhaustion of benefits defence should be characterised as a species of change of position for two reasons. First, the change of position defence is not simply concerned with 'disenrichment'. It is also concerned with identifying the enrichment surviving in the defendant's hands and recognises that this need not be the same as the value received by the defendant. Therefore, there is to some degree a strong link between enrichment and change of position. Second, to characterise exhaustion of benefits as being exclusively a matter for

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[222] *Murphy* [1982] IR 241 (SC) 320.
[223] *Littlewoods* [2010] EWHC 1071 (Ch) [111].
[224] *Ibid,* [110].

enrichment will have significant repercussions on the value that we ascribe to the use value of money. In particular, it is questionable whether dissipation of money negates the possibility of deriving further use for the money, even where the spending is done by the state. Presumably, if the state had not received the plaintiff's money it would have had to borrow the money and to pay interest on that sum for the duration of the loan period. Therefore, the use value it derives from the money would not necessarily be limited to a single tax year.

In light of the problems of proof that arise where change of position is relied upon by the state, discussed above, the exhaustion of benefits defence may supplant change of position and come to be regarded as a unique species of change of position that applies to the state, to the exclusion of other forms of change of position. However, given that exhaustion of benefits is essentially a generous, policy-motivated form of change of position, similar to that adopted in *Murphy* and *FII,* it is open to the criticism that it does not adequately protect the plaintiff's property rights. Furthermore, as discussed above, the state has been prevented from relying on the change of position defence as defence to a claim pursuant to the *Woolwich* principle. Exhaustion of benefits should be subject to the same restrictions, as the state should not be entitled to develop a new, policy motivated, defence to achieve what it was not permitted to achieve through the change of position defence.

II. Passing On

The essence of the passing on defence is that, although the defendant has been unjustly enriched, this enrichment has not been at the expense of the plaintiff. The defence has been most often considered in the context of taxes passed on by the taxpayer to an ultimate consumer. Where the tax has been passed on by the taxable person to its consumers, in the form of increased prices, it is argued that the defendant's enrichment has really been at the expense of the ultimate consumer.[225] In addition to common law formulations of the passing on defence, some jurisdictions have enacted statutory forms of the defence. Section A considers the defence at common law. It discusses its reception in Canada, Australia, England

[225] See Virgo, *Principles of the Law of Restitution* (n 203) 716-717 for a consideration of this argument. See also *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 68. Such cases of passing on can be contrasted with situations where the plaintiff has simply acted as a 'collecting agent' for the State. It has been suggested that such cases are not true cases of passing on and have not been treated as such in Canada: see *Canadian Pacific Air Lines Ltd v British Columbia* [1989] 1 SCR 1133 [44]; *Hamilton Kilty Hockey Club Inc v Ontario (AG)* (2003) 64 OR (3d) 328 (Ont CA) [22]. See also Rose, 'Passing On' in Birks (ed) *Laundering and Tracing* (Clarendon Press, Oxford 1995) Chapter 10, 266; Virgo, *Principles of the Law of Restitution* (n 203) 718; McInnes, 'Passing On in the Law of Restitution: A Re-Consideration' (1997) 19 Sydney Law Review 179, 203.

and Ireland, before considering whether the adoption of the defence is desirable in principle or in practice. Section B considers statutory forms of the defence and the problems of application that these have presented.

A. Passing On and the Common Law

The passing on defence has not been judicially considered in Ireland. However, it has not received a favourable reception in other common law jurisdictions, which may make the Irish courts less willing to adopt the defence in future. The High Court of Australia has consistently rejected the defence. In *Mason v New South Wales,* the High Court rejected the contention that the plaintiffs should be denied recovery because they had passed on the cost of obtaining haulage permits to their customers. It held that the law of restitution did not recognise the principle of corresponding loss, and the fact that the plaintiffs might have passed on the costs did not affect the state's liability to repay moneys 'which it was not in law entitled to collect and which *ex hypothesi* it got by extortion.'[226] In *Royal Insurance,* the High Court again confirmed that the passing on defence had no place in Australian law. Mason CJ rejected the defence as being theoretically incompatible with the law of restitution, which is concerned with the defendant's gain, not the plaintiff's loss; it was irrelevant that the plaintiff had recouped the loss from a third party.[227] Underlying these decisions is the recognition that the public interest in favour of restitution of unlawfully exacted taxes mandated a restrictive approach to the passing on defence. Mason CJ noted in *Royal Insurance:*

> It would be subversive of an important constitutional value if this Court were to endorse a principle of law which, in the absence of such circumstances, authorized the retention by the executive of payments which it lacked authority to receive and which were paid as a result of causative mistake.[228]

In England, the defence was first considered by Lord Goff in *Woolwich.* Although his Lordship did not express a conclusive view on the defence, he observed that application of the defence was 'not without its difficulties'.[229] In *Kleinwort Benson Ltd v South Tyneside*

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[226] *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 145 (Windeyer J). In *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2002) 208 CLR 516 [27], the High Court of Australia rejected the passing on defence. It held that, as between the parties, the plaintiff had better title to the money. A similar argument was accepted in *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 400.

[227] *Royal Insurance* (1994) 182 CLR 51 (HCA) 75. See also *KAP Motors Pty Ltd and Another v Federal Commissioner of Taxation* [2008] FCA 159, 168 FCR 319 (FCA) [43]-[44].

[228] *Royal Insurance* (1994) 182 CLR 51, 69.

[229] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL) 177-178. See also *British Steel plc v Customs and Excise Commissioners* [1997] 2 All ER 366 (CA) 368.

Metropolitan Borough Council [230] and in *Kleinwort Benson Ltd v Birmingham City Council*,[231] the defence was rejected on the basis that principles of loss were not relevant to the law of restitution. However, neither case can be regarded as conclusively rejecting the defence in the context of restitution from public authorities, as both cases left the way open for an alternative approach in taxation cases.[232] Furthermore, the defence in both cases was also rejected on the basis that the hedging contracts entered into by the bank to hedge the risks of the swaps with the local authorities were too remote to be taken into account for the purposes of the passing on defence. Therefore, these cases may yet be distinguished so that 'the defence of disimpoverishment may still, without a judge needing to overrule binding authority, find a home in the English law of unjust enrichment.'[233]

Limited support for the passing on defence may be derived from *Marks and Spencer Plc v Her Majesty's Commissioners of Customs and Excise,* where Lord Walker made comments favourable to the recognition of a general passing on defence.[234] However, there are two problems with Lord Walker's comments. First, he did not explicitly recognise the existence of a defence outside section 80(3) of the Value Added Tax Act 1994. Second, he cited *Roxborough* as authority for the acceptance of the defence, notwithstanding that the defence was rejected in that case. Lord Walker's comments cannot be accepted as a ringing endorsement of the defence and, in light of the fact that the preponderance of English authority is not favourable to the defence, it remains unlikely that it will be accepted in England.[235]

Canada has been the only jurisdiction to accept a common law defence of passing on. In *Air Canada,* La Forest J, speaking for the majority, accepted that the passing on defence applied to taxes paid by the airline, as the airline had recouped the cost of the taxes from its passengers. La Forest J's endorsement of the defence was motivated by a desire to prevent the plaintiffs from receiving a windfall:

> The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of

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[230] *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 (QBD).
[231] *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 391.
[232] *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 (QBD) 987; *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 389-390.
[233] Rush, *The Defence of Passing On*, (Hart Publishing, Oregon 2006) 40. Emphasis in original.
[234] *Marks and Spencer Plc v Her Majesty's Commissioners of Customs and Excise* [2005] UKHL 53 [24].
[235] Rose, 'Passing On' (n 225) 265 and 287.

> wealth that is either in his possession or would have accrued for his benefit, it is restored to him. [236]

However, La Forest J was also willing to preclude recovery on a public policy basis independently of the law of restitution[237] and these concerns to prevent fiscal disruption may have motivated him to adopt the passing on defence. Wilson J, in her dissenting judgment, rejected the passing on defence. Like Mason CJ in *Royal Insurance,* she considered that the public law importance of restitution mandated a restrictive approach to the application of defences: 'Where the payments were made pursuant to an unconstitutional statute, there is no legitimate basis on which they can be retained.'[238]

The passing on defence has since been rejected by the Supreme Court of Canada. In Kingstreet, Bastarache J, delivering the judgment of the court, identified three shortcomings of the passing on defence:

> first, that it is inconsistent with the basic premise of restitution law; second, that it is economically misconceived; and third, that the task of determining the ultimate location of the burden of a tax is exceedingly difficult and constitutes an inappropriate basis for denying relief.[239]

However, Bastarache J's rejection of the defence must be treated with caution for two reasons. First, he held that the regime for the restitution of ultra vires taxes did not fit within the unjust enrichment principle, but constituted a separate category of cases in which restitution was available 'as a public law remedy in a constitutional principle stemming from democracy's earliest attempts to circumscribe government's power within the rule of law.'[240] Therefore, Bastarache J appeared to consider the passing on defence within the context of a public law ground of restitution. It is unclear to what extent his comments can be taken to relate to the passing on defence as a defence to a claim for restitution for unjust enrichment.[241] Second, Bastarache J considered it to be irrelevant whether or not the plaintiff received a windfall, as restitution was not founded on the principle of compensation for

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[236] *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC) [85].
[237] *Ibid,* [88].
[238] *Ibid,* [15].
[239] *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [44].
[240] *Ibid,* [34]-[40].
[241] McInnes, 'Restitution for Ultra Vires Taxes' (2007) 213 LQR 365, 369.

loss.[242] However, the correspondence principle in Canadian law limits a plaintiff's recovery to loss caused to him by the defendant's unjust enrichment.[243] Therefore, Bastarache J's rejection of the defence on this basis is inconsistent with the Canadian acceptance of the correspondence principle.[244]

Adoption of the passing on defence at common law has been controversial for several reasons. First, because the defence has most frequently been considered in the context of restitution of overpaid taxes, its development has been so influenced by policy factors that the development of the general defence of passing on, outside the context of overpaid taxes, has become corrupted by the particular public law considerations that underpin restitution from public authorities. Second, the passing on defence is also affected by the existence of statutory forms of the defence, the interpretation of which necessarily affects the development of the common law defence. Third, cases that consider the passing on defence have failed to identify a clear rationale for the defence.[245]

One rationale for the passing on defence is that it operates to deny that the enrichment was at the plaintiff's expense. If the cost of the defendant's enrichment has been passed on by the plaintiff to a third party, the unjust enrichment of the defendant is not at the plaintiff's expense but at that of a third party. [246] This rationale led to the rejection of the defence in England[247] and in Australia,[248] as the unjust enrichment principle entails no requirement of corresponding loss in those jurisdictions. Following the decision in *Kingstreet,* it is unclear

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[242] *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [47].

[243] *Sharwood & Co v Municipal Financial Corp* 197 DLR (4th) 477 (Ontario Court of Appeal) [16]. *Peter v Beblow* [1993] 1 SCR 980, 101 DLR (4th) 621 [3]. See McInnes, 'The Measure of Restitution' (2002) 52 University of Toronto Law Journal 163, 172.

[244] However, it is not universally accepted that the correspondence principle mandates acceptance of the passing on defence. Grantham and Rickett observe that it is 'far from clear that the correspondence principle *necessarily* entails the relevance of gains made by the plaintiff from third parties to the restitutionary obligation between the plaintiff and defendant': Grantham and Rickett, 'A Normative Account of Defences to Restitutionary Liability' (2008) 67 CLJ 92, 117.

[245] Rush, *The Defence of Passing On* (n 233) 87.

[246] *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 388-389; *Waikato Regional Airport Limited v The Attorney General* [2003] UKPC 50, [2004] 3 NZLR 1 [77]. See also *Royal Insurance* (1994) 182 CLR 51 (HCA) 69 (Mason CJ).

[247] *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 (QBD) 985; *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 394-395 (Saville LJ).

[248] *Royal Insurance* (1994) 182 CLR 51 (HCA) 75; *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 145. However, this rationale was accepted to underpin a statutory form of the passing on defence in *Chippendale Printing Co Pty Ltd v Commissioner of Taxation and Another* (1996) 62 FCR 347, 348.

whether or not the correspondence principle applies in Canadian law, as Bastarache J suggests that loss suffered by the plaintiff is no longer relevant to the passing on defence.[249]

Framing the passing on defence in terms of denying that the enrichment has been at the plaintiff's expense also highlights principled reasons why the defence should be rejected. First, it demonstrates that passing on essentially replicates the requirement that the enrichment was obtained 'at the plaintiff's expense'.[250] Therefore, the defence should be rejected on the basis that it is unnecessarily duplicative. Second, Rose has suggested that adopting this rationale can elide issues of restitution and of compensation: [251]

> the common argument that a plaintiff who has passed on his liability and suffered no loss by virtue of having made the original payment to the defendant is perverse; for the defendant is arguing that he should not have to compensate the plaintiff and that the absence of liability to compensate also justifies not having to satisfy his separate obligation to make restitution...[252]

Third, it has been argued that '[T]he passing on is *res inter alios acta* (something done between other parties) and as such irrelevant to the legal relations between the present litigants.'[253] This argument was accepted by Hobhouse J in *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council*, who held that:

> What contracts or other transactions or engagements the plaintiffs may have entered into with third parties have nothing to do with the principle of restitution. Therefore it suffices in the present case for the plaintiffs to show that they were the payers of the relevant money, that the defendants were unjustly enriched by the payments and that there is no obstacle to restitution.[254]

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[249] *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [47]. See McInnes, 'Restitution for Ultra Vires Taxes' (n 241) 369.
[250] Lee, 'Defences to Claims for Restitution of Overpaid Tax', forthcoming, RLR 2012.
[251] Rose, 'Passing On' (n 225) 273.
[252] *Ibid,* 274.
[253] Birks, *Unjust Enrichment* (2nd edn OUP, Oxford 2005) 221. See also Mitchell, 'Restitution, "Passing On," and the Recovery of Unlawfully Demanded Taxes: Why *Air Canada* Doesn't Fly' (1995) 53 University of Toronto Faculty Law Review 130, 177; Grantham and Rickett, 'A Normative Account of Defences to Restitutionary Liability' (n 244) 117.
[254] *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 (QBD) 985. A similar argument appears to underpin the approach of Windeyer J in *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 145.

Finally, to accept the defence on this basis is undesirable as a matter of policy, as it would discourage plaintiffs from seeking to mitigate their loss. [255]

The other rationale put forward for the defence is that it is motivated by policy considerations.[256] The passing on defence has arisen primarily in the context of restitution of unlawfully exacted taxes and levies.[257] This has affected the development of passing on, as public law considerations have crept into the defence. [258] However, while some policy considerations warrant the adoption of the defence, there are other competing considerations that require its rejection, [259] and different public policies have resulted in different conceptions of the defence. Furthermore, it is unclear whether 'the determination of such policy imperatives is something that the courts are equipped to deal with and whether this is not a judgment best left to the legislature.'[260]

One policy-motivated justification frequently put forward in relation to the passing on defence is that scarce judicial resources should not be deployed to provide an undeserving plaintiff with an unjustified windfall. [261] This consideration was one of the factors that prompted the Supreme Court of Canada to accept the defence in *Air Canada v British Columbia*[262] and motivated Kirby J to accept the passing on defence in his dissenting judgment in *Roxborough v Rothmans.*[263] The Irish courts have not expressly considered the

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[255] *British Columbia v Canadian Forest Products Ltd* [2004] SCC 38 [207] (LeBel J, dissenting). See also *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 399.

[256] Grantham and Rickett suggest that such policy concerns constitute a 'more plausible' explanation of the defence: Grantham and Rickett, 'A Normative Account of Defences to Restitutionary Liability' (n 244) 117.

[257] *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [45]; *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC); *Canadian Pacific Air Lines Ltd v British Columbia* [1989] 1 SCR 1133 (SCC); *Mason v New South Wales* (1959) 102 CLR 108 (HCA); *Royal Insurance* (1994) 182 CLR 51 (HCA). See also Maddaugh and McCamus, *The Law of Restitution* (2nd edn Canada Law Book, Aurora 2004) [11-700-20].

[258] McInnes, 'Passing On in the Law of Restitution: A Re-Consideration' (n 227) 193. However, English cases that consider the passing on defence in a private law context have been careful to distinguish cases relating to restitution of taxes cases: *Kleinwort Benson Ltd v South Tyneside Metropolitan Borough Council* [1994] 4 All ER 972 (QBD) 987; *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 389-390 (Evans LJ).

[259] Rose, 'Passing On' (n 225) 264.

[260] Grantham and Rickett, 'A Normative Account of Defences to Restitutionary Liability' (n 244) 118.

[261] McInnes, 'Enrichments, Expenses and Restitutionary Defences' (2002) 118 LQR 209, 214; McInnes, 'Passing On in the Law of Restitution: A Re-Consideration' (n 225) 192. Mitchell has described this argument, most notably its reliance on the 'scarcity of judicial resources', as 'an argument of convenience, not one of principle': Mitchell, 'Restitution, "Passing On," and the Recovery of Unlawfully Demanded Taxes: Why *Air Canada* Doesn't Fly' (n 253) 140.

[262] *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC) [85]. Hereafter *Air Canada.* Degeling, 'The Defence of Passing On and Polices Against Accumulation: Consumers and Unjust Enrichment' [2004] RLR 25.

[263] *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68, (2002) 208 CLR 516 [118]. This argument was also considered, but ultimately rejected, by Mason CJ in *Royal Insurance* (1994) 182 CLR 51 (HCA) 68.

passing on defence. However, the Supreme Court's approval of the decision of the ECtHR in *National and Provincial Building Society v UK* in the *Health Amendment Bill* case suggests that the Irish courts would be willing to adopt the passing on defence on this basis:

> The [ECtHR] accepted that the effect of the retrospective legislation was to deprive the applicant societies of the right to bring a claim of the same type as the Woolwich, but considered that these would be "opportunistic legal proceedings to exploit technical defects in the ... Regulations and to frustrate the original intention of Parliament". It also considered that the effect of not adopting the contested legislation would have been to allow the societies "to retain a windfall". It is easy to see why the court did not accept that the societies were suffering any unjust interference with their claims.[264]

However, commentators have argued that this justification does not demonstrate why the defendant should be entitled to retain the money in place of the plaintiff, [265] thus allowing him 'to escape his *prima facie* restitutionary liability and, when all is said and done, leave him unjustly enriched.'[266]

There are two schools of thought regarding passing on in a public law context. The first considers that passing on considerations are appropriate in the context of the payment of taxes and other imposts to public authorities. [267] The 'facts which give rise to the defence are readily identifiable in tax cases,' [268] as taxes are likely to be passed down a chain of transactions to an ultimate taxpayer. This is reflected by the numerous statutory forms of the defence, considered below. However, the passing on defence has proven itself to be notoriously difficult to apply in practice and it is often difficult to determine whether or not the plaintiff has successfully passed on his loss. [269] Indeed, commentators who contend that the defence is desirable as a matter of principle question whether the defence should be available in practice. [270] Evidential difficulties surrounding the passing on defence have

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[264] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [107].
[265] Lee, 'Defences to Claims for Restitution of Overpaid Tax' (n 250). See also Rush, *The Defence of Passing On* (n 233) 21.
[266] Rose, 'Passing On' (n 225) 279.
[267] See suggestions of such an approach in LeBel J's dissenting judgment in *British Columbia v Canadian Forest Products Ltd* [2004] SCC 38 [194]-[197]. LeBel J was speaking in the context as passing on as a defence to a claim in tort.
[268] Rush, *The Defence of Passing On* (n 233) 19.
[269] Rose, 'Passing On' (n 225) 284; Virgo, *Principles of the Law of Restitution* (n 203) 718-719; Birks *Unjust Enrichment* (n 253) 221.
[270] McInnes, 'Passing On in the Law of Restitution: A Re-Consideration' (n 225) 192.

contributed to its rejection in Canada[271] and in Australia.[272] These economic difficulties apply both where the defence is relied on in a public tax payment context and where it is relied upon between two individuals. However, cases involving the application of statutory forms of the passing on defence, discussed in Part B, demonstrate most clearly the evidential difficulties courts face in considering whether a plaintiff has *successfully* passed on the burden of his loss.[273]

Other advocates of a passing on defence suggest that such a defence is a justified means of preventing fiscal disruption where restitution is sought from public authorities.[274] In *Air Canada,* the acceptance of the passing on defence was clearly motivated by fiscal chaos concerns.[275] In addition, many decisions in which the passing on defence has been rejected have left open the possibility that the defence could apply in the context of restitution of overpaid taxes,[276] a potential exception that is on fiscal chaos concerns. However, it is not clear why passing on, which focuses on the position of the plaintiff, is an appropriate vehicle for such concerns. They can be better accommodated within the change of position defence, which looks to the position of the defendant rather than to considering whether or not the plaintiff recouped his loss.

The second school of thought considers that the passing on defence would subvert important constitutional law principles underpinning the right to restitution of unlawfully exacted imposts. Many cases in which the passing on defence has been rejected have referred to the need not to subvert this principle.[277] Commentators have suggested that unjust enrichment of the taxable person is preferable to having the state retain the unjust enrichment:

> 'Why should it matter that the effect of overpaying the VAT is that the taxpayer is unjustly enriched? Surely this is better than that the Commissioners should retain the

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[271] *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [44] and [48].
[272] *Royal Insurance* (1994) 182 CLR 51 (HCA) 71.
[273] Chowdry and Degeling, 'Passing on in the High Court of Australia' (2007) 123 LQR 203.
[274] However, Beatson has observed that the passing on defence is a 'somewhat crude' way of dealing with this problem: Beatson, 'Restitution of Overpaid Tax, Discretion and Passing-On' (1995) 111 LQR 375, 377.
[275] *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC) [86]. However, La Forest J held that these concerns were a sufficient basis on which to deny relief directly without relying on the considerations to inform the passing on defence.
[276] *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (SCC) 391.
[277] *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) 161 (SCC) [15]; *Amax Potash Ltd. v. Saskatchewan* [1977] 2 SCR 576 (SCC) 590; *Royal Insurance* (1994) 182 CLR 51 (HCA) 69; *Roxborough* [2001] HCA 68, (2002) 208 CLR 516 [143] (Kirby J, dissenting). See also McInnes, 'Enrichments, Expenses and Restitutionary Defences' (n 263) 213; Mitchell, 'Restitution, "Passing On," and the Recovery of Unlawfully Demanded Taxes: Why *Air Canada* Doesn't Fly' (n 253) 132; Virgo, 'Restitution of Overpaid VAT' [1998] British Tax Review 582, 590.

money to which they are clearly not entitled. Since the justification for the taxpayer's restitutionary claim is that the Commissioners had not been authorised to receive the overpaid VAT in the first place the taxpayer's claim to restitution should outweigh the Commissioner's claim to retain the tax.'[278]

As a result, many of the cases that have considered the passing on defence have been more concerned with the desirability of ensuring that the state does not retain an unlawful gain than with considering whether the defence was compatible with the unjust enrichment principle.

This absence of authority outside a taxation context[279] suggests that the passing on defence is wholly policy motivated and, as a result, is not consistent with a principled law of restitution.[280] However, if the defence has been generally rejected because it does not fit within the unjust enrichment principle, specifically because the unjust enrichment principle does not require any element of corresponding loss, how then can it be said that the defence can be adopted in principle simply because issues of taxation are involved? If we were to recognise an exception to the rejection of the defence in the context of taxation, then it would be entirely motivated by public policy concerns, allowing policy to permit the defence where legal principle did not. Courts in all of the jurisdictions canvassed in this thesis have specifically rejected the argument that fiscal chaos concerns are sufficient to establish a defence. Legislatures have already provided for a statutory form of the passing on defence in certain circumstances. Outside those circumstances specified in legislation, there would appear to be no basis for the adoption of a passing on defence.

One of the main motivations behind the passing on defence is the desire to ensure that restitution is not made to the plaintiff where a third party has borne the burden of the tax. As a result, several cases and commentators have considered whether or not recovery by the ultimate taxpayer is both possible and desirable.[281] In many cases, the ultimate taxpayer will not be able to rely on the unjust enrichment principle, as his relationship with the taxable person will be governed by a contract of sale, thus precluding the unjust enrichment principle. Chowdry has suggested that:

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[278] Virgo, 'Restitution of Overpaid VAT' (n 277) 590.

[279] Maddaugh and McCamus, *The Law of Restitution* (n 257) [11-700-20].

[280] *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [45]. Maddaugh and McCamus, *The Law of Restitution* (n 257) [11-700-20]. However, Rush has argued that, even though the defence is more prevalent in tax cases, 'nothing necessarily prevents it from being accepted as part of the general law of unjust enrichment: Rush, *The Defence of Passing On* (n 233) 19.

[281] See now, *Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners* [2012] EWHC 458 (Ch).

> rather than treat the sum as a windfall, Customs should be required to make the repayment subject to the taxable person holding the sum on constructive trust for the customers.[282]

Similarly, in *Royal Insurance,* Mason CJ suggested that in certain circumstances the taxable person may hold the recovered overpayments on constructive trust for the payor of the taxes.[283]

Although this solution may appear superficially attractive, there are a number of difficulties attendant on this response.[284] Restitution claims by the ultimate consumers have been rejected as

> unworkable in practice. This is because in virtually every case the burden of the overpaid VAT will have been dispersed amongst a large number of taxpayers who individually will have paid little, and it would not be worth their while suing the Commissioners. In many cases, the customers would simply be unaware that the Commissioners were liable to make restitution to them.[285]

These problems would apply where restitution was available against a large retailer, particularly where there was a long chain of supply,[286] or where there was a large group of ultimate consumers. The approach suggested by Mason CJ also raises further difficulties. First, why is the remedy afforded to the ultimate taxpayer proprietary in nature? Furthermore, if a constructive trust is recognised in favour of the ultimate taxpayer, 'it is not entirely clear why such a trust relationship does not similarly exist between the government and the business.'[287] Second, what duties will the penultimate taxpayer owe under this constructive trust? Third, why should the court concern itself with making an award in favour of a person unconnected to the litigation before it, and is it possible for the court to make such an award?[288]

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[282] Chowdry, 'Unjust Enrichment and Section 80(3) of the Value Added Tax Act 1994' (2004) 6 British Tax Review 620, 630-631. Mitchell makes the same suggestion: Mitchell, 'Restitution, "Passing On," and the Recovery of Unlawfully Demanded Taxes: Why *Air Canada* Doesn't Fly' (n 253) 171-172.
[283] *Royal Insurance* (1994) 182 CLR 51 (HCA) 78. See also *KAP Motors Pty Ltd and Another v Federal Commissioner of Taxation* [2008] FCA 159, 168 FCR 319 [40]-[42].
[284] See Edelman and Bant, *Unjust Enrichment in Australia* (n 208) 376.
[285] Virgo, 'Restitution of Overpaid VAT' (n 277) 591. However, this will not always be the case. See *Investment Trust Companies (in liquidation) v Revenue and Customs Commissioners* [2012] EWHC 458 (Ch).
[286] Degeling, 'The Defence of Passing On and Polices Against Accumulation: Consumers and Unjust Enrichment' (n 262) 48.
[287] McInnes, 'Passing On in the Law of Restitution: A Re-Consideration' (n 225) 209.
[288] Rush, *The Defence of Passing On* (n 233) 32.

B. Statutory Forms of the Passing On Defence

In cases where the tax is designed to be passed on, a passing on defence reflects that the burden of the tax was not borne by the taxable person but by the ultimate customers. Such defences are commonly referred to as 'unjust enrichment' defences. However, the taxable person has not been 'unjustly enriched' at the expense of the Customs and Excise Commissioners if he is repaid money to which Customs was never entitled; if anyone has been unjustly enriched in this situation it is the taxing authority, which received a tax payment that was not lawfully due.[289] In spite of these objections, statutory forms of the passing on defence have been enacted. In particular, many jurisdictions, including Ireland,[290] England,[291] and Australia,[292] have enacted passing on defences to claims for VAT or 'turnover' tax. The passing on defence is particularly relevant to VAT, as 'VAT is a tax whose burden is designed to be passed on, so as to be borne by the end user of the goods or services.'[293]

Applying statutory passing on defences has proven to be difficult in practice. Courts are obliged to enter into a complex economic analysis to determine whether or not a charge has been successfully passed on.[294] Central to any workable retail business model is the understanding that the retailers aim to pass on their costs.[295] However, it is not clear that all such costs should be deemed to be 'passed on' for the purposes of the passing on defence. Several considerations will affect a court's assessment of whether or not an invalid tax has been passed on. First, depending on the elasticity of demand for a product, where a taxable person raises his prices to incorporate the tax, this increase in price may have a detrimental effect on the level of demand for the product,[296] causing the plaintiff consequential loss. Second, there are circumstances in which a retailer may not have control over the price that

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[289] Chowdry, 'Unjust Enrichment and Section 80(3) of the Value Added Tax Act 1994' (n 282) 623-624.
[290] Section 20(5) of the Value Added Tax Act 1972.
[291] Section 80(3) of the Value Added Tax Act 1994. For a more comprehensive list of provisions see Rush, *The Defence of Passing On* (n 223) 64.
[292] See Part 4 of the Sales Tax Assessment Act 1992 (Cth).
[293] *Baines & Ernst Limited v Commissioners for Her Majesty's Evenue and Customs* [2006] EWCA Civ 1040, [2006] STC 1632 [7]; *Chippendale Printing Co Pty Ltd v Commissioner of Taxation and Another* (1996) 62 FCR 347 (FCA) 348. Birks, *Unjust Enrichment* (n 255) 230.
[294] *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 (CA) 391; *Customs & Excise Commissioners v National Westminster Bank plc* [2003] EWHC 1822 (Ch) [31].
[295] *British Columbia v Canadian Forest Products Ltd* [2004] SCC 38 [111]; *Customs & Excise Commissioners v National Westminster Bank plc* [2003] EWHC 1822 (Ch) [31].
[296] *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 71. See also McInnes, 'Passing On in the Law of Restitution: A Re-Consideration' (n 225) 202; Mitchell, 'Restitution, "Passing On," and the Recovery of Unlawfully Demanded Taxes: Why *Air Canada* Doesn't Fly' (n 253) 156 and 159; Virgo, 'Restitution of Overpaid VAT' (n 277) 586; McInnes, 'Enrichments, Expenses and Restitutionary Defences' (n 261) 213.

he charges; for example, where the retailer has a small market share in the relevant market or operates in a competitive market that is highly price sensitive.[297] In such cases, the retailer may have no choice but to absorb the cost of the tax. In *Comateb,* Advocate General Tesauro observed that market factors made it doubtful that it would ever be possible to establish the passing on defence:

> In point of fact, it is plain, indeed abundantly plain in my view, that it can be positively established that the sum has been passed on to a third party only if supply is elastic and demand rigid, something that does not happen in the real economy. [298]

This issue has not yet been considered in Ireland. However, other jurisdictions have taken differing approaches to considering whether a tax has been passed on for the purposes of a statutory defence.

Australia has taken a particularly simplistic approach to the economic considerations raised by passing on. *Avon Products Pty Ltd v Federal Commissioner of Taxation*[299] concerned Part 4 of the Sales Tax Assessment Act 1992 (Cth), which made it a precondition for recovery that the plaintiff established that recovery of the tax would not unjustly enrich him or her. The approach taken by the High Court of Australia was particularly favourable to the taxing authority, as it assumed that the taxpayer would have passed on the burden of the tax wherever the taxable person had covered its costs.[300] This approach has been criticised as 'harsh and unrealistic':

> To find passing on, and thus deny recovery to the retailer, *whenever* the retailer has made *any* profit ignores the fact that depending on other factors such as price elasticity of demand and the prices charged by competitors, that the retailer may have decided to take a smaller profit on each sale and bear the burden of the tax without passing it on to the consumer...[301]

The Canadian courts have experienced similar difficulties of proof in applying the common law passing on defence identified in *Air Canada.* Because the defence was not

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[297] Rush, *The Defence of Passing On* (n 233) 71.
[298] Joined cases C-192/95 to C-218/95 *Société Comateb and Others v Directeur Général des Douanes et Droits Indirects* [1997] ECR I-00165, Opinion of Advocate General Tesauro [20]. Similarly, Jones has argued that 'the cost involved for a taxpayer in adducing the complex evidence necessary to rebut a finding of the Commissioners that the tax has been passed on may, in many cases, mean that in truth it is not worth its while': Jones, *Restitution and European Community Law* (Mansfield Press, London 2000) 53.
[299] *Avon Products Pty Ltd v Federal Commissioner of Taxation* [2006] HCA 29, 230 CLR 356.
[300] *Ibid,* [21].
[301] Chowdry and Degeling, 'Passing on in the High Court of Australia' (n 273) 206. Original emphasis.

restricted to indirect taxes such as VAT, difficulties arose as to what costs could be susceptible to a passing on defence. Prior to the decision of Bastarache J in *Kingstreet*, it had been commonly accepted that recovery was not available where the taxpayer had merely acted as a collecting agent of taxes paid by the ultimate consumer. Thus, in *Canadian Pacific Air Lines Ltd v British Columbia*, Wilson J, who rejected the passing on defence in *Air Canada,* agreed that the plaintiff could not recover taxes paid on alcoholic beverages, as the airlines 'were merely tax collectors and not taxpayers'[302] and such cases should not be considered to be true cases of passing on.[303] The Canadian courts also distinguished between taxes on capital assets acquired by the taxpayer and daily operating expenses incurred in respect of specific customers: the courts were more ready to consider the latter type of charge to have been passed on.[304] However, it appears simplistic to suggest that the passing on defence is only available where charges can be attributed to specific customers. It does not reflect the economic considerations that retailers enter into when setting prices in respect of their products, although the taxes that are most readily identifiable as being passed on are those specific to a particular transaction with the ultimate taxpayer, such as sales tax and VAT. In *Kingstreet*, one of the reasons that Bastarache J gave for abolishing the defence was that it was that 'the task of determining the ultimate location of the burden of a tax is exceedingly difficult'.[305]

Statutory forms of the passing on defence have been enacted in Ireland and in England in respect of overpaid VAT.[306] The right to repayment of overpaid VAT forms an important part of Community law even though, there is no right to repayment in the Sixth Directive.[307] Therefore, the application of statutory forms of the passing on defence in Ireland and in England is heavily influenced by Community law considerations. Community law permits a Member State to retain taxes levied in breach of Community law, where recovery of the money paid would result in the unjust enrichment of the plaintiff.[308] Where the burden of a charge has been borne by the ultimate consumer:

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[302] *Canadian Pacific Air Lines Ltd v British Columbia* [1989] 1 SCR 1133 [4] (Wilson J).
[303] *Allied Air Conditioning Inc v British Columbia* (1994) 87 BCLR (2d) 207 (BCCA) [48].
[304] *Ibid,* [47]-[49].
[305] *Kingstreet* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [44] and [48].
[306] VAT regimes are governed by Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes. See Chowdry, 'Unjust Enrichment and Section 80(3) of the Value Added Tax Act 1994' (n 282).
[307] Case 199/82 *San Giorgio* [1983] ECR 3595.
[308] Case 68/79 *Hans Just I/S v Danish Ministry for Fiscal Affairs* [1980] ECR 501 [26]; Case C-309/06 *Marks & Spencer plc v Commissioners of Customs & Excise* [2008] ECR I-02283 [41].

> to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge.[309]

Community law provides that the burden of establishing passing on is on the defendant.[310] However, in *Weber's Wine World*, the ECJ set a high threshold for the passing on defence, indicating that the defence will be made out 'only where it is established by the national authorities that the charge has been borne in its entirety by someone other than the taxable person'.[311] Therefore, under Community law, the state must bear the burden of establishing that the charge has in fact been passed on. Community law also prohibits 'any requirement of proof which has the effect of making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to community law.'[312] This includes any provision establishing a presumption that the claimant has passed on the charge,[313] as well as provisions placing that requirement on the claimant to show that the charge has not been passed on.[314] Furthermore, the ECJ has held that passing on a charge, either in whole or in part, does not necessarily entail the claimant's unjust enrichment.[315] As noted above, in establishing an unjust enrichment defence, it is not sufficient for the Member State to establish that the retailer passed on the charges to its customers in the form of increased prices.[316] Rather, the Member State must also establish that the retailer would be unjustly enriched by repayment of the charge: Community law precludes

> national rules which refuse ... repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without

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[309] Joined cases C-192/95 to C-218/95 *Comateb* [1997] ECR I-00165 [22].
[310] Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595 [14]; Joined cases C-192/95 to C-218/95 *Société Comateb* [1997] ECR I-00165 [25]. This principle was acknowledged in *International Limited v Commissioners of Customs and Excise* [1994] VATTR 237. In a domestic context, see also *Waikato Regional Airport Limited v The Attorney General* [2003] UKPC 50, [2004] 3 NZLR 1 [78]; *Customs & Excise Commissioners v National Westminster Bank plc* [2003] EWHC 1822 (Ch) [23]-[27].
[311] Case C-147/01 *Weber's Wine World* [2003] ECR I-11365 [94].
[312] Case 199/82 *San Giorgio* [1983] ECR 3595 [14]; Case 68/79 *Hans* [1980] ECR 501 [11]-[13]
[313] Joined cases C-192/95 to C-218/95 *Société Comateb* [1997] ECR I-165 [26] and [35].
[314] Case C-147/01*Weber's Wine World* [2003] ECR I-11365 [111].
[315] Joined cases C-192/95 to C-218/95 *Société Comateb* [1997] ECR I-00165 [29]. See also, Case C-147/01 *Weber's Wine World* [2003] ECR I-11365 [98].
[316] Case C-309/06 *Marks & Spencer plc v Commissioners of Customs & Excise* [2008] ECR I-02283 [42]; Joined cases C-192/95 to C-218/95 *Société Comateb* [1997] ECR I-00165 [30]; Joined cases C-441/98 and C-442/98 *Kapniki Michailidis AE v Idryma Koinonikon Asfaliseon* [2000] ECR I-07145 [35]. See also Rush, *The Defence of Passing On* (n 235) 17.

requiring that the degree of unjust enrichment that repayment of the charge would entail for the trader be established.[317]

It is against this European backdrop that VAT legislation in England and in Ireland providing for a passing on or 'unjust enrichment' defence must be assessed. In England, section 80(3) of the Value Added Tax Act 1994 provides that it is a defence to a claim for overpaid VAT under section 80 'that the crediting of an amount would unjustly enrich the claimant.' Sections 80(3A)-(3C) provide that the courts can take into account consequential loss suffered by a taxpayer, holding that consequential loss is relevant to the consideration of whether or not the enrichment of the taxpayer would be unjust,[318] rather than treating it as a wholly separate enquiry. Sections 80(3A)-(3C) also introduce a test of remoteness into the passing on defence:

> Consequently, loss suffered by the taxpayer as a result of the changes in market conditions will no longer be relevant, since this loss did not result from the taxpayer's mistake about the operation of the VAT provisions. [319]

The English courts have acknowledged that determining passing on is a complex assessment based on several factors[320] and have held that principles general to the law of restitution, and to the passing on defence in particular, are not applicable when interpreting section 80(3) of the VATA 1994.[321] The courts have developed specific principles to be applied when considering section 80(3). Including VAT as a separate cost on an invoice will not be conclusive evidence that the tax has been passed on.[322] Nor will the inclusion of VAT in the general cost of the commodity automatically lead to the conclusion that the tax has not been passed on.[323] Where a taxpayer can show that it set its prices by reference to prices charged by its competitors, without reference to changes in the rates of VAT, the courts will

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[317] Case C-147/01 *Weber's Wine World* [2003] ECR I-11365 [102].
[318] Section 80 (3B), Value Added Tax Act 1994.
[319] Virgo, 'Restitution of Overpaid VAT' (n 277) 588-589.
[320] *Computeach International Limited v Commissioners of Customs and Excise* [1994] VATTR 237.
[321] *Commissioners of Customs and Excise v McMaster Stores (Scotland) Ltd (in receivership)* [1995] STC 846, 853. Contrast *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QBD) and *R v Tower Hamlets London Borough Council, Ex parte Chetnik Developments Ltd* [1988] AC 858 (HL), where the idea of interpreting a statute in light of common law principles unjust enrichment principles was viewed more favourably.
[322] *Computeach International Limited v Commissioners of Customs and Excise* [1994] VATTR 237. See also, *Baines & Ernst Limited v Commissioners for Her Majesty's Evenue and Customs* [2006] EWCA Civ 1040, [2006] STC 1632 [15]. See Chowdry, 'Unjust Enrichment and Section 80(3) of the Value Added Tax Act 1994' (n 282) 628.
[323] Chowdry, 'Unjust Enrichment and Section 80(3) of the Value Added Tax Act 1994' (n 282) 628. See also, in a Canadian context, *Allied Air Conditioning Inc v British Columbia* (1994) 87 BCLR (2d) 207, [1994] 5 WWR 62 (BCCA) [32].

accept that it absorbed, rather than passed on, any increase in tax.[324] Authority also suggests that where a taxable person fails to raise his prices to reflect VAT, he will have absorbed the tax himself.[325]

In Ireland, section 20(5) of the Value Added Tax Act 1972[326] provides for an unjust enrichment defence in respect of claims for recovery of overpaid VAT. Prior to 2008, sub-section (5)(a) conferred an entitlement on taxable persons to recover overpaid sums of VAT and required the Revenue Commissioners to refund the overpaid amount to the claimant 'unless that refund would result in the unjust enrichment of the claimant.' This provision has been amended[327] to provide that the Revenue Commissioners are to refund overpayments 'unless *they determine* that the refund of that overpaid amount or part thereof would result in the unjust enrichment of the claimant.'[328] This is a significant restriction on the right to recovery of overpaid VAT,[329] as it substitutes an objective requirement of unjust enrichment for the subjective analysis of the Revenue Commissioners. It also effectively prevents the courts from reviewing the determination that the claimant would be unjustly enriched. However, the courts have resisted the suggestion that legislation may confer an unfettered discretion upon a public law body[330] and the Revenue's determination that the plaintiff would be unjustly enriched will be open to review on judicial review standards. However the onus will be upon the plaintiff to impugn the decision of the Commissioners, for example on the basis that the assessment was unreasonable under the *Wednesbury* standard.[331] It is arguable that this is contrary to the Community law requirement that it is for the body resisting repayment to establish that the taxable person would be unjustly enriched.

There do not appear to be any decided cases in Ireland in which section 20(5) has been invoked, although it is not clear why this is the case. It may be that the Revenue Commissioners are reluctant to rely on the defence due to the difficulties experienced by

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[324] *National & Provincial Building Society v Commissioners of Customs and Excise* [1996] V & DR 153.
[325] *Baines & Ernst Limited v Commissioners for Her Majesty's Revenue and Customs* [2006] EWCA Civ 1040, [2006] STC 1632 [18].
[326] Inserted by section 184 of the Finance Act 1992 and as amended by section 114 of the Finance Act 1998, section 124 of the Finance Act 2003, and section 74 of the Finance (No 2) Act 2008.
[327] By section 74 of the Finance (No 2) Act 2008.
[328] Emphasis added.
[329] However, Crowley observes that 'the claimant was already at the mercy of the Revenue insofar as unjust enrichment was concerned': Crowley ''Unjust Enrichment and the Finance (No 2) Act 2008' (2009) 22 Irish Tax Review 78, 79. See also, Brodie and Dillon, *Value Added Tax: Finance Act 2008* (Taxation Series 2008, Irish Taxation Institute, Dublin 2008) 486, although this deals with section 20(5) prior to its amendment by section 74 of the Finance (No 2) Act 2008.
[330] See, for example, *The State (Lynch) v Cooney* [1982] IR 337(SC) 360-361.
[331] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA); *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 (HC)(SC).

other jurisdictions in applying forms, both statutory and common law, of the passing on defence. On the other hand, given that the determination of 'unjust enrichment' is now to be a subjective determination of the Revenue Commissioners, taxpayers may be discouraged from seeking review of such decisions, first by the procedural hurdles they face in seeking judicial review of such a determination and, second, by the fact it is inherently more difficult to challenge a subjective determination rather than the objective fact of 'unjust enrichment'. Furthermore, the Revenue Commissioners' subjective assessment means that it is unlikely that there will be scope for the courts to provide much guidance on how 'unjust enrichment' is to be assessed outside the statutory considerations outlined in section 20(5)(c)(i).

Prior to 2008, section 5(b) provided that:

> Unjust enrichment of the claimant for the purposes of this section means the refund to a claimant of an overpaid amount or any part of an overpaid amount in circumstances where the cost of such overpaid amount or part thereof was, for practical purposes, passed on by the claimant to other persons in the price charged by the claimant for goods or services supplied by the claimant.

The effect of subsection (5)(b) was to equate unjust enrichment with passing on. In contrast, section 80(3) of the Value Added Tax Act 1994 (UK) is a defence of unjust enrichment but does not equate unjust enrichment with passing on.[332] This difference in approach is relevant for two reasons. First, under s 80(3) it may be possible to argue that the claimant would be unjustly enriched by the return of overpaid VAT, even where it was not evident that he had passed on the tax.[333] Second, the CJEU has held that passing on a charge, either in whole or in part, does not necessarily entail the claimant's unjust enrichment. [334] As noted above, a taxing authority cannot simply rely on the fact that the charges were passed on, it must also establish that the retailer would be unjustly enriched by repayment of the charge. Therefore, section 20(5)(b), by equating unjust enrichment and passing on, was not compatible with European law.

In addition, section 20(5) required the claimant to establish economic loss:

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[332] Section 80(3) provides:

> It shall be a defence, in relation to a claim [under this section by virtue of subsection (1) or (1A) above, that the crediting] of an amount would unjustly enrich the claimant.

[333] Birks, *Unjust Enrichment* (n 253) 231, citing *Commissioners of Customs and Excise v McMaster Stores (Scotland) Ltd (in receivership)* [1995] STC 846.

[334] Joined cases C-192/95 to C-218/95 *Société Comateb* [1997] ECR I-00165 [29]. See also Case C-147/01 *Weber's Wine World* [2003] ECR I-11365 [98].

> 'based on an economic analysis which takes into account the price elasticity of demand of the goods or services supplied by the claimant, that the claimant's business has suffered a loss of turnover due to the mistaken assumption made in the operation of the tax.'[335]

This separate provision for consequential loss was problematic, as it was not clear how the issue of consequential loss could be divorced from the question of whether the taxpayer has been unjustly enriched. The fact that the taxpayer passed on the tax is not sufficient to establish his unjust enrichment for the purposes of Community law. In considering whether the taxpayer had been unjustly enriched, the CJEU has held that the issue of consequential loss is relevant.[336] Therefore, if consequential loss forms part of our consideration of whether or not there has been an unjust enrichment, it should be for the state to demonstrate that no consequential loss has been suffered. Accordingly, insofar as section 20(5)(d) placed the burden of establishing consequential loss on the plaintiff, it may have been contrary to European law, as it had the effect of 'making it virtually impossible or excessively difficult to secure the repayment of charges levied contrary to community law.'[337] Because it was difficult for taxpayers to establish consequential loss,[338] this provision would, in some circumstances, have allowed the Revenue Commissioners to retain money to which it was not entitled, as it contained no provision for a person who bore the burden of the tax to reclaim a refund directly from the Revenue Commissioners.[339]

Section 20(5) has since been amended to resolve these deficiencies.[340] Section 20(5)(c)(i) now provides:

> For the purposes of determining whether a refund of an overpaid amount or part thereof would result in the unjust enrichment of a claimant, the Revenue Commissioners shall have regard to—

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[335] Section 20(5) Value Added Tax Act 1972, as inserted by section 114 Finance Act 1998.
[336] Case 68/79 *Hans Just* [1980] ECR 501 [26]; Joined cases C-192/95 to C-218/95 *Société Comateb* [1997] ECR I-00165 [30]; Joined cases C-441/98 and C-442/98 *Kapniki Michaïlidis AE v Idryma Koinonikon Asfaliseon* [2000] ECR I-07145 [35]; Case C-309/06 *Marks & Spencer plc v Commissioners of Customs & Excise* [2008] ECR I-02283 [42].
[337] Case 199/82 *San Giorgio* [1983] ECR 3595 [14]; Case 68/79 *Hans* [1980] ECR 501 [11]-[13].
[338] Beatson, 'Restitution of Overpaid Tax, Discretion and Passing-On' (n 274) 378.
[339] Section 20(7) provides that: 'The Revenue Commissioners shall not refund any amount of tax except as provided for in this Act, or any order or regulation made under this Act.'
[340] Section 74 of the Finance (No 2) Act 2008. See, however, Crowley 'Unjust Enrichment and the Finance (No 2) Act 2008' (n 329) 81.

(I) the extent to which the cost of the overpaid amount was, for practical purposes, passed on by the claimant to other persons in the price charged by that claimant for goods or services supplied by that claimant,

(II) any net loss of profits which they have reason to believe, based on their own analysis and on any information that may be provided to them by the claimant, was borne by the claimant due to the mistaken assumption made in the operation of the tax, and

(III) any other factors that the claimant brings to their attention in this context.

This provision allows the Revenue Commissioners to take account of any consequential loss suffered by taxable persons when considering whether they have been unjustly enriched, bringing section 20(5) into line with the requirements laid down by Community law. However, it would appear from the wording of s 20(5)(c)(i)(II) that consequential loss will only be taken into account where it was due to a mistaken assumption made in relation to the operation of the tax. It is unclear why this limitation was introduced, if, indeed, it was intended as a limitation, and how it will operate in practice.

III. Voluntary Transfers

There is a considerable body of authority in Australia, England, and Ireland that provides that certain types of voluntary payments may not be recoverable by way of restitution; where the plaintiff has made a payment voluntarily, it cannot be said that the enrichment was unjust, as the plaintiff's intention to confer the benefit has not been vitiated.

The scope of this category is uncertain for several reasons. First, it has been recognised that 'voluntariness' is a difficult concept to define.[341] In *Mason v New South Wales*, Windeyer J described a voluntary payment as follows:

> In my view, a payment may be said to be voluntary, in this context and for present purposes, when the payer makes it deliberately with a knowledge of all relevant facts, and either being indifferent to whether or not he be liable in law, or knowing, or

[341] *Hookway v Racing Victoria Ltd* [2005] VSCA 310 [23]-[24].

having reason to think, himself not liable, yet intending finally to close the transaction.[342]

In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council,* Hobhouse J held that '[A] situation has to be disclosed which is tantamount to a willingness to make a gift of the money to the recipient.'[343] These decisions set a high bar for determining what constitutes a voluntary payment, effectively requiring a conscious decision on the part of the payor to pay at all events. In *Hookway v Racing Victoria Ltd*, Ormiston JA described 'voluntary' in this context as 'a conscious choice to make a payment notwithstanding any possible defects in the claim.'[344]

Second, it is unclear whether the voluntary nature of the payment should provide a defence to a claim in restitution, or whether the voluntary nature of the payment means that the restitutionary claim has not been made out, ie the voluntary nature of the transaction means that no cause of action in restitution can be made out. The most recent statement on the matter is that of Ormiston JA in *Hookway v Racing Victoria*, who interpreted the majority judgment in *David Securities* as laying down a limited defence to a claim, rather than forming part of the claim in restitution itself.[345] In *Qld Alumina Ltd v Alinta DQP Pty Ltd*, it was held that voluntariness could perform both roles depending on the sense in which the term was used.[346]

Notwithstanding this conceptual confusion, several recognised defences are premised upon the voluntary nature of the plaintiff's payment.[347] In *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd*, Goff J held that restitution will be denied to a party where 'the payer intends that the payee shall have the money *at all events*, whether the fact be true or false, or is deemed in law so to intend'.[348] The Irish courts have also held that payments made at all events will not be recoverable. In *Rogers v Louth County Council*, Griffin J applied a test in identical terms to that proposed by Windeyer J in *Mason*:

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[342] *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 143. See also *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) and the discussion of *David Securities* in *Hookway v Racing Victoria Ltd* [2005] VSCA 310 [25]-[28].
[343] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890 (QBD) 934. See also *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 413 (Lord Hope).
[344] *Hookway v Racing Victoria Ltd* [2005] VSCA 310 [44].
[345] *Ibid,* [36]-[38].
[346] *Qld Alumina Ltd v Alinta DQP Pty Ltd* [2007] QCA 387 [70].
[347] *Re Municipal Spraying & Contracting Ltd* (1980) 15 BLR 37 [93].
[348] *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QBD) 695. Relying on *Kelly v Solari* 9 M & W 54. Adopted in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 379.

> a payment may be said to be voluntary when the payer makes it deliberately with a knowledge of all the relevant facts, being either indifferent to whether or not he is liable in law or knowing, or having reason to think, himself not liable, yet intending finally to close the transaction...[349]

Similarly, money voluntarily paid to close a transaction will not be recoverable.[350] Some cases have formulated the defence in terms of voluntary assumption of risk. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*, Hobhouse J rejected the contention that swaps payments had been made voluntarily, as there 'was no voluntary assumption of risk' on the part of the banks that the money was not due.[351] In *Webb v Ireland,* Blayney J adopted a similar approach in the High Court. The plaintiffs sought the return of the Derrynaflan hoard, which they had found and delivered to the National Museum of Ireland for safekeeping. The State counter-claimed for work carried out by the Museum restoring the hoard. Blayney J held that the State was entitled to recover for work carried out by the museum before it had notice of the plaintiff's claim, but could not recover in respect of work carried out thereafter, as they were aware of the risk that the hoard might belong to the plaintiffs:

> I consider that the fact that they had received notice of a claim resulted in a situation in which they ought to have been aware, irrespective of what they believed, that there was a risk that the claim was valid, and they necessarily accepted that risk....
>
> On the evidence, it is clear that all the work done by the National Museum, with the exception of the excavations carried out in the spring of 1980, was done after the plaintiffs had claimed the return of the hoard in November, 1981, and so expenditure on such work cannot be taken into account.[352]

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[349] *Rogers v Louth County Council* [1981] IR 265 (SC) 271. See also *Carse v Taylor* [1858] 7 ICLR 451, 455; *O'Loghlen v O'Callaghan* (1874) IR 8 CL 116, 121.

[350] *Maskell v Horner* [1915] 3 KB 106 (CA) 118. See also *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705 (QBD) 721; *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL) 165. The issue was canvassed in *Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council* [1999] QB 215 (CA) 232 (Waller LJ) but no conclusive view was expressed on the matter. Hill has argued that such a defence should not be available: Hill, 'Restitution from Public Authorities and the Treasury's Position: *Woolwich Equitable Building Society v IRC*' (1993) 56 MLR 856, 857-858.

[351] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 4 All ER 890.

[352] *Webb v Ireland* [1988] IR 353 (HC) 370.

Other judicial decisions have also canvassed the idea that payments made in settlement of an honest claim may not be recoverable.[353] The status of this defence is unclear, as is its relationship to the established defence of payment at all events and the rejected defence of honest receipt, which is discussed in Part IV. [354]

The state will rarely be able to rely on the 'voluntariness' of the payment in light of its unique position.[355] The payment will often be made in return for a withheld benefit, or with the implied threat that the coercive power of the state will be brought to bear on the individual in the event of non-payment. In *Rogers,* Griffin J held that this will be sufficient to displace the voluntary nature of the payment:

> The parties were not on equal terms. The defendants had the power, if they thought fit, to withhold permission for the redemption of the annuity; they were prepared to allow the plaintiff to redeem it but only on the conditions imposed by them, which included exacting a payment in excess of that permitted by the statute.[356]

Similarly, in *Mason v New South Wales*, the High Court of Australia rejected that payments to the state could be regarded as voluntary where they were implicitly backed by the coercive power of the state. Kitto J observed:

> To describe the fees, when paid in these circumstances, as paid voluntarily—to describe the plaintiffs as taking their chance whether they were giving their money away or not—is surely impossible. How absurd it would be to say that they made their choice "on reasonably equal terms". What was their choice but a yielding to the superior power of the State?[357]

Thus, it would seem that where the state has demanded money on the basis of withholding a benefit, or through threatening sanctions, the money cannot be regarded as having been paid voluntarily. Furthermore, it is arguable that a defence based on the voluntariness of the plaintiff's payment could never apply where restitution was sought on the basis of the

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[353] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 412-413. See also *Irving Oil Co v Belledune Housing & Enterprises Ltd* (1968) 1 NBR (2d) 48 [36]; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 373.

[354] Birks, *Unjust Enrichment* (n 253) 234; Edelman and Bant, *Unjust Enrichment in Australia* (n 208) 371.

[355] Burrows, 'Public authorities, Ultra Vires and Restitution' in Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press, Oxford 1991) 53.

[356] *Rogers v Louth County Council* [1981] IR 265 (SC) 271

[357] *Mason v New South Wales* (1959) 102 CLR 108 (HCA)129 (Kitto J). However, in the same case, Windeyer J was of the view that the defence of payment to close a transaction could be invoked even where the payment had been made as a result of duress *colore officii*: *Mason* (1959) 102 CLR 108 (HCA) 144.

Woolwich principle as 'the general restitutionary principle considered in *Woolwich* is not based on any mistake or compulsion. It does not focus on the conduct of the payer; rather, it looks to the character and position of the payee'.[358]

IV. Policy Motivated Defences

Other defences that have been canvassed in restitutionary claims are not based on a principled denial of an element of the plaintiff's cause of action, but instead are motivated by policy considerations. Policy can operate in three ways in the context of defences. First, public policy concerns can simply be relied upon in their own right as a basis for refusing restitution. As we have seen in Chapter 2, this approach has rarely been successful. Second, public policy can change the contours of an existing defence, as has happened to some extent where the change of position defence has been relied upon by the state and in the development of exhaustion of benefits as an extended form of the change of position defence. Third, public policy can generate specific restitutionary defences. Two such defences are considered in this Part. Section A considers payments made under a settled understanding of the law, or, the "settled law" defence. Section B considers the 'honest receipt' defence. Both, where suggested, have been confined to claims for restitution for mistake of law. This is unsurprising, as it is the mistake of law cause of action that gives rise to the concerns in relation to the defendant's security of receipt. Many feared that, if restitution were permitted for mistakes of law, this would have the effect of undermining the security of past transactions,[359] and, more specifically, would disrupt the stability of the public purse where taxes had been paid over a continuous period on an erroneous interpretation of the law.

A. Settled law defence

The settled law defence provides that, where the payment has been made under a settled understanding of the law, it will be irrecoverable, notwithstanding that the view of the law under which that payment was made was incorrect. Some cases have recognised that payments made pursuant to a settled understanding of the law are irrecoverable, although the status of the defence is unclear. These cases are considered in part (i). Furthermore, a statutory form of the settled law defence has been enacted in England. This defence is considered in part (ii).

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[358] Hill, 'Restitution from Public Authorities and the Treasury's Position: *Woolwich Equitable Building Society v IRC*' (n 350) 857-858.

[359] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) 392 (Lord Lloyd).

(i) The 'Settled Law' Defence at Common Law

A 'settled law' defence can be conceptualised in one of two ways.[360] First, it has been suggested that, where a plaintiff makes a payment pursuant to a general understanding of the common law, the payment will not be considered to have been made under a mistake if that general understanding subsequently proves to be incorrect. On this view, the 'settled law' defence is really a question of whether there has been a mistake in the first place. However, the premise upon which this interpretation of defence is based has been rejected by the House of Lords as being inconsistent with the declaratory theory of the law, as declarations of the law state what the law has always been.[361] Second, a settled understanding of the law can operate as a defence to a mistake claim. However, although the first conception of 'settled law' has been favoured by some commentators[362] and acknowledged by some judges,[363] judicial or legislative adoption of the rule has been couched in terms of an independent defence.[364]

The development of the settled law defence can be traced back to the English case of *Brisbane v Dacres,* in which Mansfield CJ stated that, where money had been paid pursuant to a settled understanding of the law, it was not unconscionable for the recipient to retain the money.[365]

Similarly, some early Irish cases suggest judicial recognition of a settled law defence. In *O'Loghlen v O'Callaghan,* the defendant paid rent to the plaintiff landlord, subject to deductions of poor rates as provided by section 74 of the Poor Relief (Ireland) Act 1838.[366] This was the common practice at the time. When it emerged that the applicable rate was not that specified in section 74 but that applicable under s 75 of the Act, the plaintiff sought to recover the excess sums deducted by the defendant. The money was held to be irrecoverable. Whiteside CJ observed that the money was paid under a mistake of law and continued:

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[360] See Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*' (1993) 15 Sydney Law Review 461, 468; Bhandari, 'Recovering Mistakenly Paid Tax: Taxes Management Act 1970, Section 33 and the Prevailing Practice Defence' (2008) 4 British Tax Review 335, 339.

[361] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL); *Murphy* [1982] IR 241 (SC).

[362] Virgo, *Principles of the Law of Restitution* (n 205) 176; Virgo, '*Deutsche Morgan Grenfell:* Restitution of Tax Paid by Mistake' [2004] British Tax Review 8, 14; Finnis, 'The Fairy Tale's Moral' (1999) 115 LQR 170, 172; *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Commission Report No 227: Cm 2731, 1994) [5.3].

[363] *Kleinwort Benson* [1999] 2 AC 349 (HL) 382 (Lord Goff) and 397 (Lord Lloyd).

[364] *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Commission Report No 227: Cm 2731, 1994). See Clause 3 of the Commission's draft bill.

[365] *Brisbane v Dacres* (1813) 5 Taunt 143, 161-162.

[366] Poor Relief (Ireland Act) 1838 1&2 Vict c 56.

> It seems to me to be exceedingly difficult for a party to recover back, by legal process, what he had so paid under a kind of custom and with knowledge of all the acts as they existed.[367]

He concluded that, as the money had been paid under a mistake of law and with knowledge of the facts, it was not recoverable.[368] A narrow reading of this case could simply treat it as authority for the rule that money paid under a mistake of law is irrecoverable. However, Whiteside CJ's recognition that the money had been paid 'under a kind of custom' is significant. It suggests that he considered the money to be irrecoverable on the basis that it had been paid pursuant to a settled understanding of the law.

A similar defence has been developed in Australia. In *David Securities,* a majority of the High Court of Australia recharacterised many of the cases commonly relied upon as authority for the mistake of law rule as cases founded upon a 'voluntary submission to an honest claim.'[369] However, as argued in Chapter 5, it is unwise to attempt to circumvent the mistake of law rule by recharacterising such cases as ones based on voluntary submission and the Irish courts should avoid following the example of the Australian courts in this regard. The defence of voluntary submission should only be used in cases where it is appropriate and the mistake of law rule should be explicitly abolished.

The 'settled law' defence was considered by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council.* The judges were divided as to whether or not such a defence should be adopted.[370] Lord Browne-Wilkinson was in favour of the adoption of such a defence:

> If, at the date of payment, it was settled law that payment was legally due, I can see nothing unjust in permitting the payee to retain moneys he received at a time when all lawyers skilled in the field would have advised that he was entitled to receive them and the payer was bound to pay them.[371]

He held that the settled understanding need not be established by clear judicial authority. It was sufficient that had the payer sought legal advice from a skilled practitioner in the field,

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[367] *O'Loghlen v O'Callaghan* (1874) IR 8 CL 116, 120.
[368] *Ibid,* 121.
[369] *David Securities* (1992) 175 CLR 353 (HCA) 372-374.
[370] See, Hedley, 'Restitution—mistake of law—Reform in Haste, Repent at Leisure' (1999) 58 CLJ 21, 22-23.
[371] *Kleinwort Benson* [1999] 2 AC 349 (HL) 363.

he would have been informed that the payment was valid or due.[372] Lord Lloyd considered that the existence of a settled understanding of the law meant that the plaintiff was not mistaken at the time of the payment.[373]

In contrast, Lord Hoffmann rejected the defence. He noted that a settled law defence could operate unfairly insofar as those who failed to seek legal advice as to the state of the law could recover the payment, whereas those who did seek such advice could not.[374] He also noted that the defence was being advocated to prevent fiscal disruption. Changing the law in this manner, to give effect to policy concerns, 'would be a legislative act in a sense in which the abrogation of the mistake of law rule would not.'[375] Lord Goff also held that the defence should be rejected for two reasons. First, the defence was inconsistent with the declaratory theory of law, on which the English common law was based.[376] Second, statutory forms of the defence, which had been adopted in New Zealand[377] and in Western Australia,[378] had given rise to considerable difficulties in determining what constituted a 'settled understanding' for the purposes of the defence.[379] However, Lord Goff left open the possibility that a settled law defence might apply to claims for recovery of overpaid taxes:

> in cases concerned with overpaid taxes, a case can be made in favour of a principle that payments made in accordance with a prevailing practice, or indeed under a settled understanding of the law, should be irrecoverable.[380]

The English courts have subsequently resisted further entreaties to introduce a 'settled law' defence. In *DMG,* Jonathon Parker LJ, in the Court of Appeal, held that recognition of such a defence was primarily a 'question for Parliament' and, insofar as the matter fell to be addressed by the courts, Lord Goff had declined to recognise such a defence in *Kleinwort Benson.*[381] This approach was echoed by Lord Walker on appeal in *DMG*, who held that:

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[372] *Ibid,* 363. *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Commission Report No 227: Cm 2731, 1994) [5.11].
[373] *Ibid,* 397. See also Lord Browne Wilkinson at 358-359.
[374] *Ibid,* 399-400.
[375] *Ibid,* 401.
[376] *Ibid,* 381.
[377] Section 94A(2) of the Judicature Act 1908.
[378] Section 23(2) of the Law Reform (Property, Perpetuities and Succession) Act 1962.
[379] *Kleinwort Benson* [1999] 2 AC 349, 383. See also Lord Hope at 414.
[380] *Ibid,* 382.
[381] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2005] EWCA Civ 78, [2006] Ch 243 [237].

> As Lord Goff recognised in the *Woolwich* and *Kleinwort Benson* cases, there are strong policy arguments in favour of a general common law right of recovery of wrongly exacted tax, and also strong countervailing arguments in favour of some restrictions on that right of recovery, especially as the defence of change of position could seldom, if ever, apply to wrongfully exacted tax. But the balancing of these high policy arguments is essentially a matter for the legislature.[382]

More recently, in *Monro v Revenue and Customs Commissioners*, Arden LJ confirmed that 'The common law does not recognise a "settled understanding of the law defence"'.[383]

Although the settled law defence would provide a simple solution to concerns about the security of public receipts, and, in particular, of revenue receipts, in the wake of the abolition of the mistake of law bar,[384] commentators have identified several significant shortcomings related to the defence. First, as noted by Lord Goff in *Kleinwort Benson*, there would be considerable difficulty in defining what constitutes a settled understanding of the law.[385] Beatson has noted that 'it is possible for a "common understanding" to be formed by a very small class of people, since it is only those who have adverted to the issue who count.'[386] To this end, Virgo has described the Law Commission's failure to include a definition of what would constitute a settled understanding of the law in their draft Bill as 'unfortunate'.[387] Second, because it is uniquely within the Revenue's power to establish a settled practice within the law, 'the Revenue can create a situation in which the bar to recovery will operate and only those taxpayers with substantial resources will in practice be able to dispute the Revenue's view of what is "accepted" as practice.'[388]

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[382] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 [145].

[383] *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306, [2009] Ch 69 [7].

[384] Convery, 'Lord Goff's Swansong: Restitution, Mistake of Law, and the Retrospective Effect of Judicial Decisions' (1999) 3 Edinburgh Law Review 202, 210; Virgo, '*Deutsche Morgan Grenfell:* The Right to Restitution of Tax Paid by Mistake Rejected' [2005] British Tax Review 281, 285; Virgo, 'Striking the Balance in the Law of Restitution' [1995] LMCLQ 362, 365.

[385] Allen, 'Restitution of Payments Made Under Mistake of Law and the Security of Completed Transactions' (2004) 63 CLJ 27, 29; Sheehan, 'What is a Mistake?' (2000) 20 Legal Studies, 538, 558; Virgo, '*Deutsche Morgan Grenfell:* Restitution of Tax Paid by Mistake' (n 362) 14.

[386] Beatson, 'Mistakes of Law and Ultra Vires Public Authority Receipts: The Law Commission Report' [1995] RLR 280, 284.

[387] Virgo, 'Striking the Balance in the Law of Restitution' (n 384) 366.

[388] Beatson, 'Mistakes of Law and Ultra Vires Public Authority Receipts: The Law Commission Report' (n 386) 285.

Third, it has been suggested that the defence would undermine the constitutional principle on which the right to recovery of unlawfully paid taxes is based. Virgo has argued that

> The argument of constitutional impropriety in the public authority retaining money which was not due to it should prevail over that founded on the disruption to public funds arising from a mistake as to a settled view of the law.[389]

If the settled law defence is confined to mistake claims, as appears to have been envisaged by Lord Goff in *Kleinwort Benson,* the constitutional principle would not be undermined, as the taxes would continue to be recoverable pursuant to the *Woolwich* principle. However, as noted above, the public law principles behind the *Woolwich* principle continue to apply where restitution is sought from the state on the basis of other unjust factors.[390] Therefore, the fact that the *Woolwich* principle is available is irrelevant. Fourth, to recognise a settled law defence appears to be inconsistent with the requirements of Community law. In *Fantask* the ECJ rejected a defence in Danish law in similar terms, stating that

> such a principle in the circumstances described would make it excessively difficult to obtain recovery of charges which are contrary to Community law. It would, moreover, have the effect of encouraging infringements of Community law which have been committed over a long period. [391]

Fifth, a settled law defence might have unforeseen consequences for the structure of our legal system. Not only is such a defence inconsistent with the declaratory theory of the law, [392] Sheehan has argued that, if a settled law defence is adopted:

> '...the conclusion has to be reached that there is one more source of law than we had thought there was. This is the common understanding of the law. If that common understanding exists, then it can be said that that was the law. This is a conclusion that payers would instinctively and rightly shy away from'.[393]

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[389] Virgo, 'Restitution from Public Authorities: Past, Present and Future' [2006] Judicial Review 370, 377.
[390] See above at 300-302.
[391] C-188/95 *Fantask A/S v Industriministeriet* [1997] ECR I-6783 [40]. See also *FII Group Litigation* [2008] EWHC 2893 (Ch) [308]; *Littlewoods* [2010] EWHC 1071 (Ch) [137]; *F J Chalke Limited, A C Barnes (Wokingham) Limited v The Commissioners for Her Majesty's Revenue & Customs* [2009] EWHC 952 (Ch) [176]; Williams, *Unjust Enrichment and Public Law* (n 9) 142.
[392] Virgo, 'Striking the Balance in the Law of Restitution' (n 384) 365.
[393] Sheehan, 'What is a Mistake?' (n 385) 554.

Sheehan also argued that 'if change of position is broadly interpreted, the defence ought not to be necessary.'[394] In light of these concerns, the Irish courts should resist the adoption of such a defence in this jurisdiction.

(ii) The Prevailing Practice Defence

A statutory form of the settled law defence has been enacted in England. It was originally contained in section 33 of the Taxes Management Act 1970, which applied when an error or mistake in a tax return which led to an excessive calculation of tax for self-assessment purposes. Section 33(2A) provided that no relief would be given for

> (a) an error or mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

The prevailing practice defence had been the subject of considerable criticism. It had been argued that the defence should be removed from the legislation, as it has made claims against the Revenue 'excessively difficult'.[395] The unfairness of this defence is compounded by the fact it precludes recovery of taxes where no liability to pay them existed in the first place.[396] Furthermore, the concept of what constitutes a prevailing practice was 'nebulous, and determining what it amounts to in a particular case can involve an expensive and time-consuming appeal to the Special Commissioners.'[397] Finally, concerns had been expressed that the defence was not compatible with Community law. [398] This last concern was addressed in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners*. Henderson J held that section 33, where applicable to taxes levied in breach of Community law, 'must yield to the principle of effectiveness under Community law where the claimant seeks domestic redress for a San Giorgio claim.'[399] Henderson J reached this

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[394] *Ibid,* 557.
[395] Bhandari, 'Recovering Mistakenly Paid Tax: Taxes Management Act 1970, Section 33 and the Prevailing Practice Defence' (n 360) 341.
[396] *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Commission Report No 227: Cm 2731, 1994) [10.12].
[397] *Ibid,* [10.15]; Jones, '*Monro v HMRC*: Defining the Scope of Section 33 TMA 1970' (2008) British Tax Review 315, 320-321. See also Jones, 'Finance Act Notes: Section 100 and Schedule 52 - Recovery of Overpaid Tax' (2009) 5 British Tax Review 635, 636.
[398] Bhandari, 'Recovering Mistakenly Paid Tax: Taxes Management Act 1970, Section 33 and the Prevailing Practice Defence' (n 360) 348-349; Jones, 'Finance Act Notes: Section 100 and Schedule 52 - Recovery of Overpaid Tax' (n 397) 636.
[399] *FII Group Litigation* [2008] EWHC 2893 (Ch) [439].

conclusion in relying on the decision in *Monro*, where he held that the point was established, 'although slightly obliquely'.[400]

The Court of Appeal upheld Henderson J's assessment. It held that 'subsection (2A)(a) is incompatible with Community law, as it would wholly deprive the Claimants of any remedy for repayment of taxes paid in breach of Community law as a result of the Revenue's misunderstanding and misapplication of that law.'[401] However, the Court held that, rather than simply disapplying the provision, it had to be seen whether the provision could be interpreted so as to render it compatible with Community law.[402] It held that 'subsection (2A)(a) is to be read as subject to the limitation that it applies only if and to the extent that the United Kingdom can consistently with its Treaty obligations impose such a restriction.'[403]

Section 33 has been substantially amended by the Finance Act 2009. Claims for recovery of overpaid tax are now dealt with in Schedule 1AB.[404] The Schedule applies where a person has paid, or has been assessed as liable to pay, income tax or capital gains tax that he believes is not due. Regulation 2 of the Schedule sets out the circumstances in which the Revenue Commissioners will not be liable to make repayment. The prevailing practice defence is re-enacted in regulations 2(8) and 2(9). Regulation 2(8) provides that recovery will not be available in respect of overpayments where 'liability was calculated in accordance with the practice generally prevailing at the time.'[405] Regulation 2(9) extends the prevailing practice defence to PAYE payments.

In view of the considerable criticism of the rule, most notably in the Law Commission's 1994 report, it is 'disappointing' that the defence was retained and extended in the amended section 33.[406] Regulation 1 substantially widens the scope of the statutory scheme for recovery, so that it is no longer confined to taxes paid pursuant to an erroneous assessment. This reduces the circumstances in which litigants will be able to recover money that they did not owe, and the Revenue Commissioners can avail of the defence to retain

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[400] *Ibid,* [439]. In *Monro v Revenue and Customs Commissioners* [2008] EWCA Civ 306, [2009] Ch 69 [34], Arden LJ held:

> The Court of Justice of the European Communities has held that the principle of effectiveness must be observed in relation to recovery of tax under Community law. It would thus follow that such a right could not be taken away until a person had been given an adequate opportunity to pursue it.

[401] *FII Group Litigation* [2010] EWCA Civ 103 [257].
[402] *Ibid,* [252].
[403] *Ibid,* [261]-[264]. Compare C-188/95 *Fantask A/S v Industriministeriet* [1997] ECR I-6783 [40].
[404] Inserted by section 100 of the Finance Act 2009 and Schedule 52 of the same Act.
[405] Regulation 2(8)(b).
[406] Jones, 'Finance Act Notes: Section 100 and Schedule 52 - Recovery of Overpaid Tax' (n 397) 636.

money to which it was not entitled in many more cases than was previously possible. Further, the failure of the legislation to address concerns regarding where taxes are levied contrary to European law is of particular concern, particularly where the issue had been judicially considered and the failure of the law to make provision for this circumstance was clear.

B. Honest receipt

The honest receipt defence was developed by Brennan J in the High Court of Australia in *David Securities* as a defence specific to mistake of law claims.[407] Brennan J formulated the 'honest receipt' defence as follows:

> It is a defence to a claim for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer, that he was entitled to receive and retain the money or property.[408]

Brennan J considered that such a defence was necessary to ensure that the finality of settled transactions would not be undermined by the abolition of the mistake of law rule: 'Unless some limiting principle is introduced, the finality of any payment would be as uncertain as the governing law.' [409]

The payee's state of mind is to be assessed at the time of the payment. Therefore, once the payee had received the money honestly, it is irrelevant that he subsequently learned that the money was not owing to him.[410] Furthermore, Brennan J held that the 'defence applies pro tanto; it does not apply to any part of the money or property which the defendant did not honestly believe himself to be entitled to receive and retain.'[411]

Although McInnes has suggested that the majority in *Royal Insurance* implicitly accepted the honest receipt defence,[412] the majority decision in *David Securities* contains no hint of judicial approval of Brennan J's proposition. In *Hookway v Racing Victoria Ltd,* Ormiston JA doubted that the honest receipt defence was good law. [413] He noted that Brennan

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[407] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 398.
[408] *Ibid,* 399.
[409] *Ibid,* 398.
[410] *Ibid,* 398.
[411] *Ibid,* 399.
[412] McInnes, 'Mistaken Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance*' (n 96) 232-233.
[413] *Hookway v Racing Victoria Ltd* [2005] VSCA 310 [58].

J's view was inconsistent with those of other members of the court and was 'based on the need to find a practical limiting principle and not on any authority.' [414]

> The defence has been rejected in England. In *Kleinwort Benson,* Lord Goff held:
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> Anything which falls from Brennan J is, of course, entitled to great respect. But I have to state at once that this proposal seems to have been stillborn. Of the judges who sat with Brennan J on the David Securities case, none supported this proposal. I know of no judicial support which the proposal has since received, nor of any support from any of the Law Commissions which have considered this part of the law. The reason for this lack of support is, I believe, that the proposal is generally regarded as being wider than is necessary to meet the perceived mischief. [415]

Lord Lloyd also rejected the honest receipt defence. He said it would run counter to many authorities, there was no principled basis for confining it to mistakes of law and recognition of the defence would be inconsistent with the change of position defence.[416]

Brennan J's defence should be rejected for several reasons.[417] First, as recognised by Brennan J himself,[418] the defence involves the maintenance of the distinction between mistakes of fact and mistakes of law. When the distinction has been abolished in respect of restitutionary causes of action, it seems to be illogical to resurrect it for the purposes of establishing defences.[419] Second, the defence undermines the strict liability nature of the cause of action, as it requires an element of fault before the plaintiff will be entitled to restitution of money paid pursuant to a mistake of law. Indeed, the plaintiff must establish that the defendant's receipt was dishonest. It will not be sufficient that the defendant was negligent as to whether he was entitled to the money, or that the defendant never turned his mind to the question of whether the sum was genuinely owed to him or not. This will make it particularly difficult to obtain restitution from the state, since, in receiving unlawfully exacted

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[414] *Ibid,* [52].
[415] *Kleinwort Benson* [1999] 2 AC 349 (HL) 384-385.
[416] *Ibid,* 413.
[417] See also, Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*' (n 360) 483.
[418] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 (HCA) 399.
[419] Burrows, 'Restitution for Mistake of Law in Australia' (1993) 13 Oxford Journal of Legal Studies 584, 588; Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*' (n 360) 483; McInnes, 'Mistaken Payments Return to the High Court: *Commissioner of Revenue v Royal Insurance*' (n 96) 232-233.

taxes, the state is generally considered to have acted in good faith.[420] Third, the defence appears to be superfluous, as the change of position defence allows the defendant to avoid making restitution where his circumstances have changed so as make it unjust to require him to make restitution. Furthermore, the honest receipt defence does not require any consideration of whether the payee relied on the security of his receipt and, in failing to do so, fails to give effect to any policy concerns in the law of restitution, other than a general concern to prevent 'too much restitution'. If the change of position defence is sufficient to protect the payee's security of receipt, it is not clear why it is necessary to have a defence that goes further. As Brennan J himself recognised in *David Securities,* 'if money paid under a mistake of law is not received in satisfaction of an honest claim of right, it may not be possible to raise a defence of change of position'.[421]

Although an honest receipt defence has not been expressly adopted in Ireland, in *Murphy,* Henchy J relied on the *bona fides* of the state's receipt as a basis for establishing a broadly drawn change of position defence.[422] He also accepted the novel argument that, as the plaintiffs were members of the community and the taxes had been spent in the common good, they had benefited from the expenditure of the taxes and

> the position had become so altered, the logistics of reparation so weighted and distorted by factors such as inflation and interest, the prima facie right of the taxpayers to be recouped so devalued by the fact that, as members of the community, and more particularly as married couples, they had benefited from the taxes thus collected, that it would be inequitable, unjust and unreal to expect the State to make full restitution.[423]

This approach is inappropriate. Henchy J was influenced by the fact that the State had received the money in good faith and had spent it in accordance with the needs of the common good. However, the bona fides of the receipt is not a relevant consideration in the law of restitution. Neither is the nature of the expenditure, other than for the purposes of the

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[420] See, for example, *Murphy* [1982] IR 241 (SC) 320; *FII Group Litigation* [2008] EWHC 2893 [344]. See also, Bryan, 'Mistaken Payments and the Law of Unjust Enrichment: *David Securities Pty Ltd v Commonwealth Bank of Australia*' (n 360) 483; Virgo, 'The Law of Taxation is not an Island—Overpaid Taxes and the Law of Restitution' (n 182) 457.However, McKendrick has taken the contrary view and argued 'if the unjust factor is based on the *ultra vires* nature of the demand, can such a claim be the subject-matter of an "honest settlement"?': McKendrick 'Restitution of Unlawfully Demanded Tax' [1993] LMCLQ 88, 99.

[421] *David Securities* (1992) 175 CLR 353 (HCA) 399.

[422] See above at 297-300.

[423] *Murphy* [1982] IR 241(SC) 220.

change of position defence. The principle of security of receipt is not premised on the assumption that the recipient should spend the money on something worthwhile. If that was the case, the court would be required to enter into inappropriate considerations of what constitutes worthwhile expenditure for the purposes of the defence of change of position.

In *Re Article 26 and the Health (Amendment) (No 2) Bill 2004,* Hardiman J's questions to counsel suggest he considers good faith receipt of money to be a possible defence. [424] However, the issue was not canvassed in any detail in that case, as the State continued to impose the charges after it became aware that they were illegal and could in no way be said to have acted in good faith. As noted in *Re Article 26 and the Health (Amendment) (No 2) Bill 2004*, the presumption of constitutionality of the tax measure in *Murphy* meant that the State was entitled to assume that the charges were lawful until otherwise informed.[425] In light of the lack of judicial support for an 'honest receipt' defence, coupled with the shortcomings of the rule that were discussed above, the Irish courts should resist adopting a similar rule in this jurisdiction.

Conclusions

This chapter demonstrates that generous restitutionary causes of action have been matched with generous restitutionary defences. This is particularly evident in the expansive approach to the change of position defence that has been adopted by the English and Irish courts, and in the generous approach to the passing on defence that has been adopted by the Australian courts. Furthermore, recent judicial and academic discussion of the change of position defence and claims for overpaid tax demonstrates that restitutionary defences, and the change of position defence in particular, will continue to be an area of controversy where restitution is sought from the state.

It is also clear that the significance of the special position of the state is not limited to restitutionary causes of action and may also be relevant where the state seeks to rely on specific restitutionary defences. This Chapter has argued that limits may need to be imposed on restitutionary defences to ensure that they do not render nugatory the important public law imperatives that underpin the *Woolwich* principle or infringe the plaintiff's constitutional rights—most notably the right to property. This Chapter has argued that the constitutional

[424] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105, 122. Hardiman J observed that '[t]he good faith receipt of monies is possible until a statute is challenged', but queried whether the situation that the Health Amendment (No 2) Bill sought to remedy was a 'deliberate breach of statute'.
[425] *Ibid,* [93] and [106].

right to property may be relied upon to import a proportionality requirement into the change of position defence where it is relied upon by the state in response to claims for restitution of overpaid tax. Moreover, it has demonstrated that, in many cases, the Irish and the English courts *have* implicitly considered such a proportionality requirement where the state has relied on the change of position defence.

This Chapter has demonstrated that, not only are the Irish courts willing to adopt expansive formulations of established defences, to claims for overpaid tax, they are also willing to consider specific, policy-motivated defences, such the 'settled law' and 'honest receipt' defences, as well as an expanded change of position defence in the form of the 'exhaustion of benefits' defence. However, the experience of jurisdictions that have expressly considered such policy motivated defences demonstrates that such policy defences are not without their problems and should not be adopted in this jurisdiction. Finally, although policy motivated defences have been rejected in many jurisdictions, some of these defences have been established through legislation. The most notable of these is the prevailing practice defence in section 33 of the English TMA. Similarly, 'unjust enrichment' defences have been incorporated into VAT legislation, where the passing on defence has been judicially rejected, such as Section 20(5) of Ireland's Value Added Tax Act 1972 and Section 80(3) of England's Value Added Tax Act 1994. However, these defences remain controversial, and their compatibility with EU law remains open to doubt.

Chapter 9: Remedies

Ordinarily, where a court determines that the state has been unjustly enriched by the receipt of unlawfully exacted taxes, it will order repayment of the sum, along with an award of interest.[1] However, the Irish courts have taken an approach to remedies that is at best flexible and at worst incoherent. They have awarded a wide variety of remedies, both personal and proprietary, in response to claims for restitution of overpaid tax.

This Chapter briefly considers the remedies that are available to a plaintiff who seeks restitution from the state. Part I of this Chapter examines personal remedies available in response to unjust enrichment claims. Remedies awarded in response to unjust enrichment claims are generally personal in nature and the principles applicable to personal liability are rarely contested. In contrast, the relationship between proprietary interests and restitution for unjust enrichment is highly controversial.[2] Although many commentators have argued that unjust enrichment does not generate a proprietary response,[3] the Irish courts have frequently granted proprietary remedies in response to claims for restitution in general[4] and to claims for restitution of overpaid tax in particular.[5] These proprietary responses are considered in Part II. However, the larger debate surrounding the relationship between the law of property and restitution for unjust enrichment is beyond the scope of this Thesis. Finally, Part III considers the doctrine of subrogation and the doctrine of rescission. These are 'hybrid' remedies that may be either personal or proprietary in their effects and may operate to reverse unjust enrichment.

Given the unique approach of the Irish courts to the remedies available in unjust enrichment claims, and the considerable divergence between the other jurisdictions

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[1] See Chapter 3 on the payment of interest on claims for restitution of unlawfully exacted tax.

[2] For a sample of this debate see: Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2011) 170-187; Birks, *Unjust Enrichment* (2nd edn OUP, Oxford 2005) 33-34; Birks, 'Property and Unjust Enrichment: Categorical Truths' [1997] New Zealand Law Review 623, 642; Grantham and Rickett, 'Property Rights as a Legally Significant Event' (2003) 62 CLJ 717; Swadling, 'Property and Unjust Enrichment' in Harris (ed) *Property Problems: From Genes to Pension Funds* (Kluwer Law International, London 1997) 130. For a snapshot of the debate see, in particular, Virgo, 'Vindicating Vindication of Property Rights' in Hudson (ed) *New Perspectives on Property Law, Obligations and Restitution* (Cavendish Publishing, London 2004).

[3] Swadling, 'Property and Unjust Enrichment' (n 2) 130.

[4] *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 469 (SC) 483; *Kelly v Cahill* [2001] 1 IR 56 (HC) 62; *In re PMPA Insurance Co Ltd* [1986] ILRM 524 (HC). See also Burrows, *The Law of Restitution* (n 2) 172-173; Birks, *Unjust Enrichment* (n 2) 26 and 186-189.

[5] *Murphy v AG* [1982] IR 241(SC); *O'Rourke v Revenue Commissioners* (Supreme Court, 15 May 1996); *In re Frederick Inns* [1991] ILRM 582 (HC) 593-594. Proprietary relief was not considered on appeal in this case: [1994] 1 ILRM 387 (SC).

considered in this Thesis,[6] the primary focus in this Chapter will be on Irish law. However, reference will be made to English authorities for two reasons. First, the Irish courts have failed to identify the principles underpinning their approach to many remedies awarded in restitution claims. Second, the Irish courts, in developing many remedies, have purported to follow English authorities in doing so. Therefore, regard must be had to the English cases on which the Irish cases have built their doctrines in order to develop a principled framework with which to begin analysis of the Irish cases.

I. Personal remedies

Restitutionary remedies are generally personal in nature.[7] This Part considers three personal remedies. Section A considers common law claims for account. These are the route by which restitution is most commonly sought and the principles applicable to such claims are uncontroversial. Section B considers the novel development in *Murphy v Attorney General,* in which Henchy J held that the unjust enrichment of the state rendered it liable to account in equity in respect of the overpaid tax. Both forms of account, at law and in equity, are personal remedies that respond to unjust enrichment. However, restitutionary relief may also take the form of restitutionary damages. These damages are a gain-based form of relief awarded in respect of a wrong committed by the defendant, rather than in response to unjust enrichment. Section C describes restitutionary damages in Irish law and considers whether they are available in breach of statutory duty claims against the state.

A. Common Law Claims for Account

As noted in Chapter 2, restitution was traditionally effected through causes of action founded on the common law writ of *indebitatus assumpsit.* Therefore, the law of restitution has been built upon claims based on the traditional common law counts: the action for money had and received, the action for money paid to the defendant's use, the *quantum meruit* claim and the *quantum valebat* claim.[8] In light of this historical development of the law of restitution, it is unsurprising that claims for account at common law are available as a

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[6] For example, much of the debate relating to constructive trusts and unjust enrichment in Canada has centred on trusts of family property. See: *Pettkus v Becker* [1980] 2 SCR 834 (SCC); *Sorochan v Sorochan* [1986] 2 SCR 38 (SCC); *Rawluk v Rawluk* [1990] 1 SCR 70 (SCC); *Rathwell v Rathwell* [1978] 2 SCR 436 (SCC).

[7] Burrows, *The Law of Restitution* (n 2) 14; Birks, *Unjust Enrichment* (n 2) 167.

[8] See Chapter 2 at 17. *Peel (Regional Municipality) v Canada* [1992] 3 SCR 762, (1993) 98 DLR (4th) 140 [28]; *East Cork Foods Limited v O'Dwyer Steel Company Limited* [1978] 1 IR 103 (SC) 110-111. These counts, and the *indebitatus assumpsit*, were abolished by the Common Law Procedure Act 1852 and the Judicature Acts 1873 and 1875.

personal, restitutionary response to reverse unjust enrichment.[9] Many, if not most, cases of restitution from the public authorities concern the recovery of taxes or charges.[10] Therefore, the action for money had and received is the common law claim most commonly relied upon where restitution is sought from the state.[11] Although the other claims are available in principle, it is rare that they will be available on the facts of any given case.[12]

B. Claims for Account in Equity

Irish plaintiffs are not confined to claims for account at law, as the state may be liable to account in equity. In *Murphy,* Henchy J held:

> Whether the action be framed at common law for money had and received or (as here) in equity for an account of money held as a constructive trustee for the plaintiffs, I would hold that, in the absence of countervailing circumstances (to which I shall presently refer), such money may be recovered.[13]

This conclusion is significant for two reasons. First, it is highly unusual that liability in unjust enrichment will generate liability to account in equity, as liability in unjust enrichment is generally recognised as giving rise to liability at law.[14] Typically, liability to account in equity is confined to three categories of case—where the defendant is a trustee *de son tort,*[15] where he is liable for dishonest assistance in a breach of trust,[16] or where he has received

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[9] Virgo, *Principles of the Law of Restitution* (2nd edn OUP, Oxford 2006) 21; Burrows, *The Law of Restitution* (n 2) 15; Birks, *Unjust Enrichment* (n 2) 168-169.

[10] See, for example, *Dolan v Neligan* [1967] IR 247 (HC)(SC); *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC); *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC).

[11] *Campbell v Hall* (1774) 1 Cowp 204, 205; *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL) 199 (Lord Slynn); *Mason v New South Wales* (1959) 102 CLR 108 (HCA) 139; *Dolan v Neligan* [1967] IR 247 (HC) 258; *Rogers v Louth County Council* [1981] IR 265 (SC) 271; *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7, [2005] 1 IR 105 [121]. Hereafter *Health Amendment Bill*. In many ways, the whole of this thesis before this Chapter is a description of this count in action.

[12] It is rare that the taxpayer will have paid money to a third party for the state's benefit and many claims for goods or services delivered to the state are likely to arise in the context of commercial transactions, which do not attract the public policy concerns applicable to claims for recovery of overpaid charges.

[13] *Murphy v Attorney General* [1982] IR 241 (SC) 316. In light of the confusion that the term 'liability to account as a constructive trustee' has caused in Irish law, the term 'liability to account in equity' will be used throughout this Chapter.

[14] See, for example, Lord Scott's comments in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 1752 [39]-[44].

[15] *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 [132]-[144].

[16] *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC); *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Ch) 291 (Ch); *The Law Society of England and Wales v Habitable Concepts Limited* [2010] EWHC 1449 (Ch) [19]. See also *Twinsectra Ltd v Yardley* [2002] UKHL 12, [2002] 2 AC 164; *Barlow Clowes International Ltd (in liquidation) v Eurotrust International Ltd* [2005] UKPC 37, [2006] 1 WLR 1476.

property in the knowledge that it is trust property.[17] Henchy J did not consider what events will trigger liability to account in equity, as opposed to liability to account at law. However, it appears from his conclusions in *Murphy* that both forms of liability may be founded upon traditional unjust factors, such as duress *colore officii.*

The suggestion that liability to account in equity can respond to unjust enrichment claims, although novel, is unsurprising as a matter of Irish law. The Irish courts have demonstrated considerable remedial flexibility when reversing unjust enrichment. They have not confined plaintiffs to personal claims for money awards, but instead have held that proprietary remedies—such as constructive trusts,[18] resulting trusts,[19] or restitution of property *in specie*[20]— are available to reverse unjust enrichment. A personal claim to account in equity can easily be accommodated within this flexible approach. However, it is unclear what circumstances will justify the imposition of liability to account in equity, rather than liability to account at law, or whether both forms of liability arise concurrently.

However, another aspect of Henchy J's judgment is troubling, as he appears to consider that liability to account as a constructive trustee in equity is premised upon an implicit contention that the defendant *is* a constructive trustee of the property:[21]

> The implied contention that the State *is a constructive trustee* of the money collected as income tax under the condemned sections is the counterpart in equity of a claim in common law for money had and received. In *Moses v Macferlan* ... Lord Mansfield held that "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." Thus, he put the claim on the footing of equity, or unjust enrichment, rather than under the fiction of an implied promise to repay money had and received.

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[17] *BCCI v Akindele* [2001] Ch 437 (CA); *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Ch) 291; *The Law Society of England and Wales v Habitable Concepts Limited* [2010] EWHC 1449 (Ch) [29]. See also, Smith, 'Constructive Trusts and Constructive Trustees' (1999) 58 CLJ 294, 299; Adeline Chong, 'The Common Law Choice of Law Rules for Resulting and Constructive Trusts' (2005) 54 ICLQ 855, 855.

[18] *East Cork Foods v O'Dwyer Steel* [1978] IR 103 (SC) 111; *Motor Insurers' Bureau of Ireland v Stanbridge* [2008] IEHC 389; *HKN Invest OY v Incotrade PVT Ltd (In Liquidation)* [1993] 3 IR 152 (HC); *Kelly v Cahill* [2001] 1 IR 56 (HC). See further Mee, 'Palmtrees in the Rain, The New Model Constructive Trust in Ireland' [1996] Commercial and Property Law Journal 9; O'Dell, 'Unjust Enrichment and the Remedial Constructive Trust' (2001) 8 Dublin University Law Journal (ns) 71.

[19] *Dublin Corporation v Building and Allied Trade Union* (High Court, 6 March 1996). Budd J appeared willing to consider resulting trusts as a response to restitutionary claims, although he rejected the doctrine's application on the facts. This issue did not arise on appeal: *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468 (SC).

[20] *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 468 (SC) 483.

[21] *Murphy* [1982] IR 241 (SC) 317.

> Whether the action be framed at common law for money had and received or (as here) in equity for an account of money *held as a constructive trustee* for the plaintiffs, I would hold that, in the absence of countervailing circumstances (to which I shall presently refer), such money may be recovered. [22]

These comments demonstrate that, in imposing the personal remedy of liability to account as a constructive trustee, Henchy J considered that defendant held the money received '*as* a constructive trustee.' This analysis is incorrect as a matter of authority. Liability to account as a constructive trustee is a personal remedy[23] and should not be confused with the imposition of a constructive trust.[24] As Lord Millett noted in *Dubai Aluminium Co Ltd v Salaam*, a person who is liable to account as a constructive trustee

> is not in fact a trustee at all, even though he may be liable to account as if he were. He never claims to assume the position of trustee on behalf of others, and he may be liable without ever receiving or handling the trust property. If he receives the trust property at all he receives it adversely to the claimant and by an unlawful transaction which is impugned by the claimant. He is not a fiduciary or subject to fiduciary obligations ....[25]

Although consideration of whether the state will be liable to account at law or in equity may seem to be an arid debate, the determination as to whether the defendant is liable to account in law or in equity may have significant consequences. In particular, if the Irish courts do not follow the House of Lords' conclusion in *Sempra Metals* that compound interest is available at law,[26] equity's inherent jurisdiction to award compound interest may render a claim for account in equity more attractive than common law claims. However, further judicial clarification of certain issues would be welcome. In particular, the Irish courts should identify in what circumstances liability to account in equity will be imposed in response to an unjust enrichment claim, and should clarify the relationship in Irish law

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[22] *Murphy* [1982] IR 241 (SC) 316. Emphasis added.
[23] *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Ch) 290-291.
[24] Smith, 'Constructive Trusts and Constructive Trustees' (n 17) 298-299; Hayton, 'Liability as Constructive Trustee' (1990) 11 Comparative Law 97, 97; Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 339, 399-400.
[25] *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 [141]. See also, *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 (CA) 409; *JJ Harrison (Properties) Ltd v Harrison* [2001] EWCA Civ 1467, [2002] BCC 729 [28]. See further, Millett, 'Restitution and Constructive Trusts' (n 24).
[26] See further, Chapter 3 at 108-110.

between liability to account in equity and a determination that a defendant *is* a constructive trustee.

C. Restitutionary Damages

As discussed in Chapter 3, restitution does not simply respond to unjust enrichment, it also responds to other events. [27] Where the defendant has obtained a gain as a result of committing a wrong against the defendant, the plaintiff may be able to seek an award of restitutionary damages.[28] Restitutionary damages do not compensate the plaintiff. Instead, they seek to remove from the defendant the gain that he made by committing the wrong.[29] In some cases, such damages may be available against the state where it has committed a breach of statutory duty. However, before it is possible conclude that restitutionary damages are available in such circumstances, it is first necessary to consider whether, as a matter of Irish law, they are generally available in respect of wrongs in general and tort claims in particular.[30]

There are two forms of restitutionary damages.[31] The first, known as *Wrotham Park* damages, is generally awarded where the defendant has obtained a gain in breach of the plaintiff's rights.[32] The award that is made in such cases will reflect the price that the defendant would have had to pay the plaintiff to acquire the plaintiff's right, as this is the amount that the defendant saved by acting in breach of that right.[33] Thus, where *Wrotham Park* damages are awarded,

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[27] Birks, 'Misnomer' in Cornish, Nolan, O'Sullivan, and Virgo (eds) *Restitution: Past, Present and Future* (Hart, Oxford 1998) 7; Swadling, 'Rescission, Property, and the Common Law' (2005) 121 LQR 123, 134. See also Burrows, *The Law of Restitution* (3rd edn OUP, Oxford 2011) 9-12.

[28] Beatson, 'The Nature of Waiver of Tort', in *The Use and Abuse of Unjust Enrichment* (Clarendon Press, Oxford 1991) 232; Edelman, 'Restitutionary Damages for Torts' (2006) 122 LQR 391; Rotherham 'The Conceptual Structure of Restitution for Wrongs' (2007) 66 CLJ 172, 174.

[29] In *Duhan v Radius Television Production Ltd* [2007] IEHC 292, [2008] 1 IR 506 [43], Herbert J acknowledged that such damages operated to reverse unjust enrichment.

[30] *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 AC 122, 156.

[31] See Rotherham, 'Gain-based Relief in Tort after *AG v Blake*' (2010) LQR 102, 103 *et seq; Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086, [2009] Ch 390 [3]; Sheehan, 'Competition Law Meets Restitution for Wrongs' (2009) 125 LQR 222, 223. Compare, Edelman, *Gain-Based Damages* (Hart Publishing, Oxford 2002) 80-86.

[32] See *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch); *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 (CA); *Victory & Anor v Galhoy Inns Ltd* [2010] IEHC 459.

[33] There has been some dispute as to whether *Wrotham Park* damages are compensatory in nature or gain-based. Some cases suggest that such damages are compensatory in nature: *WWF v WWF* [2007] EWCA (Civ) 286 [29], [38], [47]. However, the better view is that such damages look to the defendant's gain. In *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086, [2009] Ch 390 [37] Arden LJ recognised that *Wrotham Park* damages are gain-based, but involve a compensatory element. See further, Cunnington, 'A Lost Opportunity to Clarify' (2007) 123 LQR 48, 48. This debate is also rehearsed in *Giedo van der Garde BV v Force India Formula One Team Ltd (formerly Spyker F1 Team Ltd (England))* [2010] EWHC 2373 (QB) [521]-[523].

> the defendant must be liable to pay an amount of damages which insofar as it can be estimated is equivalent to a proper and fair price which would be payable for the acquisition of the [right] in question. [34]

The second form of damages is an account of profits, or 'disgorgement damages'.[35] This is a more extreme form of relief that strips the defendant of all gains that he derived from the wrong in question.[36]

It is long established that an account of profits will be available in respect of equitable wrongs. Therefore, where the defendant has obtained a benefit in breach of his fiduciary duties, the courts will order an account of profits, to ensure that the defendant disgorges the gain that he obtained therefrom.[37] The remedy awarded in such circumstances is full disgorgement.

Restitutionary damages may also be available in respect of breach of contract, and this principle has been accepted as a matter of Irish law.[38] In *Blake v Attorney General,* the House of Lords acknowledged that, although compensatory damages are the basic award for breach of contract, such a remedy will not always be adequate where the innocent party has an interest in performance that cannot be adequately measured in financial terms[39] and, '[i]n a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach.'[40] However, Lord Nicholls confirmed that:

> It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the

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[34] *Bracewell v Appleby* [1975] 1 All ER 993 (Ch) 1000; *Horsford v Bird* [2006] UKPC 3; *Experience Hendrix Plc v PPX Enterprises* [2003] FSR 853; *Victory v Galhoy Inns Ltd* [2010] IEHC 459 [40]; *Giedo van der Garde BV v Force India Formula One Team Ltd (formerly Spyker F1 Team Ltd (England))* [2010] EWHC 2373 (QB) [521].
See further, Edelman, 'Restitutionary Damages for Torts' (n 28).

[35] Edelman, *Gain-Based Damages* (n 31) 66-67.

[36] *Attorney General v Blake* [2001] 1 AC 268 (HL); *Hickey & Co Ltd v Roches Stores (Dublin) Ltd* [1980] ILRM 107 (HC).

[37] *Keech v Sandford* (1728) 25 ER 223; *Boardman v Phipps* [1967] 2 AC 46 (HL); *Sherrard v Barron* [1923] 1 IR 21, 24 (Court of Appeal).

[38] *Hickey & Co Ltd v Roches Stores (Dublin) Ltd* [1980] ILRM 107 (HC). See also Law Reform Commission Report, *Aggravated, Exemplary and Restitutionary Damages* (LRC 60-2000) [6.18]-[6.24].

[39] *Attorney General v Blake* [2001] 1 AC 268 (HL) 282.

[40] *Ibid,* 283-284.

> circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit.[41]

In *Experience Hendrix LLC v PPX Enterprises Inc*, the Court of Appeal confirmed that an account of profits will only be available in exceptional circumstances. It suggested that such damages would often be inappropriate in a commercial context and suggested that *Wrotham Park* damages would be more appropriate where the circumstances of the case were not sufficiently extreme to justify disgorgement in the *Blake* sense.[42] Irish cases suggest that restitutionary damages will be available where the defendant has acted in bad faith[43] or where 'there is a difference between those two sums such that the wrongdoer gains more by his breach than the plaintiff has actually suffered by the wrongdoing.'[44]

Gain based damages have been awarded in tort cases, although an award of restitutionary damages has generally been confined to cases in which there has been an interference with the plaintiff's property rights.[45] In *Devenish Nutrition,* the Court of Appeal was called upon to consider whether gain-based awards were available in respect of non-proprietary torts. The Court held that extension of restitutionary damages to non-proprietary torts had been rejected by the Court of Appeal in *Stroke on Trent City Council v JW Wass & Co*[46] and that it was bound by this conclusion.[47] However, the Court's conclusion in *Devenish* is unconvincing for two reasons. First, Rotherham has noted that the Court of Appeal's conclusion that *Wass* precluded restitutionary damages for non-proprietary torts is unfounded as a matter of authority. He argues that *Wass* has not been interpreted in this way in Court of Appeal decisions where such a reading would have been significant and argues that if

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[41] *Ibid*, 285. See also, Edelman, *Gain-Based Damages* (n 31); Rotherham 'The Conceptual Structure of Restitution for Wrongs' (n 28) 189-191.

[42] *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323 [55]. See Rotherham, 'Gain-based Relief in Tort after *AG v Blake*' (n 31) 105-106.

[43] *Conneran v Corbett and Sons Ltd* [2006] IEHC 254, relying on *Hickey & Co Ltd v Roches Stores (Dublin) Ltd* [1980] ILRM 107 (HC).

[44] *Vavasour v O'Reilly* [2005] IEHC 16. Indeed, Clarke J suggested that gain-based damages would only be relevant in such circumstances.

[45] See, for example, *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch); *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 (CA); *Victory & Anor v Galhoy Inns Ltd* [2010] IEHC 459. See further, Rotherham 'The Conceptual Structure of Restitution for Wrongs' (n 28) 174 and 194-198; Odudu and Virgo, 'Remedies for breach of statutory duty' (2009) 68 CLJ 32, 32.

[46] *Stroke on Trent City Council v JW Wass & Co* [1988] 1 WLR 1406 (CA).

[47] *Devenish* [2008] EWCA Civ 1086, [2009] Ch 390 [75] (Arden LJ), [155] (Tuckey LJ). Longmore LJ dissented on this point at [144].

> *Wass* was authority for this view, it would be odd that this would have escaped Lord Nicholls' attention [in *Attorney General v Blake*], given that such a reading would have been at odds with the spirit of his analysis of this area of the law as a whole.[48]

Second, the approach of the Court of Appeal in *Devenish* appears to be inconsistent with the approach of Lord Nicholls in *Blake,* which exemplifies a flexible approach that is unconcerned with whether the rights at issue were proprietary in nature.[49] Virgo and Odudu have argued that, even if *Wass* decided that gain-based remedies were unavailable in non-proprietary torts 'the decision was made well before *Blake* set the law on gain-based remedies on a new course and so could be treated as though it was overruled.'[50] The status of Irish law on this point is unclear. Many of the Irish cases in which restitutionary damages have been awarded for torts have involved interference with property rights.[51] However, the courts have not explicitly confined restitutionary damages to proprietary torts.

In light of these criticisms, the Court of Appeal's conclusions in *Devenish* may be revisited in the near future and restitutionary damages may be more generally available in respect of torts. If *Devenish* is overruled on this point, or if the Irish courts refuse to follow *Devenish*, there is no reason in principle why restitutionary damages should not be available in respect of breach of statutory duty, as opposed to other non-proprietary torts.[52] However, it is unclear what circumstances will justify an award of restitutionary, as opposed to compensatory, damages for breach of statutory duty. Commentators have suggested that restitutionary damages may be appropriate for breach of statutory duty in a competition context. Gain-based damages would deter breaches of competition law by wholly removing the financial incentives for breaching competition rules and may 'encourage private parties to serve the important public function of monitoring compliance with competition law.'[53]

However, it is not clear what other circumstances would justify restitutionary damages for breach of statutory duty. Such damages may be available where the state deliberately breached its statutory duty with a view to making a gain, as occurred where the

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[48] Rotherham, 'Gain-based Relief in Tort after *AG v Blake*' (n 31) 110-111.
[49] Odudu and Virgo, 'Remedies for breach of statutory duty' (n 45) 33. See also Sheehan, 'Competition Law meets Restitution for Wrongs' (n 31) 222-223.
[50] *Ibid.*
[51] *Duhan v Radius Television Production Ltd* [2007] IEHC 292, [2008] 1 IR 506; *Victory & Anor v Galhoy Inns Ltd* [2010] IEHC 459.
[52] Sheehan, 'Competition Law meets Restitution for Wrongs' (n 31) 224-225.
[53] Odudu and Virgo, 'Remedies for breach of statutory duty' (n 45) 34. See also Banfi, 'Defining the Competition Torts as Intentional Wrongs' (2011) 70 CLJ 83, 110; Rotherham, 'Gain-based Relief in Tort after *AG v Blake*' (n 31) 119.

Irish Government knowingly levied illegal health charges on elderly nursing home patients.[54] One common thread that emerges from English cases on restitutionary damages is that such damages are exceptional and are inappropriate where other forms of relief are available.[55] The *Woolwich* principle permits recovery of ultra vires taxes as of right. Therefore, there is a form of relief that is available both to provide redress to the taxpayer and to ensure that the state conforms to the principles of legality. Thus, it may be that, while restitutionary damages for breach of statutory duty are available *in principle*, the existence of the *Woolwich* principle as a means of obtaining restitution, means that restitutionary damages will rarely be available *in practice*. However, if, for some reason, a claim pursuant to the *Woolwich* principle was not available, there would not appear to be any principled basis for denying a claim for restitutionary damages.

II. Proprietary Remedies

Typically, liability to make restitution is personal. A defendant will be obliged to make restitution of the *value* of the enrichment received by him, rather than the specific benefit that he received.[56] In cases involving services or the payment of money, restitution of the value of the benefit received will often be the only practicable way of achieving restitution. However, sometimes a proprietary remedy may be available as a response to unjust enrichment. Such an award confers significant advantages on the person to whom it is awarded. The plaintiff will be entitled to take advantage of any increase in the value of the property[57] and his claim will take priority over the claims of the defendant's unsecured creditors in the event of the defendant's insolvency.[58] He may also be able to persuade the court that the constructive trustee was a fiduciary, thus triggering equitable tracing rules.[59]

These advantages, and the effect that proprietary remedies have on statutory schemes of insolvency, mean that the role of proprietary remedies as a response to unjust enrichment

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[54] See *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105.

[55] *Attorney General v Blake* [2001] 1 AC 268 (HL) 285; *Experience Hendrix LLC v PPX Enterprises Inc* [2003] EWCA Civ 323 [55]; *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2008] EWCA Civ 1086, [2009] Ch 390 [58]. However, see Sheehan, 'Competition Law Meets Restitution for Wrongs' (n 31) 224-225.

[56] *Re W & R Morrogh* [2007] 4 IR 1 (HC) 23.

[57] However, where the property in question has been dissipated, or has decreased in value, a personal remedy may be more beneficial to a plaintiff: Burrows, *The Law of Restitution* (n 2) 173.

[58] Virgo, *Principles of the Law of Restitution* (n 9) 440.

[59] There is considerable support for the view that there is no justification for different tracing rules at law and in equity: *Agip(Africa) v Jackson* [1990] 1 Ch 265 (Ch) 290 (Millett J); *Foskett v McKeown* [2001] 1 AC 102 (HL) 128 (Lord Millett) and 113-114 (Lord Steyn). See further, Birks, 'The Necessity of a Unitary Law of Tracing' in Cranston (ed) *Making Commercial Law* (Clarendon Press, Oxford 1997); Smith, *The Law of Tracing* (Clarendon Press, Oxford 1997).

is a most controversial issue in an area of law known for controversy. However, the Irish courts have held that a proprietary remedy may be awarded to reverse unjust enrichment. For example, in the *Bricklayers Hall,* Keane J's comment that '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',[60] suggests that restitution can involve, not only restitution of the value of the enrichment, but also restitution of the property *in specie.* Although, no authority addresses this point directly and approves the *obiter* comments made by Keane J, several cases demonstrate that restitution of specific property will sometimes be available. In *Greenwood v Bennett*, the Court of Appeal adopted a comparable approach, permitting specific restitution of a car.[61] In *Webb v Ireland,* Blayney J in the High Court specifically adopted the Court of Appeal's approach in *Greenwood.*[62]

Irish cases have also held that proprietary remedies are available to effect restitution *in specie* of overpaid tax. *In re Frederick Inns*, Lardner J held that:

> The action for money had and received is essentially a claim *in personam.* In addition or where for some reason it is not available a proprietary remedy entitling the liquidator to proceed against a particular asset or assets in the Revenue Commissioners' hands may also exist.[63]

Although the Irish courts have permitted proprietary remedies to reverse unjust enrichment, they have failed to consider the significance of this development or to address any principled analysis to the resolution of many contentious issues. For example, there is considerable disagreement as to whether proprietary remedies should be available to reverse unjust enrichment, what proprietary remedies should be available, and what circumstances should trigger a proprietary remedy in an area of law where liability is traditionally personal in nature. These issues could be particularly troublesome in the context of restitution of

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[60] *Dublin Corporation v Building and Allied Trade Union* [1996] 1 IR 469 (SC) 483. Emphasis added. This was relied upon by Kelly J in *Bank of Ireland Trust Services v Revenue Commissioners (No 1)* [2002] 4 IR 178 (HC) 186 although he expressed no views as to whether a proprietary remedy was available. Similarly, in *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47, [2004] 1 WLR 2775, 2792, Mance LJ observed that the defendant received 'a benefit which he should *prima facie* reimburse, if not in kind then in cash', suggesting that he considered that, in certain circumstances it may be possible to make an order of restitution *in specie.* See also, *Gollan v Nugent* [1988] HCA 59, (1988) 166 CLR 18.

[61] *Greenwood v Bennett* [1973] QB 195 (CA).Specific restitution was subject to a requirement to compensate the plaintiff for works carried out on the vehicle. See Virgo, *Principles of the Law of Restitution* (n 9) 637.

[62] *Webb v Ireland* [1988] IR 353 (SC) 365-366 and 368-370. Similarly, the requirement to make restitution *in specie* in cases of rescission at law may be regarded as a circumstance where restitution *in specie* is available. However, the existence of this requirement has been doubted: Häcker, 'Proprietary Restitution after Impaired Consent Transfers: a Generalised Power Model' (2009) 68 CLJ 324, 328 n 22.

[63] *In re Frederick Inns* [1991] ILRM 582 (HC) 593-594.

overpaid taxes, where—as Lardner J's *dictum* above demonstrates—the Irish courts' attitude to proprietary restitution[64] is particularly cavalier.

This Part considers the proprietary remedies available as a response to unjust enrichment.[65] Section A examines equitable liens, Section B considers constructive trusts—including the remedial constructive trust—and Section C examines the resulting trust. In considering these remedies, this Part concludes that the Irish courts' approach to proprietary remedies is problematic for two reasons. First, the Irish courts have failed to identify any rationale for the award of proprietary remedies as a response to unjust enrichment and, as a result, have failed to identify the circumstances in which such a remedy will be available. Second, the nature of the proprietary interest that responds to unjust enrichment is unclear, as the Irish courts have been willing to apply different proprietary remedies in the context of unjust enrichment, without explaining why one remedy was preferred over another in the individual circumstances of each case.

A. Liens

Liens exist at law and in equity.[66] The common law lien is a 'mere right to retain possession of property until a debt, owed by the owner of the property, has been paid.'[67] In contrast, an equitable lien confers on the plaintiff a proprietary interest over property to the extent of the personal sum owed to the plaintiff by the defendant. Thus, '[t]he equitable lien or charge offers a proprietary remedy by way of security for the amount of the unjust enrichment, rather than conferring beneficial ownership.'[68]

The availability of equitable liens has generally been confined to specific factual matrices, such as a solicitor's lien over property in his possession to secure payment of his fees,[69] a vendor's lien over property to secure the purchase price of the property as yet unpaid,[70] or a lien obtained by a purchaser over property upon which he has paid a deposit pursuant to a contract of sale.[71] However, there is nothing in principle to prevent the court

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[64] See above at 370.

[65] Furthermore, the courts will, in some circumstances, grant a judicial order to vest the property in the defendant. See, *Webb v Ireland* [1988] IR 353 (SC); *Greenwood v Bennett* [1973] QB 195 (CA).

[66] Lyall and Power, *Land Law in Ireland* (3rd edn Roundhall, Dublin 2010) 867.

[67] *Ibid,* 867.

[68] Gummow, 'Unjust Enrichment, Restitution and Proprietary Remedies' in Finn (ed) *Essays on Restitution* (The Law Book Company, Victoria 1990) 72-73. See also Goode, 'Property and Unjust Enrichment' in Burrows (ed), *Essays on the Law of Restitution* (Clarendon Press, Oxford 1991) 222.

[69] *In Re Galdan Properties Ltd (In Liquidation)* [1988] ILRM 559 (SC).

[70] *Tempany v Hynes* [1976] IR 101 (SC) 109.

[71] *In re Barratt Apartments Ltd* [1985] IR 350 (SC); *Bank of Ireland Finance Limited v D J Daly Limited (In liquidation)* [1978] IR 79 (HC); *Tempany v Hynes* [1976] IR 101 (SC) 114. See, further O'Dell, 'Liens,

from imposing a lien over property to prevent the unjust enrichment of the property's owner.[72] For example, equitable liens imposed over mistakenly improved land operate to reverse unjust enrichment.[73] Thus, in *McCarron v McCarron*, Murphy J held that a person who improved the property of another through the provision of his services may be entitled to obtain a lien over property to secure a claim for *quantum meruit* for the reasonable value of the services rendered.[74]

In *In re Barratt Apartments Ltd*, Keane J considered whether an equitable lien could be conferred upon the plaintiffs to prevent the unjust enrichment of the defendants. The plaintiffs had paid 'booking deposits' to the defendants in respect of apartments to be constructed on a site owned by the defendant. In the course of insolvency proceedings, the liquidator sought directions as to whether the plaintiffs were entitled to rank as secured creditors. The plaintiffs contended that the payment of the booking deposits entitled them to liens over the site upon which the apartments were to be constructed to the extent necessary to facilitate repayment of the deposits. Keane J held that the payors of the deposits were entitled to a lien, on the basis that the defendant would otherwise be unjustly enriched:

> I think it is clear that the lien which is claimed by the depositors in the present case arises not from the existence of any contract but from the right of the prospective purchaser to recover his deposit in circumstances where it would be unjust for the prospective vendor to retain it.[75]

Keane J's decision was overturned on appeal. However, Henchy J, who delivered the judgment of the Supreme Court, did not object to the principle that an equitable lien could arise to reverse or prevent unjust enrichment. Instead, he held that the defendant was not enriched by the receipt of the deposits, as the sums would

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Necessity and Unjust Enrichment' (2006) 57 Northern Ireland Legal Quarterly 288, who discusses the development of the equitable salvage lien in Irish law.

[72] Chambers, 'Resulting Trusts' in Burrows and Rogers (eds) *Mapping the Law: Essays in Honour of Peter Birks* (OUP, Oxford 2006) 256-257. Indeed, O'Dell has suggested that certain forms of equitable lien may already do so: O'Dell, 'Liens, Necessity and Unjust Enrichment' (n 71) 312-314. Additionally, the doctrine of subrogation, which has been specifically held to be a doctrine that reverses unjust enrichment, gives rise to an equitable lien over the interest to which the claimant has been subrogated. See, *Lord Napier and Ettrick v RF Kershaw Ltd (No1)* [1993] AC 713 (HL) 738 (Lord Templeman), 744 (Lord Goff) and 752 (Lord Browne-Wilkinson); *Banque Financiere de la Cité Appellants v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 242 (Lord Hutton). Discussed below at 387-390.

[73] Burrows, *The Law of Restitution* (n 2) 172-173. See also Birks, *Unjust Enrichment* (n 2) 186-189. Relying on *Cooper v Phibbs* (1867) LR 2 HL 149.

[74] *McCarron v McCarron* (Supreme Court, February 13 1997).

[75] *In re Barratt Apartments Ltd* [1985] IR 350 (HC) 355.

> be applied in the winding up, as will the rest of the assets, towards the payment of the company's debts, according to a fixed order of priority amongst the creditors. Therefore, the point at issue is not to be decided by assessing the comparative merits of the depositors and of the company. It is the claims of the creditors *inter se* that have to be looked at.[76]

Therefore, outcome in this case was motivated by the Supreme Court's concern to ensure that plaintiffs could not rely upon an equitable lien, where such an interest would give the party an unjustified priority on insolvency. However, focusing on the insolvency of the defendant is likely to give rise to arbitrary result. If the equitable lien arises as a matter of law to reverse unjust enrichment, the subsequent insolvency of the defendant should not deny the plaintiff to the relief to which he is entitled.

Equitable liens are unlikely to arise where restitution is sought of overpaid taxes or charges for two reasons. First, in most cases where an equitable lien is granted, the money has been in some way expended upon the defendant's property so that there is a link between the payment of the charge and the property over which the lien is sought. There is no such link where the payment is simply the payment of a tax or a charge. Second, the courts may be unwilling to grant proprietary interests over property in state hands where the property in question was not that which was directly received by the state from the taxpayer.

B. Constructive trusts

The doctrine that has received the most judicial focus as a potential proprietary remedy is the constructive trust. Irish law recognises two forms of constructive trust. In *The Bricklayers Hall,* Budd J described them as follows:

> In broad terms, there are two categories of constructive trust. In the first the constructive trustee is already a trustee and the trust arises because he has derived some benefit from his trusteeship to which he is not entitled. This principle is not confined to trustees in the strict sense as it has been extended to a number of categories where a person stands in a fiduciary relationship to another. ...
>
> The second category of constructive trust arises because of the particular circumstances in which a person holds property. ...

[76] *In re Barratt Apartments Ltd* [1985] IR 350 (SC) 358.

> Broadly speaking, it may be said that the application of the principle of unjust enrichment requires the restoration by the Defendant to the Plaintiff of a benefit which it would be unjust for the Defendant to retain.[77]

These categories reflect the distinction in other jurisdictions between the institutional constructive trust and the remedial constructive trust. In *Westdeutsche Landesbank Girozentrale v Islington London BC* Lord Browne-Wilkinson outlined the distinction between an institutional constructive trust and a remedial constructive trust in similar terms to those adopted by Budd J in the *Bricklayers Hall*:

> Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen ... are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.[78]

In addition to remedial and institutional constructive trusts, Irish law has also recognised the 'new model constructive trust' developed in *Hussey v Palmer,* which Lord Denning MR held to be:

> a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it.[79]

However, it is unclear whether, as a matter of Irish law, the new model constructive trust is conceptually distinct from the remedial constructive trust, or whether it is merely the forerunner to what is now recognised as the remedial constructive trust. This uncertainty is compounded by the Irish courts willingness to impose a 'constructive trust' without identifying which doctrine it intends to apply. The relationship between these two doctrines will be considered below.

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[77] *Dublin Corporation v Building and Allied Trade Union* (High Court, 6 March 1996).
[78] *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669 (HL) 714-715.
[79] *Hussey v Palmer* [1972] 1 WLR 1286 (CA) 1289-1290.

There is considerable authority in Ireland for the proposition that a constructive trust can respond to unjust enrichment. In the English case of *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*, Goulding J held that the recipient of a mistaken payment held the property on a constructive trust for the mistaken payor.[80] This conclusion has been subsequently doubted by the English courts. In *Westdeutsche,* Lord Browne-Wilkinson disputed Goulding J's conclusion that receipt of a mistaken payment, without more, could generate a constructive trust.[81]

Chase Manhattan has been approved as a correct statement of Irish law by Carroll J in *Re Irish Shipping Ltd.*[82] Furthermore, recognition in Irish law that a constructive trust can respond to unjust enrichment predates *Chase Manhattan*. In *East Cork Foods v O'Dwyer Steel,* Henchy J held that a plaintiff could obtain restitution by way of an action for money had and received, or by seeking a declaration that the money was held by the defendant on a constructive trust for its benefit.[83] Henchy J justified the imposition of the constructive trust in the case before him on the basis that the defendant was aware that the plaintiff was entitled to the return of the money:

> when the second defendant served a notice of appeal, the first defendant should then have known that, unless and until the appeal was determined in its favour, it was not entitled to treat the £20,000 as being its own as of right. The defendant should have been cognisant of the risk that at the end of the day the whole, or at least some of that money might be held by this Court to be the property of the second defendant.[84]

Unfortunately, Henchy J did not expressly identify which form of constructive trust he intended to apply.

The new model constructive trust was first expressly applied in Ireland in *HKN Invest OY v Incotrade PVT Ltd (In Liquidation).*[85] The plaintiffs sought recovery of money paid to the defendant company prior to its incorporation. However, the money was lodged to the second defendant's account and no funds were transferred to the defendant company after it

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[80] *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 (Ch) 117-120.
[81] *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669 (HL) 714-715. However, Lord Browne-Wilkinson held that such a trust may arise where the defendant knew that he was not entitled to the money. See below at 379-380. See also *London Allied Holdings Ltd v Lee* [2007] EWHC 2061 (Ch) [268]-[272]; *Fitzalan-Howard v Hibbert* [2009] EWHC 2855 (QB).
[82] *Re Irish Shipping Ltd* [1986] ILRM 518 (HC) 522-523.
[83] *East Cork Foods v O'Dwyer Steel* [1978] IR 103 (SC) 111.
[84] *Ibid*, 111.
[85] *HKN Invest OY v Incotrade PVT Ltd (In Liquidation)* [1993] 3 IR 152 (HC).

had been incorporated. The liquidator of the company contended that the money held by the personal defendants was owned beneficially by the Company. Costello J, when called upon to determine the beneficial ownership of the money paid under pre-incorporation contracts, held that the personal defendants had received the money paid under the pre-incorporation contracts as constructive trustees.[86] Relying on Lord Denning MR's judgment in *Hussey v Palmer*, Costello J held:

> The principle is that where a person who holds property in circumstances which in equity and good conscience should be held or enjoyed by another he will be compelled to hold the property in trust for another.[87]

He concluded that it was appropriate to impose a constructive trust in the circumstances as, if the property was not held on constructive trust, 'considerable injustice' could be suffered by the company, its shareholders or creditors who were deprived of the commission and the creditors in the bankruptcy would otherwise obtain a greater interest than the bankrupt himself enjoyed.[88] This authority is explicable in unjust enrichment terms, as, if the trust was not imposed, the general creditors in the bankruptcy would be unjust enriched at the expense of the plaintiffs. However, it is unclear whether this case can truly be described as one involving a proprietary response to unjust enrichment. The general creditors of the company had given value that they were trying to recover, and so it cannot be said that they would be unjustly enriched. [89] In this regard, *Incotrade* is inconsistent with Henchy J's decision in *Barratt Apartments.*[90]

The new model constructive trust was also imposed *Murray v Murray.*[91] The defendant built a house and permitted his sister, Lily, to live there. Lily paid mortgage instalments on the property, but repeatedly refused the defendant's offers to transfer the property to her. Barron J held that, at the time of Lily's death she held a beneficial interest in the property, as payment of the mortgage instalments helped to free the property from the mortgage and would otherwise unjustly enrich the defendant. In doing so he relied on *Hussey v Palmer* as authority for the proposition that 'where equity so requires, a debt may well be secured by the device of a constructive trust on the property created by the money

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[86] *Ibid*, 162.
[87] *Ibid,* 162.
[88] *Ibid,* 163.
[89] Mee, 'Palmtrees in the Rain, The New Model Constructive Trust in Ireland' (n 18).
[90] See above at 372-373.
[91] *Murray v Murray* [1996] 3 IR 251 (HC).

involved.'[92] This is a controversial conclusion, as it has been suggested that the constructive trust is incompatible with the debtor creditor relationship.[93] Furthermore, Barron J awarded Lily a beneficial interest, even though he specifically recognised that she had never intended to take a beneficial interest in the property, which should also have precluded the recognition of a new model constructive trust.[94] Moreover, there was no suggestion that it was not Lily's intention that her brother should benefit from the payment of the mortgage instalments. In the absence of any factor rendering the defendant's retention of the interest unjust, the defendant should have been entitled to retain the benefit of the payments.

In *Kelly v Cahill*,[95] Barr J held that a new model constructive trust arose to prevent the unjust enrichment of a nephew at the expense of a widow, where the nephew had succeeded to property which the deceased had sought to transfer to his widow before his death, but the transfer had—unknown to all of them—been ineffective due to the inadvertence of his solicitor.[96] He described the constructive trust as a remedy, imposed to restore a benefit to the plaintiff in circumstances where retention of the benefit would cause the defendant to be unjustly enriched. Barr J based his decision on Lord Denning MR's decision in *Hussey v Palmer* and upon Keane, *Equity and the Law of Trusts in the Republic of Ireland.* Reliance on both of these authorities is questionable. It is unclear why, in 2001, Barr J is willing to place such a reliance on a text published in 1988 and why he relied upon *Hussey v Palmer* without further consideration of subsequent English cases that reject Lord Denning's doctrine[97] or academic commentaries that attack the doctrine.[98]

Constructive Trusts and Overpaid Tax

Not only have the Irish courts been willing to impose a constructive trust to reverse unjust enrichment, they have specifically been willing to impose a constructive trust upon

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[92] *Ibid,* 255

[93] *Hussey v Palmer* [1972] 1 WLR 1286 (CA) 1292 (Cairns LJ); *In re Sharpe (A Bankrupt)* [1980] 1 WLR 219 (Ch) 223; Mee, 'Palmtrees in the Rain, The New Model Constructive Trust in Ireland' (n 18) 9.

[94] Mee, 'Palmtrees in the Rain, The New Model Constructive Trust in Ireland' (n 18).

[95] *Kelly v Cahill* [2001] 1 IR 56 (HC). See O'Dell, 'Restitution' in [2001] *Byrne and Binchy's Annual Review of Irish Law* 502; O'Dell, 'Unjust Enrichment and the Remedial Constructive Trust' (n 18) 71.

[96] *Ibid,* 62. Compare *Hill v Van Erp* (1997) 188 CLR 159 (HCA) 226-227. See also *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [14] and [20]-[21] (Lord Scott).

[97] *Gissing v Gissing* [1971] AC 886 (HL) 904–906; *Pettitt v Pettitt* [1970] AC 777 (HL) 819-821; *Ivin v Blake* (1994) 67 P & CR 263 (CA) 267-268.

[98] Birks has referred to the concept underlying the remedial constructive trust as 'ugly, repugnant alike to legal certainty, the sanctity of property and the rule of law': Birks 'Property and Unjust Enrichment: Categorical Truths' (n 2). See also, Virgo, 'Vindicating Vindication: *Foskett v McKeown* Reviewed' (n 2); Maudsley, 'Constructive Trusts' [1977] Northern Ireland Legal Quarterly 123, 137.

taxes unlawfully received by the state. In *In re Frederick Inns*, the Revenue Commissioners accepted the payment of money from companies in a group of companies in discharge of the group's liabilities as a whole, contrary to the principle of separate legal personality. Lardner J held that the Revenue Commissioners held these ultra views tax payments on trust for the paying company, observing that the state knew at the time that it received the payments that they were ultra vires the company who had made the payment.

> In these circumstances the Revenue Commissioners received and held such payments in a fiduciary capacity, in my judgment as trustees upon a constructive trust for the payor companies and the purported appropriation of such payments or any part thereof in reduction of the tax liabilities of any other company in the group constituted a breach of trust.[99]

Similarly, in *O'Rourke v Revenue Commissioners,* O'Flaherty J in the Supreme Court observed that the state held the overpaid taxes 'on a form of constructive trust for the taxpayer', suggesting that such a constructive trust will also be available where restitution of overpaid tax is sought from the state.[100] When the case was remitted to the High Court, Keane J made no further reference to this comment. He held that interest was payable at the statutory rate of interest provided for in section 22 of the Courts Act 1981 and did not consider the position of the state as a possible trustee.[101]

Conclusions

The Irish courts are willing to impose a constructive to reverse unjust enrichment. There is little difficulty with this conclusion in principle. Although the English courts have not yet adopted the remedial constructive trust as part of English law,[102] the House of Lords has made comments favourable to the future adoption of the remedial constructive trust in an appropriate unjust enrichment case.[103] However, the Irish courts' adoption of the constructive trusts as a response to unjust enrichment suffers from two major shortcomings.

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[99] *In re Frederick Inns* [1991] ILRM 582 (HC) 592.
[100] *O'Rourke v Revenue Commissioners* (Supreme Court, 15 May 1996).
[101] In this case, there was no suggestion that the State was aware at the time that it received the payments that they were *ultra vires.*
[102] See *Re Polly Peck International plc (in administration) (No 2)* [1998] 3 All ER 812 (CA) 823-827; *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (In Administration)* [2011] EWCA Civ 347 [37].
[103] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 714 and 716; *Re Goldcorp Exchange Ltd (in receivership)* [1995] 1 AC 74 (PC) 104. See too Lord Scott's willingness to employ the remedial constructive trust to give effect to the claimant's inheritance expectations in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776 [20]-[21].

First, the Irish courts have not considered what kind of constructive trust should be applied as a response to unjust enrichment. This has led to both institutional and remedial constructive trusts being deployed as a response to unjust enrichment. By failing to distinguish between the different forms of constructive trust, the Irish courts have obscured the juridical basis of each trust. The Irish courts have also been willing to adopt Lord Denning's new model constructive trust without clarifying whether they consider it to be a separate entity to the remedial constructive trust or whether it is merely an earlier conception of that doctrine. This is not a mere issue of semantics. The new model constructive trust is a 'trust imposed by law whenever justice and good conscience require it'.[104] It is a wide, highly discretionary, doctrine that may be used as 'a weapon of such force and such flexibility that a court is enabled, without authority, and without rule to declare that one party is the winner because there is a Constructive Trust in his favour.'[105] In contrast, many of the judicial statements favourable to the adoption of a remedial constructive trust consider it to be a narrower doctrine; a proprietary response whose application is 'determined by rules of law, not under a discretion'[106] and which arises in response to established causes of action. As a result, the narrower remedial constructive trust is to be preferred to the more flexible new model constructive trust. It is therefore to be hoped that the Irish courts, when they next revisit this issue, confine themselves to the narrower version of the remedy embodied in the remedial constructive trust.

Second, the Irish courts have failed to identify what factual circumstances will justify the imposition of a constructive trust, as opposed to personal relief. In *Westdeutsche*, Lord Browne Wilkinson held that the conscience of the recipient must be affected in order for the constructive trust to arise. He concluded:

> Although mere receipt of monies, in ignorance of the mistake, gives rise to no trust, the retention of monies after the recipient bank learned of the mistake may well have given rise to a constructive trust.[107]

Many Irish cases have adopted a similar approach. In *East Cork Foods*, a constructive trust was imposed where a defendant who was unjustly enriched became aware of the facts giving

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[104] *Hussey v Palmer* [1972] 1 WLR 1286 (CA) 1289-1290.
[105] Maudsley, 'Constructive Trusts' (n 98) 137.
[106] *Westdeutsche Landesbank Girozentrale v Islington London BC* [1996] AC 669 (HL) 714-715.
[107] *Westdeutsche Landesbank Girozentrale v Islington London* [1996] AC 669 (HL) 715.

rise to the plaintiff's claim.[108] Similarly, in the *Bricklayers Hall*, Budd J suggested that a defendant's unconscionable conduct would justify the imposition of a constructive trust.[109] More recently, in *Motor Insurers' Bureau of Ireland v Stanbridge,* Laffoy J accepted that unjust enrichment and unconscionable conduct could give rise to a constructive trust.[110]

Thus, it appears as though the Irish cases have implicitly accepted that unjust enrichment, coupled with the defendant's wronging or knowledge of the plaintiff's claim, will give rise to a constructive trust. However, it is unclear 'why the addition of knowledge on the part of the defendant of the unjust factor should elevate an otherwise personal right to restitution to a proprietary one to the detriment of the defendant's other creditors.' [111] Indeed, Birks has argued that such an approach is likely to cause confusion as to the role of fault in the law of unjust enrichment, as,

> since rights arise from unjust enrichment independently of fault, making the *in rem* response turn on dishonesty looks like a lop-sided outbreak of the heresy that there can be no unjust enrichment without fault. That heresy is a sub-form of all attempts to nudge the law of unjust enrichment into the law of wrongs.[112]

The decision of Laffoy J in *Goodman v Minister for Finance*[113] provides an excellent illustration of how Birks's concerns may be realised. The plaintiffs obtained orders for the costs of their participation in the Beef Tribunal.[114] They claimed interest on those costs, under the Debtors (Ireland) Act, 1840 and further contended that the state would be unjustly enriched if interest was not paid on the sums owed. Laffoy J, following a survey of the cases in which interest was awarded as part of a claim for restitution, concluded that

> While, in my view, it is unnecessary for present purposes to consider the theoretical basis on which the principal monies with interest of loss of profit were, or subject to the proofs being in order, would have been recoverable in the foregoing authorities, even a superficial analysis of them reveals that *in all of them the party against whom*

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[108] *Murphy v Attorney General* [1982] IR 241(SC) 317. See also, *East Cork Foods v O'Dwyer Steel* [1978] IR 103 (SC) 111.
[109] *Dublin Corporation v Building and Allied Trade Union* (High Court, 6 March 1996).
[110] *Motor Insurers' Bureau of Ireland v Stanbridge* [2008] IEHC 389.
[111] Swadling, 'Property and Unjust Enrichment' (n 2) 141. See also Swadling, 'Property' in Birks and Rose (eds) *Lessons of the Swaps Litigation* (Mansfield Press, London 2000) 263.
[112] Birks, *Unjust Enrichment* (n 2) 193.
[113] *Goodman v Minister for Finance* [1999] 3 IR 357 (HC).
[114] The Beef Tribunal was a tribunal of inquiry set up in 1991 to investigate irregularities in the beef export trade and the involvement of politicians in these irregularities.

> *the claim for restitution was made had received the monies or retained the monies in issue in circumstances which involved unconscionable conduct or wrongdoing in the broadest sense of that word*: in circumstances in which he was under an obligation to repay the monies to the claimant but he had not done so, so that the monies were thereafter held by him in fiduciary circumstances. The entitlement of the party claiming restitution to loss of profit or interest arose as part of the measure of his damages on his claim for restitution.[115]

She held that the unconscionable conduct to which she alluded was the defendant's failure to refund the money when he was under an obligation to do so.

Laffoy J's conclusions are beset with several serious misconceptions. First, her conclusions are out of step with our current understandings of the role of interest in the law of restitution. As discussed in Chapter 3, interest, whether simple or compound, reflects the gain obtained by the defendant from having had the use of the plaintiff's money. It is an element of the enrichment obtained by the defendant at the plaintiff's expense[116] and is not awarded in response to the defendant's wrongdoing or unconscionable conduct.

Second, Laffoy J's conclusion that it was unconscionable for the defendant to fail to return the money upon an unjust enrichment claim being advanced is also open to question. Liability to make restitution for unjust enrichment is strict. However, if, as Laffoy J appears to suggest, it is unconscionable for the defendant to retain the money when under an obligation to refund it, in every case in which the defendant was unjustly enriched, unconscionable conduct will automatically follow from the unjust enrichment, and will give rise to a proprietary remedy. Furthermore, it is not unconscionable for the defendant to retain the money once he is aware of the plaintiff's restitution claim, as he may have a defence to that claim. Laffoy J's judgment is, therefore, troubling, as it conflates the circumstances in which a constructive trust will be imposed with liability to make restitution for unjust enrichment and, in doing so, appears to have introduced a fault requirement to the unjust enrichment principle that is clearly at odds with the strict liability nature of the action. Laffoy J's analysis is particularly troubling in the context of restitution of overpaid tax, as it would entail that all claims for restitution of overpaid tax would generate a proprietary response.

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[115] *Goodman v Minister for Finance* [1999] 3 IR 357 (HC) 379. Emphasis added.

[116] *F J Chalke Limited, A C Barnes (Wokingham) Limited v The Commissioners for Her Majesty's Revenue & Customs* [2009] EWHC 952 (Ch) [86]-[88]. See further Chapter 3.

Furthermore, it is unclear how Laffoy J's approach can be reconciled with the acknowledgement that the state does not commit a wrong by levying an *ultra vires* tax.[117]

C. Resulting trust

The resulting trust traditionally arises in response to two classes of events: apparent gifts and incomplete disposition of equitable interest.[118] Each of these categories generates a specific species of resulting trust. The 'presumed resulting trust' responds to apparent gifts and the 'automatic resulting trust' to situations where the donor has failed to exhaust the beneficial interest.[119] However, Birks and Chambers have argued that the resulting trust can, and does, respond to unjust enrichment. They consider that the resulting trust is engaged where the transferor did not intend to transfer the benefit to the transferee beneficially. Thus, the circumstances that generate a claim in unjust enrichment, where causes of action turn on the absence of the claimant's intention to benefit the defendant, will also generate a resulting trust. [120]

This thesis has provoked considerable disagreement and controversy.[121] Much of the dispute centres on the transferor's intention. Although most commentators agree that the transferor's intention is central to the imposition of a resulting trust, there is little agreement as to what the relevant intention might be. Some commentators have argued that the resulting trust arises, not because the plaintiff did not intend to benefit the defendant, but rather because the plaintiff intended that the transferee should hold the property on trust for the transferor.[122] In response, Webb, in a refinement of the traditional Birks/Chambers approach has argued that the crucial issue was that the claimant's intention to pass title in the property was contingent upon a condition that was not fulfilled:

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[117] This matter is discussed in Chapter 8 290-292.

[118] Birks has argued that *Quistclose* Trusts comprise a third category of resulting trust: Birks, 'Trusts Raised to Reverse Unjust Enrichment' [1996] Restitution Law Review 3, 16. Compare Swadling, 'A New Role for Resulting Trusts?' (1996) Legal Studies 110, 124.

[119] See the judgment of Megarry J in *Re Vandervell (No 2)* [1974] Ch 269 (Ch).

[120] Birks, 'Restitution and Resulting Trusts' in Goldstein (ed) *Equity and Contemporary Legal Developments,* (Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Jerusalem 1992); Chambers, 'Resulting Trusts' in Burrows and Roger (eds), *Mapping the Law; Essays in Honour of Peter Birks, 247;* Chambers, *Resulting Trusts* (n 72); Millett, 'Restitution and Constructive Trusts' (n 24).

[121] For a summary of the debate on resulting trusts see Mee, '"Automatic Resulting Trusts": Retention, Restitution, or Reposing Trusts?' in Mitchell (ed) *Constructive and Resulting Trusts* (Hart, Portland 2009) 209-212. See also O'Dell 'Peter Birks and the Resulting Trust' in Rickett and Grantham (eds) *Structure in the Private Law* (Hart Publishing, Oxford, 2008) 379, presenting a much pared down version of the traditional resulting trust which does not respond to unjust enrichment.

[122] Swadling, 'Property and Unjust Enrichment' (n 2) 140; Swadling 'A New Role for Resulting Trusts?' (n 118); Mee, '"Automatic Resulting Trusts: Retention, Restitution, or Reposing Trusts?' (n 121) 209 and 234.

the significance of the claimant's mistake is that it highlights a contingency to which his intention to transfer the asset does not extend. This enables him to say that, given these circumstances, he lacks an intention not simply to *benefit* the defendant but to *pass title* to the asset to him.'[123]

The judicial approach to this issue has been mixed and both main approaches have received judicial support. In *Air Jamaica v Charleton*, Lord Millett favoured the Birks/Chambers approach, expressly holding that the presumption that arose in cases of presumed resulting trusts was one of non-beneficial transfer.[124] In contrast, Swadling's approach has been adopted by Lord Browne-Wilkinson in *Westdeutsche,* who observed: 'the presumption of resulting trust is rebutted by evidence of any intention inconsistent with such a trust, not only by evidence of intention to make a gift.' In the same case, Lord Goff expressly rejected Birks's argument that constructive trusts could respond to unjust enrichment:

> Professor Birks has argued for a wider role for the resulting trust in the field of restitution, and specifically for its availability in cases of mistake and failure of consideration. His thesis is avowedly experimental, written to test the temperature of the water. I feel bound to respond that the temperature of the water must be regarded as decidedly cold.[125]

The Irish courts have given little consideration to the extension of the resulting trusts beyond the traditional categories in which it applies, and have not expressly considered whether the resulting trust can respond to unjust enrichment. Furthermore, the Irish courts have not clarified what kind of intention they consider the resulting trust to be founded upon. In the *Bricklayers Hall case,* Budd J considered the intention of the plaintiff to constitute the defendant a trustee of the property *and* an absence of intention to benefit the defendant to be relevant:

> A resulting trust arises *because the law presumes that it was the intention of the original owner of the property that it should be held in trust.* A constructive trust arises because the law considers it inequitable that the person should retain property

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[123] Webb, 'Intention, Mistakes and Resulting Trusts' in Mitchell (ed) *Constructive and Resulting Trust* (Hart, Portland 2009) 330. Original emphasis.
[124] *Air Jamaica v Charleton* [1999] 1 WLR 1399 (PC) 1412. See also *Vandervell v IRC* [1967] 2 AC 291(HL) 307 (Lord Reid, dissenting).
[125] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 (HL) 689.

> for their benefit. *Where it appears to have been the intention of the donor that the donee should not take the property beneficially, there will be a resulting trust in favour of the donor.*[126]

These two intentions are not mutually exclusive, but the intention to constitute the transferee a trustee is a narrower test than one founded upon the transferor's lack of intention to confer a beneficial interest. There will be many cases in which the transferor did not intend to benefit the transferee, but did not intend to constitute a trust for himself.

Support for resulting trust analysis in Irish law may be derived from the decision of Barr J *Kelly v Cahill.*[127] This conclusion is supported by two considerations. First, Barr J adopted Lord Denning MR's analysis in *Hussey v Palmer.* This suggests that he implicitly accepted Lord Denning's contention that both resulting and constructive trusts could be used interchangeably to respond to unjust enrichment.[128] Second, *Kelly v Cahill* was a case in which the highly controversial new model constructive trust was imposed. If this doctrine is rejected, and it has been suggested that it should be,[129] *Kelly v Cahill* may be better appropriated within the resulting trusts model than the constructive trust model. In *Kelly*, Barr J held that the testator had evinced a clear positive intention that his wife should inherit his entire property beneficially:

> The essential element is that the testator changed his mind regarding the disposition of his estate after death and that his took appropriate steps to give effect to his revised intention. That having been established, it follows that in the words of Lord Denning, "justice and good conscience" requires that the second defendant should not be allowed to inherit the testator's property or any part of it on the death of his widow and that his interest in remainder under the will should be deemed to be a constructive trust in favour of the widow.[130]

The importance attached to intention in this case is at odds with the traditional analysis of the institutional constructive trust, which is commonly considered to arise irrespective of the intentions of the parties[131] and typically has been imposed where the

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[126] *Dublin Corporation v Building and Allied Trade Union* (High Court, 6 March 1996). Emphasis added.
[127] *Kelly v Cahill* [2001] 1 IR 56 (HC).
[128] *Hussey v Palmer* [1972] 1 WLR 1286 (CA) 1289-1290.
[129] See above at 378-382.
[130] *Kelly v Cahill* [2001] 1 IR 56 (HC) 62.
[131] See for example, Budd J's comments in *Dublin Corporation v Building and Allied Trade Union* (High Court, 6 March 1996). By contrast, intention is not a necessary ingredient in the creation of a constructive trust.

defendant is guilty of wrongdoing.[132] Barr J also held that it was irrelevant that the second defendant was neither responsible for the mistake, nor aware that a mistake had been made. This is plainly inconsistent with the institutional constructive trust, which requires notice of the circumstances of the facts giving rise to the trust in order to attach the conscience of the defendant.[133] The combination of Barr J's emphasis on the intention of the transferor and the irrelevance of any fault or unconscionability on the part of the recipient make it unusual that he did not consider whether or not a resulting trust arose on the facts of the case. This may have been because the imposition of a constructive trust in *Kelly* would have caused the property to result back to the testator's estate, rather than going to the testator's widow. Barr J's failure to engage in a resulting trust analysis means that it is not possible to state whether a resulting trust could have been awarded in a way that would have passed the property to the testator's widow.

In conclusion, if the Irish courts adopt the view that the resulting trust responds to absence or vitiation of intention to confer the benefit upon the defendant, there is little basis in principle to denying resulting trusts as a proprietary response to unjust enrichment. However, care will be needed in indentifying the further factors that will be necessary for a resulting trust to arise, to avoid impermissibly widening the scope of proprietary liability in restitution. Furthermore, it is unclear whether such an approach would be available in overpaid tax claims. In particular, it is unlikely that such a trust will be available where the *Woolwich* principle is relied upon, as this unjust factor turns on public policy, rather than the plaintiff's vitiated intention.

Conclusions

Although the Irish courts have been willing to permit proprietary remedies to respond to unjust enrichment, their approach is unprincipled and incoherent. They have failed to identify any principled reason why a proprietary, as opposed to personal, remedy should be imposed in any given case. Commentators are divided as to what rationale would justify the imposition of proprietary relief. Some have suggested that the imposition of a proprietary remedy is appropriate where the plaintiff did not take the risk of the defendant's insolvency.[134] This test is supported by judicial authority. In *Westdeutsche,* Lord Goff

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[132] See, generally, Delany, *Equity and the Law of Trusts in Ireland* (5th edn Thomson Roundhall, Dublin 2011) Chapter 8.

[133] See above at 378 *et seq.*

[134] O'Dell, 'Unjust Enrichment and the Remedial Constructive Trust' (n 18); Burrows, 'Proprietary Restitution: Unmasking Unjust Enrichment' (2001) 117 LQR 412, 425.

observed that the bank had entered into a commercial transaction and so had taken the risk of the defendant's insolvency.[135] However, three difficulties underpin this approach.

First, it is not clear in what circumstances the plaintiff will be considered not to have accepted the risk of the defendant's insolvency. It may be that the plaintiff will be deemed to have accepted the risk of the defendant's insolvency in many of the cases in which his intention to make the payment is vitiated for the purposes of restitution, and that the only circumstances in which the plaintiff did not take the risk of the defendant's insolvency are cases where the plaintiff never intended to make the payment at all, for example, in cases of mistaken identity or mistake as to the subject matter of the transfer. However, in such cases the plaintiff's title will not have passed, so that the plaintiff will already have a proprietary claim available to him.[136] Second, cases of unjust enrichment are not the only cases in which the creditor did not willingly accept the risk of the defendant's insolvency and it is unclear why the plaintiff in a restitution case should rank over other such creditors.[137]

Another justification offered for a proprietary response to unjust enrichment is that the defendant's assets have been swollen by the receipt of the plaintiff's asset. Therefore, it has been argued that the creditors of the defendant should not be entitled to have recourse to this windfall.[138] However, Swadling has observed that such creditors are not seeking a windfall but merely seeking to have their losses made good.[139] As noted by Henchy J in *Barratt Apartments*,[140] where creditors are competing for limited resources upon insolvency, it is inappropriate to speak of either set of creditors as being unjustly enriched, as all creditors will have given value to the defendant.

The second major flaw underpinning the Irish courts' approach is that they have failed to consider when one form of proprietary relief, rather than another, will be available on the facts of a particular case. Awards of proprietary relief may carry significantly different consequences. For example, a constructive trust will give a far more extensive form of

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[135] *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669 (HL) 684. See also *Lord Napier and Ettrick v. Hunter* [1993] AC 713 (HL) 737 (Lord Templeman).

[136] See, generally, Fox, 'The Transfer of Legal Title to Money' [1996] Restitution Law Review 60. However, Webb has argued that 'there is no intention to benefit which is separate to or separable from the claimant's broader intention to pass title': Webb, 'Intention, Mistakes and Resulting Trusts' (n 123) 332.

[137] Swadling, 'Rescission, Property, and the Common Law' (n 27) 137. See also Swadling, 'A New Role for Resulting Trusts?' (n 118) 126-127.

[138] Jones, 'Remedies for the Recovery of Money Paid by Mistake' [1980] CLJ 275, 276; Webb, 'Intention, Mistakes and Resulting Trusts' (n 123) 330.

[139] Swadling, 'Rescission, Property and the Common Law' (n 27) 138, who notes that Tipping J rejected the windfall argument for similar reasons in *Fortex Group Ltd v MacIntosh* [1998] 3 NZLR 171.

[140] See above at 372-373.

proprietary relief than an equitable lien. By failing to address whether one form of proprietary relief rather than another is appropriate, the Irish courts have allowed an incoherent approach to proprietary relief to develop that appears to by wholly and exclusively driven by judicial discretion.[141] The lack of a principled basis for proprietary relief is of particular concern in claims for restitution of overpaid tax. The policy driven concerns, particularly fiscal chaos concerns, that underpin claims for restitution of overpaid tax, combined with this broad judicial discretion, may amplify the arbitrary manner in which proprietary relief is granted or withheld in Irish law and add further to the incoherence that underpins this area.

III. Hybrid remedies

A. Subrogation

Subrogation is

> a process by which one party is deemed to have been substituted for another, so that he can acquire and enforce the other's rights against a third party for his own benefit. It is often said that a subrogated claimant "stands in the shoes" of the party whose rights he is deemed to have acquired.[142]

The law distinguishes between two forms of subrogation: contractual subrogation and equitable subrogation.[143] In *Banque Financiere de la Cité Appellants v Parc (Battersea) Ltd*, Lord Hoffmann distinguished between these two forms of subrogation, holding:

> Subrogation in [the contractual] sense is a contractual arrangement for the transfer of rights against third parties and is founded upon the common intention of the parties. But the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived. The fact that contractual subrogation and subrogation to prevent unjust enrichment both involve transfers of rights or something resembling transfers of rights should not be allowed to obscure the fact that one is dealing with

[141] Compare, *Foskett v McKeown* [2001] 1 AC 102 (HL) 108-109.
[142] Mitchell and Watterson, *Subrogation Law and Practice* (OUP, Oxford 2007) [1.01].
[143] *Lord Napier and Ettrick v RF Kershaw Ltd (No1)* [1993] AC 713 (HL) 741.

radically different institutions. One is part of the law of contract and the other part of the law of restitution.[144]

The English courts have confirmed that equitable subrogation is an equitable remedy that arises irrespective of the intentions of the parties [145] and operates to reverse unjust enrichment.[146] Thus, as observed by Lord Steyn in *BFC*, 'the place of subrogation on the map of the law of obligations is by and large within the now sizeable corner marked out for restitution.'[147]

The Irish courts have not yet explicitly held that the doctrine of subrogation operates to prevent unjust enrichment.[148] This may be in part because the courts have failed to distinguish fully between equitable and contractual subrogation, and have considered that subrogation turns on the intention of the parties, as embodied in the contract governing their relationship. For example, in *In re 19th Ltd (In Liquidation)*, although Lynch J held that the 'right of subrogation arises from equitable doctrines seeking to do justice between the parties,'[149] he held that the question as to whether the right of subrogation arose turned largely on the construction of the contract between the parties.[150]

More recently, the principle that subrogation responds to unjust enrichment has been cited before the Irish courts on numerous occasions and, although the courts have not specifically rejected this argument, they have failed to explicitly approve it. In *Highland Finance Ireland Limited v Sacred Heart College of Agriculture Limited*, Murphy J, in the High Court, considered the argument that subrogation operated to reverse unjust enrichment

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[144] *Banque Financiere de la Cité Appellants v Parc (Battersea) Ltd* [1999] 1 AC 221 (HL) 231-232. Hereafter *BFC*. See also *Niru Battery Manufacturing Co v Milestone Trading Ltd (No2)* [2004] EWCA Civ 487 [27]; *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291 [32].

[145] Watts, 'Subrogation - A Step Too Far?' (1998) 114 LQR 341, 345; McGhee (ed), *Snells Equity* (32nd edn Sweet and Maxwell, London 2010) 891; Meagher, Heydon, and Leeming (eds) *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th edn Lexis Nexis Butterworths, 2002) 352. Donnelly has argued that subrogation can be both a right and a remedy: Donnelly, *Subrogation* (PhD Thesis, Trinity College Dublin) 26.

[146] *BFC* [1999] 1 AC 221 (HL) 236 (Lord Hoffmann) and 245 (Lord Hutton); *Boscawen v Bajwa* [1996] 1 WLR 328 (CA) 335; *HSBC Bank Plc v Liberty Mutual Insurance Co (UK) Ltd* [2002] EWCA Civ 691 [43]; *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291 [33]. Compare Meagher, Heydon, and Leeming eds, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (n 145) 360. For a consideration of contractual subrogation see *Orakpo v Manson Investments Ltd* [1978] AC 95 (HL) 105-106; *Lord Napier and Ettrick v RF Kershaw Ltd (No1)* [1993] AC 713 (HL)735.

[147] *BFC* [1999] 1 AC 221 (HL) 228.

[148] See for example Murphy J's comments to this effect in *Highland Finance Ireland Limited v Sacred Heart College of Agriculture Limited* [1992] 1 IR 472 (HC) 478.

[149] *In re 19th Ltd (In Liquidation)* [1989] ILRM 652 (HC) 656. See also, *Bank of Ireland Finance Limited v D J Daly Limited (In liquidation)* [1978] IR 79 (HC) 83-84.

[150] *In re 19th Ltd (In Liquidation)* [1989] ILRM 652 (HC) 658.

was attractive, but held that, because this line of reasoning had not been adopted in Irish law, it was inappropriate for him to have regard to it. He concluded that subrogation turned on the intention of the parties to the transaction.[151] On appeal, Blayney J held that the fact that neither party intended that the plaintiff should have a charge 'does not necessarily exclude the possibility of the doctrine of subrogation being applied, but it is a relevant factor in considering whether "a contrary intention appears".'[152] He concluded held that the parties did not intend the plaintiff to have the benefit of a security and subrogation claim failed.[153] In *Re Bell Lines Ltd (In Liquidation)*, Dunne J did not dispute counsel's contention that the principles set out in English cases in relation to equitable subrogation applied in Irish law. However, she ultimately held that the statutory scheme at issue in the case precluded consideration of the subrogation doctrine.[154] In *Eylewood Ltd v Companies Acts*, Finlay Geoghegan J held that the principles of subrogation

> flow, not from any contract between the principal debtor and the surety, but rather, from the equitable principles derived from an aim "to ensure that the person primarily liable should bear the whole burden in relief of others".[155]

Donnelly has suggested that equitable subrogation can respond to three possible imperatives: the intention of the parties, unjust enrichment, and the concern that the party from whom subrogation is sought should not be allowed to escape liability for his wrongdoing.[156] Support for each of these concerns can be found in the cases discussed above. Thus, it may be that no single rationale—whether intention, consent, or unjust enrichment— can wholly account for the doctrine of equitable subrogation in Irish law.[157]

It is unclear what circumstances of unjust enrichment will trigger the doctrine of subrogation. Burrows has argued that subrogation 'is triggered by a range of unjust factors.'[158] However, Virgo has argued that subrogation should only be available where the

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[151] *Highland Finance Ireland Limited v Sacred Heart College of Agriculture Limited* [1992] 1 IR 472 (HC) 481.
[152] *Highland Finance Ireland Limited v Sacred Heart College of Agriculture Limited* [1998] 2 IR 180 (SC) 190.
[153] *Ibid,* 191-192.
[154] *Re Bell Lines Ltd (In Liquidation)* [2006] IEHC 188. This conclusion was overturned on appeal, although the Supreme Court similarly did not engage with the principles underpinning the common law doctrine of subrogation: [2010] IESC 15, [2010] 1 IR 816.
[155] *Eylewood Ltd v Companies Acts* [2010] IEHC 57 [70].
[156] Donnelly, *Subrogation* (n 145) 14, 308, and 311-313. Compare, O'Dell, 'Liens, Necessity and Unjust Enrichment' (n 71) 325-328.
[157] Donnelly, *Subrogation* (n 145) 4.
[158] Burrows, *The Law of Restitution* (n 2) 147. See also Birks, *Unjust Enrichment* (n 2) 171.

plaintiff intended to obtain a security on making the payment.[159] The latter approach was adopted in *Filby v Mortgage Express (No 2) Ltd.* May LJ held:

> the enrichment will be unjust if the claimant did not get the security he bargained for when he advanced the money which in reality effected the improvement, and if the defendant's financial improvement is properly seen as a windfall. [160]

This conclusion does not entail that the doctrine turns on the intention of the parties. Instead, it is only in circumstances where the unjust enrichment arose where the paying party intended to obtain a security interest that the doctrine will be engaged in relation to security rights. Therefore, a combination of unjust enrichment coupled with an intention to obtain a security interest is necessary for the doctrine of subrogation to arise. Therefore, it is unlikely that the doctrine of subrogation will arise in respect of claims for overpaid tax. The taxpayer does not pay taxes with the intention of obtaining a security interest. Furthermore, money recovered in the form of taxes is not applied by the state specifically to discharge a debt owed to a third party. Therefore, the doctrine of subrogation will not apply in the context of payments of overpaid tax.

Furthermore, two other considerations suggest that a private individual may not be subrogated to the state's rights. First, the nature of the relief available pursuant to the doctrine of subrogation may entail that the remedy is not available against the state. Typically, the relief awarded in subrogation is proprietary in nature, [161] although 'it can apply to personal rights.'[162] In many cases, the claimant will be subrogated to the third party's security interest over the defendant's property, generally by way of equitable lien. [163] Judicial deference may entail a reluctance to grant mandatory orders against the state or to grant orders against the state that affect its contractual relationships with third parties.[164] Second, the courts may hold that public policy precludes the doctrine of subrogation from arising against the state. In

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[159] Virgo, *Principles of the Law of Restitution* (n 9) 642.
[160] *Filby v Mortgage Express (No2) Ltd* [2004] EWCA Civ 759 [62].
[161] *Lord Napier and Ettrick v RF Kershaw Ltd (No1)* [1993] AC 713 (HL) 749 (Lord Browne Wilkinson). See, Virgo, *Principles of the Law of Restitution* (n 9) 641.
[162] *Cheltenham & Gloucester Plc v Appleyard* [2004] EWCA Civ 291 [36], relying on *BFC* [1999] 1 AC 221 (HL). See also *Halifax Plc v Omar* [2002] EWCA Civ 121 [71]; Virgo, *Principles of the Law of Restitution* (n 9) 25; Burrows, *The Law of Restitution* (n 2) 145 and 147.
[163] *Lord Napier and Ettrick v RF Kershaw Ltd (No1)* [1993] AC 713 (HL) 738 (Lord Templeman), 744 (Lord Goff) and 752 (Lord Browne Wilkinson); *Highland Finance Ireland Limited v Sacred Heart College of Agriculture Limited* [1992] 1 IR 472 (HC) 478. Interestingly, in *Eylewood Ltd v Companies Acts,* [2010] IEHC 57 [82], Finlay Geoghegan J held that the right to indemnification that arises as a result of the doctrine of subrogation is a property right and so is entitled to constitutional protection.
[164] *Sinnott v Minister for Education* [2001] 2 IR 545 (SC); *TD v Minister for Education* [2001] 4 IR 259 (SC).

Orakpo v Manson investments, Lord Salmon held that the doctrine of subrogation could be precluded by the operation of public policy. [165] Similarly, the discretionary approach to subrogation adopted by the Supreme Court in *Highland Finance* may grant the Irish courts the flexibility to conclude on a policy basis that private individuals may not be subrogated to rights enjoyed by the state or to a third party's rights that are enforceable against the state.

However, the doctrine of subrogation may be relied upon by the state against a taxpayer to whom it has advanced money. For example, if the state had made an ultra vires disbursement that it sought to recover, and that sum had been used by the recipient to discharge a liability to the third party, in some circumstances the courts may be willing to hold that the state is subrogated to the rights of the third party against the defendant.

B. Rescission

Although the term rescission has had several meanings attributed to it, the remedy of rescission 'involves the setting aside or avoiding of contracts and other instruments by the court'.[166] It is an equitable form of relief 'that will be granted when the court considers that it would be just and equitable to do so in order to restore the parties, at least substantially, to their respective positions before the fraudulent misrepresentation was acted on.'[167] Since the aim of rescission is to restore the parties to their pre-contractual positions, each party must return to the other what it received under the contract,[168] As a result, it is most appropriately characterised as a restitutionary remedy.[169] Because the doctrine of rescission is a form of contractual relief, [170] it will have no application where restitution is sought for overpayments of tax or for other forms of charges.

Conclusions

The Irish courts' consideration of the appropriate remedial response to a claim for restitution of overpaid tax is unprincipled and incoherent. The cases discussed in this Chapter point to a number of conclusions. First, the Irish courts are willing to apply proprietary and personal forms of relief to restitution of overpaid tax, without considering why proprietary relief, as opposed to personal relief, is appropriate in any given case. This has obscured the

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[165] *Orakpo v Manson Investments Ltd* [1978] AC 95 (HL) 115.
[166] Delany, *Equity and the Law of Trusts in Ireland* (n 132) 715.
[167] *Northern Bank Finance v Charlton* [1979] IR 149 (SC) 197 (Henchy J) and 207 (Griffin J).
[168] *Ibid,* 198.
[169] However, Virgo has noted that '[r]escission does not, however, always have restitutionary consequences. For example, sometimes the court may order restitution on terms, such as requiring the parties to enter into a new, more appropriate contract': Virgo, *Principles of the Law of Restitution* (n 9) 29. Footnotes omitted.
[170] *Northern Bank Finance v Charlton* [1979] IR 149 (SC) 207-208.

proper conceptual bases of proprietary awards and makes it difficult to determine when such forms of relief will be available. In the specific context of restitution from the state, it is unclear when, or, indeed, *why,* proprietary restitutionary remedies will be available. Although some decisions—such as that of Lynch J in *In re Frederick Inns* and that of O'Flaherty J in *O'Rourke v Revenue Commissioners*—have suggested that a constructive trust may be imposed over unlawfully exacted taxes, no judge has indicated in what circumstances such remedies will be available. Common consensus is that proprietary remedies must be justified.[171] However, the Irish courts have failed to offer *any* justification for why a proprietary remedy was awarded in any of the cases considered in this Chapter and, in failing to do so undermine the insolvency regime by making proprietary remedies too widely available.

Second, even within cases in which the plaintiff has been confined to personal remedies, the courts' approach has been inconsistent. The Irish courts have been willing to award different forms of personal remedies without considering why one form of relief should be awarded rather than another. For example, it is unclear when the state will be liable to account at law or in equity for a payment as a result of Henchy J's confused analysis in *Murphy v Attorney General.* Henchy J's decision may also be criticised on the basis that, by equating liability to account as a constructive trustee with the constructive trust, he has conflated personal and proprietary liability.[172]

Third, given the traditional deference that the courts have accorded to the state in matters of public expenditure,[173] their apparent willingness to grant relief that bites directly on the state's receipts is surprising. However, this willingness probably stems from the courts failure to consider the consequences of a grant of proprietary relief. It is likely that, if they were to do so, they would be less willing to grant such remedies against the state in future

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[171] Waters, 'The Nature of the Remedial Constructive Trust' in Birks (ed) *The Frontiers of Liability* (OUP, Oxford 1994); Goode, 'Proprietary Restitutionary Claims' in Cornish, Nolan, O'Sullivan and Virgo (eds) *Restitution: Past, Present and Future* (Hart, Oxford 1998); O'Dell, 'Unjust Enrichment and the Remedial Constructive Trust' (n 18); Rickett, 'Of Constructive Trusts and Insolvency' in Rose (ed) *Restitution and Insolvency* (Informa Publishing, London 2000).

[172] See further, O'Dell, 'Unjust Enrichment and the Remedial Constructive Trust' (n 18).

[173] See *O'Reilly v Limerick Corporation* [1989] ILRM 181 (HC); *Sinnott v Minister for Education* [2001] 2 IR 545 (SC); *TD v Minister for Education* [2001] 4 IR 259 (SC).

Chapter 10: Conclusions

This thesis has explored the law on restitution from public authorities in Ireland. In embarking on this project, this thesis had two primary aims. First, it sought to chart the development and the current position of the law of restitution in Ireland, and to compare the development of Irish law with the law of restitution in Canada, Australia, and England.

Second, this thesis examined the relationship between the law of restitution and principles of public law. It sought to argue that traditional restitutionary principles, causes of action, and defences apply to claims for restitution from the state, and that these doctrines should not be supplanted by a public law right to restitution. Additionally, it proposed that, although traditional doctrines apply to restitution claims against the state, the public law considerations that arise in such claims feed into traditional restitutionary doctrines, so that those doctrines are moulded and redefined by principles of public law.

In seeking to answer these questions, this thesis has reached four main conclusions.

Conclusion 1: The Law of Restitution in Ireland—General Principles

The first conclusion relates to the status of general principles of the law of restitution in Irish law. This thesis has demonstrated that Irish law adheres to general restitutionary doctrines as they have been developed in England and Australia. However, Irish law retains a distinct identity, as it differs in many significant respects from that of other jurisdictions.

Chapter 2 demonstrated that Irish law recognises a distinct body of the law known as the law of restitution, which is founded upon the principle against unjust enrichment. It demonstrated that the historical development of the law of restitution in Ireland bears a close relationship with that of other common law jurisdictions, particularly that of English law. This is unsurprising in light of the close relationship between English and Irish law.[1] Chapter 2 also proved that, in common with Australia and England, Irish law recognises four constituent elements of a cause of action in restitution: an enrichment of the defendant at the expense of the plaintiff in circumstances that the law recognises as unjust, where the defendant has no recognised defence to a restitutionary claim. Chapters 3, 4, 5, and 8

[1] Discussed in Chapter 1.

considered further these constituent elements of a claim in restitution. They demonstrated that, although the Irish courts have given little consideration to these elements, they are likely to be developed in a manner similar to their exposition in Australia and England.

Chapter 3 considered the concept of enrichment in Australia, Canada, and England, and considered whether Ireland was likely to adopt any of the principles developed in these jurisdictions. It concluded that, although the Irish courts have yet to consider the concept of enrichment in any detail, they recognise that objective and subjective conceptions of value are relevant in considering whether a defendant has been enriched. As a result, the Irish courts are likely to be guided by many of the tests for enrichment that have been developed in other jurisdictions, and may have already implicitly adopted a number of these tests, such as the 'free acceptance' and 'accepted benefits' tests for enrichment. However, unlike the other jurisdictions discussed in Chapter 3, Irish law has yet to recognise that full restitution requires an award of compound interest. Chapter 3 argued that compound interest should be awarded in claims for restitution of overpaid tax, as it is necessary to ensure that a defendant makes full restitution of a gain. Such an award takes on an increased significance in claims for restitution from the state, as it serves the important objective of stripping the state of all benefits received as a result of unlawful taxation.

Chapter 4 considered the requirement that the enrichment was at the expense of the plaintiff. It noted that Irish law differed significantly from the law of other jurisdictions in a number of important respects. First, it noted that the Irish courts appear to have accepted a direct quadration between restitution and unjust enrichment. This quadration has not been subjected to any principled analysis by the Irish courts; it is based on scant authority, and has been rejected in the other jurisdictions canvassed in this thesis. Second, the Irish courts have accepted that indirect receipts and intercepted receipts are received by a defendant 'at the expense of the plaintiff'. Although there is limited support for this approach in Australia and England, the Irish courts have unequivocally accepted this proposition. Chapter 6 noted that such a development was important to ensure that a plaintiff could recover indirect forms of taxation that had been unlawfully exacted by the state. Finally, Chapter 4 noted that it is unclear whether the Irish law of restitution requires correspondence between the plaintiff's loss and the defendant's gain, and argued that Ireland is likely to reject the correspondence principle, in line with Australia and England.

Chapter 5 considered traditional causes of action in the law of restitution, and concluded that, although Ireland recognises traditional causes of action, such as mistake, duress, and duress *colore officii*, many features of these causes of action in Irish law are distinct to Ireland. For example, unlike Canada, Australia, or England, where the mistake of law rule has been abolished, the Irish courts have not yet formally abrogated the rule. Chapter 5 demonstrated that the status of the mistake of law rule in Irish law is unclear, as there are two conflicting lines of authority. One acknowledges the existence of the mistake of law rule, while the other ignores its potential existence. Chapter 5 argued that Ireland should resolve this uncertainty and formally abolish the mistake of law rule. It also noted that, while the Irish courts have recognised the duress *colore officii* ground, they do not require that a payment made *colore officii* is demanded in return for the performance of a public duty. Instead, the Irish courts may require that a plaintiff seeking to rely on duress *colore officii* protested against the imposition of the tax.[2]

Chapter 7 considered general defences that may be invoked in response to restitution claims. It noted that the Irish courts have permitted defendants to rely upon general defences that are not specific to the law of restitution, such as *res judicata* and laches, in response to restitutionary claims. However, it noted that there is some confusion as to the precise parameters of these defences in Irish law. Chapter 7 also demonstrated that general limitation periods enshrined in the Statute of Limitations 1957 may apply to claims for restitution, although the precise application of some of these limitation periods to claims for restitution has not been clarified by the Irish courts.

Chapter 8 considered defences that have been developed in response to restitutionary claims, and considered the status of these defences in Irish law. It noted that the Irish courts have adopted many of the traditional defences that have been developed in response to restitutionary claims, such as the change of position defence, the defence of 'counter restitution impossible', and the principle that payments at all events and other voluntary transfers are irrecoverable. Chapter 8 also noted that, although the Irish courts have not considered whether the common law defence of passing on should be adopted in Irish law, a statutory form of this defence has been adopted by the Irish legislature. Furthermore, Irish cases have not explicitly considered the policy motivated defences that have been canvassed in Australia or in England. However, some cases suggest that the Irish courts may in some

[2] *O'Rourke v Revenue Commissioners* [1996] 2 IR 1 (HC) 10. Emphasis added. This was noted in *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [71].

circumstances recognise that the honest or *bona fide* receipt of an enrichment may constitute a defence to a claim for restitution of that benefit.[3] Chapter 9 discussed the remedies awarded in claims for restitution in Ireland and, in light of the unique approach adopted by the Irish courts to remedies, confined its analysis to the remedies awarded by the Irish courts. It demonstrated that the Irish courts have awarded a wide variety of remedies in response to restitutionary claims. Some of these remedies, such as claims for an account at law and in equity, are personal. Some, such as the constructive trust and the equitable lien, are proprietary. Chapter 9 argued that the Irish courts' approach to awarding remedies in restitution claims has been incoherent. They have failed to identify why a personal or a proprietary claim should be awarded in any given set of circumstances and have failed to specify why a particular *form* of personal or proprietary remedy, as opposed to another, has been awarded in a given case.

Conclusion 2: The Law of Restitution in Ireland—Public Law Considerations

The second major focus of this thesis was to consider why restitution from public authorities differs from ordinary restitution claims. Chapter 2 considered the principles and policies that underpin the Irish courts' approach to restitution from the state, and compared these considerations with those adopted in other jurisdictions. It concluded that, in considering claims for restitution from the state, the Irish courts have been motivated by concerns similar to those considered by courts in other jurisdictions. Thus, in awarding restitution against the state, the Irish courts have had regard to the principle of legality,[4] the higher standards of probity that are required from state actors,[5] and the inequality of arms between taxpayers and the state.[6] Chapter 2 also noted that, like other jurisdictions, the Irish courts have sought to balance these public law imperatives in favour of restitution against the concern that the right to restitution should not disrupt the public purse. It demonstrated that, in common with the other jurisdictions canvassed, the Irish courts have been sensitive to

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[3] *Murphy v Attorney General* [1982] IR 241 (SC) 220; *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] 1 IR 105, 122. See Chapter 8 at 355-358.
[4] *Murphy v Attorney General* [1982] IR 241 (SC).
[5] *Dolan v Neligan* [1967] IR 247 (HC); *Rogers v Louth County Council* [1981] IR 265 (SC).
[6] *Dolan v Neligan* [1967] IR 247 (HC) 252; *Bank of Ireland Trust Services Ltd v Revenue Commissioners* [2002] 4 IR 178 (HC) 187.

fiscal concerns, but have not yet allowed 'fiscal chaos' to operate as a complete defence to restitutionary claims.[7]

The principled considerations relevant to restitution from public authorities in other jurisdictions, are supplemented by provisions of the Irish Constitution. Thus, the principle of 'no taxation without representation', enshrined in Article 4 of the Bill of Rights 1689, derives support from Articles 15.2.1°, 21, 22, and 28.7.1° of the Irish Constitution. Similarly, the principle in *Auckland Harbour Board v R,* which provides that ultra vires payments made by the state are recoverable as of right,[8] is recognised in Irish law,[9] and is also buttressed by Articles 11 and 17 of the Irish Constitution. However, Chapter 2 noted that these considerations have not been relied upon in the same manner in Ireland as they have in other jurisdictions. For example, whereas, in *Woolwich,* Lord Goff relied on the principle in *Auckland Harbour Board* to develop a reciprocal right to restitution of ultra vires payments made *to* the state, Articles 11 and 17 have been relied upon by the Supreme Court to restrict restitution of unlawfully exacted taxes.[10]

Finally, Chapter 2 considered how restitution from public authorities is also underpinned by substantive rights. It demonstrated that the right to property, protected under Articles 40 and 43 of the Irish constitution and under Article 1 of the First Protocol to the European Convention on Human Rights, may be relied upon to reinforce the principle that the state should not retain unlawfully exacted payments. It also demonstrated the important impact that principles of EU law, such as the principle against unjust enrichment and the right to an effective remedy, have had on the development of the law of restitution in English law. It suggested that such considerations may also inform the development of Irish law where restitution is sought of payments levied in breach of EU law.

Conclusion 3: Restitution from Public Authorities and Traditional Restitutionary Causes of Action

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[7] *Murphy v Attorney General* [1982] IR 241 (SC) 320; *Tate v The Minister for Social Welfare* [1995] 1 IR 418 (HC) 432; *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [128].

[8] *Auckland Harbour Board v R* [1924] AC 318 (PC) 326; *R v Toronto Terminals Railway* [1948] 4 DLR 468 [40].

[9] *Great Southern and Western Railway Company of Ireland v R* [1925] 59 ILTR 85 (HL); *Kenny v Cosgrave* [1926] 1 IR 517 (SC); *Dolan v Neligan* [1967] IR 247 (HC).

[10] *Murphy v Attorney General* [1982] IR 241 (SC) 302 and 318.

A primary aim of this thesis was to demonstrate that claims for restitution against the state may be encompassed within traditional principles of the law of restitution. It sought to prove that traditional unjust factors and defences were adequate to accommodate such claims.

Chapter 5 examined the application of traditional, consent-oriented, causes of action, such as mistake and compulsion, to claims against the state in Canada, Australia, England, and Ireland. It relied on authorities from each jurisdiction to demonstrate how consent-oriented unjust factors may be successfully relied upon to obtain restitution from the state. Furthermore, in all four jurisdictions, judges ensured that such causes of action could respond to claims from the state by limiting restrictions traditionally associated with such causes of action. It is no coincidence that the development of judicial techniques to avoid the mistake of law rule—by recharacterising mistakes of law as mistakes of fact,[11] and developing an exception to the rule where the parties are not *in pari delicto*[12]—occurred predominantly in cases where restitution was sought from the state. Similarly, many of the cases in which the mistake of law rule has been formally abolished concerned restitution from state bodies,[13] and so the abolition of the rule in these jurisdictions may be been implicitly motivated by a concern that the state should not be enriched by the unlawful receipt of taxes.

Chapter 5 also charted a similar trend in compulsion cases, although this phenomenon was less obvious and less widespread than it was in the mistake cases. Some jurisdictions, such Australia and Ireland, have been willing to permit recovery of unlawfully exacted taxes on the basis of duress *colore officii*, notwithstanding the fact that the payment of the tax was not made to secure the provision of a withheld entitlement.[14] Similarly, Canada, Australia, and Ireland have adopted a generous duress cause of action in claims against the state, in recognition of the coercive force that underpins demands for the payment of tax.[15]

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[11] *George (Porky) Jacobs Enterprises Ltd (Plaintiff) Appellant v City of Regina* [1964] SCR 326, 44 DLR (2d) 179 (SCC); *Eadie v Township of Brantford* [1967] SCR 573, 63 DLR (2d) 561 (SCC).

[12] *Rogers v Louth County Council* [1981] IR 265 (SC); *Dolan v Neligan* [1967] IR 247 (HC).

[13] *Air Canada v British Columbia* [1989] 1 SCR 1161, 59 DLR (4th) 161; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).

[14] *Murphy v Attorney General* [1982] IR 241 (SC); *Mason v New South Wales* (1959) 102 CLR 108 (HCA); *Aerolineas Argentinas and Others v Federal Airports Corporation* (1995) 63 FCR 100; *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 (HCA). Compare, *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL).

[15] *Eadie v Township of Brantford* [1967] SCR 573, 63 DLR (2d) 561 (SCC); *AJ Seversen Inc v Qualicum Beach (Village)* (1982) 135 DLR (3d) 122 (BCCA) [12]; *Mason* (1959) 102 CLR 108 (HCA); *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137 (HCA); *Dolan v Neligan* [1967] IR 247 (HC) 252; *Rogers v Louth County Council* [1981] IR 265 (SC) 271; *Murphy v Attorney General* [1982] IR 241 (SC) 317. See also,

Traditional defences also can respond to claims for restitution from the state and, like restitutionary causes of action, are susceptible to modification where necessary to accommodate public law principles. However, there has been considerable divergence between the approach adopted in other jurisdictions and that adopted in Irish law, as discussed in Chapters 7 and 8.

Chapter 7 considered how principles of public law affected general defences, such as statutory limitation periods and the defence of laches. It demonstrated that restrictive limitation periods may be assessed for consistency with principles of public law, whether derived from national or from EU law. The CJEU has held that limitation periods must conform to the principles of equivalence and effectiveness,[16] and should not 'render virtually impossible or excessively difficult the exercise of rights conferred by EU law.'[17] Similarly, retroactive limitation periods may fall foul of Irish constitutional law where they constitute an unjustified interference with vested causes of action.[18] Thus, Chapter 7 demonstrated that even defences that are not specific to restitutionary claims must be adapted where restitution is sought from the state.

Chapter 8 demonstrated that public law considerations are also relevant to defences specific to restitutionary claims, and that the courts in many jurisdictions are sensitive to these considerations. In England, the courts have held that the change of position defence is not available where claimants seek recovery of unlawfully paid taxes pursuant to the *Woolwich* principle.[19] In Australia and Canada, the courts rejected the passing on defence in relation to claims for taxation where it would subvert the principles underpinning the *Woolwich* principle.[20] However, Chapter 8 argued that if the public law principles behind the *Woolwich* principle justify a total restriction on the change of position defence where the *Woolwich* principle is relied upon, they also justify a restrictive approach to change of

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Woolwich [1993] AC 70 (HL), where conflicting views on this matter were expressed by Lord Browne-Wilkinson (at 197) and Lord Goff (at 173).

[16] *Tate v Minister for Social Welfare* [1995] 1 IR 418 (HC) 441-442.

[17] Case C-231/96 *Edis v Ministero delle Finanze* [1998] ECR I-4951 [35]; Case C-260/96 *SPAC v Ministero delle Finanze* [1998] ECR I-4997[19]; Case C-228/96 *Aprile Srl v Amministrazione delle Finanze dello Stato* [1998] ECR I-7141 [19].

[18] *Health Amendment Bill* [2005] IESC 7, [2005] 1 IR 105 [111] and [121].

[19] *FII Group Litigation* [2008] EWHC 2893 (Ch), [2009] STC 254 [304]; *Bloomsbury International* [2009] EWHC 1721 (QB) [134].

[20] *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd* (1994) 182 CLR 51 (HCA) 69.

position where restitution is sought from the state on the basis of other unjust factors. Therefore, the restrictive approach that the courts have adopted where defences are relied upon to defeat a claim under the *Woolwich* principle should also apply where restitution is sought on the basis of other unjust factors.

The approach adopted in England and Australia[21] focuses on preventing the state from retaining unlawfully exacted taxes. In contrast, the approach of the Irish courts has displayed greater sensitivity to the fiscal concerns of the state. Chapter 7 considered the approach of the Irish courts to the doctrine of laches in restitutionary claims against the state. It considered Henchy J's generous formulation of laches in claims for restitution of overpaid tax in *Murphy*,[22] and suggested that this approach was prompted by fiscal chaos concerns. Chapter 8 noted that Henchy J's generous approach to the change of position defence in the same case also seemed designed to prevent disruption of the state finances.[23]

Even in jurisdictions where the courts have been willing to restrict defences that are inconsistent with the policies underpinning the *Woolwich* principle, there may be difficulties in applying restitutionary defences to claims against the state. Chapter 8 considered how the test for change of position, and its attendant standards of proof and causation, has caused difficulties where the courts have tried to apply it to restitution claims against public authorities. It noted that the courts have not sought to treat the state more favourably in these claims,[24] but that the standards of proof and causation that apply to individual defendants cannot be transposed to cases in which the state is the defendant. Chapter 8 argued that the current judicial approach to change of position entails that claims for restitution will automatically be defeated by the change of position defence if claimants cannot bring their claims within the *Woolwich* principle, and that this approach may constitute a disproportionate interference with the constitutional right to property. Chapter 8 suggested that a proportionality element should be incorporated within the defence where it is relied upon by the state, so that the state must demonstrate adverse fiscal consequences that are sufficiently serious to justify retention of unlawfully expropriated taxes.

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[21] This approach was also adopted in Canadian jurisprudence before the decision of the Canadian Supreme Court in *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3.

[22] *Murphy v Attorney General* [1982] IR 241 (SC) 319.

[23] *Murphy* [1982] IR 241 (SC) 320.

[24] *Philip Collins Ltd v Davis* [2000] 3 All ER 808 (Ch) 829.

Thus, Parts II and III of this thesis considered the relationship between the private law of restitution and principles of public law when restitution is sought from the state. They demonstrated that principles of the private law of restitution can, and do, respond to claims for restitution against the state. Each of the four jurisdictions considered in this thesis has successfully applied traditional unjust factors to claims for restitution against the state, and has restricted restitution through the application of traditional restitutionary defences. However, the unique position of the state means that principles of public law have fed into to the manner in which these causes of action and defences are applied, and each jurisdiction has incorporated these principles somewhat differently. However, the mere fact that the courts have had to accommodate such considerations does not indicate that private law principles are an inappropriate basis on which to found restitution from the state.

Conclusion 4: The Woolwich Principle and Public Law Grounds of Restitution.

The central task of this thesis has been to unpick the relationship between the private law principles of restitution and the public law considerations that arise when restitution is sought from a state body. These final conclusions will address two areas which are central to this relationship, and which were discussed in Chapter 6.

The first of these is the principle in *Woolwich Equitable Building Society v IRC.*[25] This is a private law unjust factor, albeit one that is heavily influenced by public policy considerations. Chapter 6 noted that, although the *Woolwich* principle has been adopted in Irish law, its adoption has been fraught with conceptual difficulties. These difficulties stem from the failure of the Irish courts to distinguish between the three bases of recovery—compulsion, absence of consideration, and an automatic right to recovery—canvassed in the *Woolwich* decision. As a result, the Irish courts' consideration of the automatic right to recovery propounded by Lord Goff in *Woolwich* has become flavoured with concepts that apply more appropriately to the other bases of recovery discussed in *Woolwich.*

Chapter 6 also noted that the *Woolwich* principle is a relatively new cause of action and, as a result, some uncertainty exists at its borders. It considered the manner in which the English courts had begun to resolve those ambiguities, and considered the manner in which

[25] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL).

Irish courts were likely to address the same issues. It concluded that, although these ambiguities were likely to cause uncertainty in the near future, none was incapable of resolution, and none rendered the *Woolwich* principle undesirable as matter of principle or unworkable as a matter of practice.

The second issue that Chapter 6 examined was whether traditional private law unjust factors, including the *Woolwich* principle, should be replaced by a public law regime for recovery. Chapter 6 considered the public law approaches adopted by the Court of Appeal in *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners,*[26] and by the Supreme Court of Canada in *Kingstreet Investments Ltd v New Brunswick (Department of Finance).*[27] It also considered the hybrid public and private regime proposed by Williams, and considered whether a public law approach to restitution may be derived from the decision of the Irish Supreme Court in *A v Governor of Arbour Hill Prison*.[28] It concluded that none of the models discussed provided an adequate replacement for the traditional approach to restitution on the basis of unjust factors.

Chapter 6 considered the case for the introduction of a public law regime for restitution of overpaid tax. It considered whether the established private law bases for recovery were capable of accommodating claims for restitution of overpaid tax, as this is the basis upon which public law bases for recovery are frequently justified. It concluded that this proposition was unfounded. The main focus of Parts II and III of this thesis has been to show that private law causes of action and defences are capable of responding to claims for restitution of overpaid tax. Principles of public law simply shape the parameters of these doctrines where relied upon by, or against, the state. However, Chapter 6 acknowledged that it may be too soon to conclusively determine whether or not the private law of restitution is appropriate to deal with claims against the state. However, even in light of this acknowledgment, claims that the private law of restitution should be replaced by a public law regime are premature.

Chapter 6 also argued that the uncertainties that currently attend the private law of restitution will not be resolved by the adoption of a public or a hybrid regime. In *Kingstreet,* Bastarache J justified the adoption of a constitutional right to restitution of unconstitutional

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[26] *DMG* [2005] EWCA Civ 78, [2006] Ch 243; [2006] UKHL 49, [2007] 1 AC 558.
[27] *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1, 276 DLR (4th) 342, [2007] 1 SCR 3 [33].
[28] *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88.

taxes on the basis that restitutionary analyses of enrichment and loss were ill-suited to claims involving unconstitutional taxes. However, he failed to identify how recovery of unconstitutional taxes should be quantified in future. Moreover, recent Canadian cases demonstrate that the *Kingstreet* approach to restitution does not do away with the need to consider the kinds of charges or types of legislative invalidity that fall within a constitutional right to restitution.[29] Thus, Chapter 6 demonstrated that a public law regime will not solve any of the problems inherent in the traditional *Woolwich* approach.

Chapter 6 also argued that the adoption of public or hybrid regimes will give rise to further difficulties. Some of these difficulties are conceptual. For example, if a public law regime is adopted, it is unclear what relationship would exist between a public law basis for recovery of monies paid to the state and other related areas of law. Such areas included restitution pursuant to traditional unjust factors, and other forms of redress for ultra vires acts. The relationship between public law and traditional unjust factors is particularly problematic in Williams's hybrid basis for recovery, and represents a major stumbling block to recognition of that regime. Chapter 6 also highlighted practical difficulties attendant upon the adoption of a public law regime for restitution. It noted the procedural and remedial restrictions attendant upon public law claims in Ireland and England, and considered whether, in light of these limitations, a public law basis for restitution would be an appropriate basis upon which to ensure the important public law imperative that the state does not retain payments to which it is not entitled.

Thus, restitution from public authorities straddles the boundary between private and public law. As a result, it reconciles conflicts between private and public law considerations and between conflicting public law imperatives. The balance that has been struck by the law of restitution in Ireland, England, and Australia, has been to apply the private law of restitution, but to acknowledge the relevance of public law considerations when applying traditional restitutionary doctrines to claims against the state. To date, this approach has satisfactorily reconciled principles of private and public law. Whether it will be replaced by a wholly public or hybrid regime for restitution remains to be seen. However, the Canadian experience demonstrates that considerable refinement of these public law regimes will be necessary before they can provide a satisfactory alternative to the current approach.

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[29] *Barbour v University of British Columbia* [2009] BCSC 425, 310 DLR (4th) 130 [69]; *Hislop v Canada (Attorney General)* [2007] SCC 10, 278 DLR (4th) 385.