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Introduction

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A. BACKGROUND

Time was when money paid to the government was surprisingly difficult to recover when it transpired that the payment was not due. Tax statutes gave claimants some recovery rights,[1] but these were limited in scope. So too were their rights at common law, which were essentially no different from their rights against private individuals.[2] Money could be recovered if it was paid by mistake, but only if the mistake related to a fact and not if it related to a proposition of law. Money could also be recovered if it was paid under duress, including duress *colore officii*, but such cases were (and are) uncommon. Where money was paid pending the outcome of a dispute with a tax authority, it was sometimes possible to imply an agreement that the money would be repaid if the taxpayer were successful;[3] resort to this artifice highlighted the inadequacy of the remedies that were generally available to taxpayers.

Times have changed. In 1992 the House of Lords made a new start in *Woolwich Equitable Building Society v IRC*.[4] Encouraged by academic writings[5] and developments in European law,[6] the court held that money paid as tax pursuant to ultra vires legislation could be recovered, although there was no illegitimate compulsion, mistake, or contract to repay. This was a bold step. Unjust enrichment claims generally lie only when the case falls 'within or close to some established category or factual recovery situation',[7] but *Woolwich* shows us that the courts have the power to recognise new grounds for recovery.[8]

[1] Statutory recovery rights were first introduced by the Finance Act 1923, s 24, which was the statutory precursor of the present-day Taxes Management Act 1970, s 33.

[2] See the survey in Law Commission, *Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments* (Law Com No 227, 1994) Part C.

[3] *Sebel Products Ltd v Customs & Excise Commissioners* [1949] Ch 409; *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1989] 1 WLR 137 (QB).

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

[5] P Birks, 'Restitution from the Executive: a Tercentenary Footnote to the Bill of Rights' in P Finn (ed), *Essays on Restitution* (Sydney, Law Book Co, 1990) 164; W Cornish, '"Colour of Office": Restitutionary Redress Against Public Authority' (1987) 14 *Journal of Malaysian and Comparative Law* 41.

[6] See *Woolwich* (n 4) 177, where Lord Goff cited Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595 (hereafter '*San Giorgio*').

[7] *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch) [16]–[18].

[8] See especially *Woolwich* (n 4) 172 (Lord Goff), but contrast 197 (Lord Browne-Wilkinson). See too *CTN Cash & Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714 (CA) 720; *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 691 and 722, and *Kleinwort Benson Ltd v Lincoln City Council* [1999] AC 349 (hereafter '*Kleinwort Benson*') 372 and 393. For discussion of the limits to the courts' power see *Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678, [2010] IRLR 786 (hereafter '*Gibb*') [26]–[27].

In 1999 the House of Lords took a further significant step in *Kleinwort Benson Ltd v Lincoln City Council*,[9] when it abolished the mistake of law bar. In obiter dicta, the court also held that restitution could be awarded on the ground of mistake where payments were made pursuant to an understanding of the law which was correct at the time but which was retrospectively falsified by a later court decision. In the first decade of the present century, claimants who paid money in the mistaken belief that they owed a tax liability therefore had two new avenues to recovery – *Woolwich* and mistake of law – and they made the most of them.

The *Woolwich* case left some important questions unanswered. Does the principle established by the case apply where taxes are demanded on the basis of a misapplication of valid legislation? According to the Court of Appeal in *British Steel plc v Customs & Excise Commissioners (No 1)*,[10] the answer is yes. Does the principle only operate where the amount was demanded by the state? In *Test Claimants in the FII Group Litigation v HMRC*,[11] the Supreme Court has now told us that demand is inessential, with the result that the *Woolwich* principle also applies to taxes collected by self-assessment. More fundamentally, does *Woolwich* cover the field of overpaid tax? In *Deutsche Morgan Grenfell Group plc v IRC*,[12] the House of Lords held that it does not, and that *Woolwich* claims sit alongside, and are merely alternatives to, any other restitution claims that are also available. More fundamentally still, how does the *Woolwich* principle fit within the structure of the English law of unjust enrichment, which generally requires claimants to establish a positive ground for restitution, and does not generally treat the absence of a legal ground for a transfer as a sufficient reason to award recovery?[13] In *FII*,[14] members of the Supreme Court touched inconclusively on this question, but it awaits a definitive judicial answer.

In *Kleinwort Benson*, Lord Browne-Wilkinson dissented from the court's findings that 'retrospective' mistakes could ground recovery, and would be subject to the same limitation rules as other mistakes, because he foresaw that these findings would enable claimants to recover payments stretching back for decades.[15] In *DMG*,[16] the House of Lords confirmed that claimants relying on 'retrospective' mistake to recover money paid as tax were entitled to invoke the Limitation Act 1980, section 32(1)(c). This postpones the inception of the six-year period applicable to mistake claims to the date when the claimant knew of, or could reasonably be expected to have discovered, his mistake. Also, the date when the claimant's mistake became reasonably discoverable in such a case was usually no earlier than the date of the court decision which retrospectively changed the law. In response to these findings, legislation was enacted to disapply section 32(1)(c) in relation to mistakes of law relating to taxation matters under the care and management of the Revenue.[17]

[9] *Kleinwort Benson* (n 8).

[10] *British Steel plc v Customs & Excise Commissioners (No 1)* [1997] 2 All ER 366.

[11] *Test Claimants in the Franked Investment Income Group Litigation v HM Revenue & Customs* [2012] UKSC 19, [2012] 2 AC 337 (hereafter, '*FII* (SC)') [64]–[81] and [171]–[174].

[12] *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 (hereafter '*DMG*').

[13] *Kleinwort Benson* (n 8) 405; *DMG* (n 12) [21] and [155]; *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561 (hereafter '*Sempra*') [23]–[25].

[14] *FII* (SC) (n 11) [81] and [162].

[15] *Kleinwort Benson* (n 8) 364.

[16] *DMG* (n 12).

[17] The Finance Act 2004, s 320, which applied prospectively to actions brought on or after 8 September 2003, and the Finance Act 2007, s 107, which extended the disapplication retrospectively to any action brought before 8 September 2003 for relief from the consequences of such a mistake of law.

However, a majority of the Supreme Court has now held in *FII*[18] that these statutory measures have not achieved their purpose with regard to claims by taxpayers with EU law-sourced rights of recovery, as the government failed to implement transitional measures to protect taxpayers with accrued restitutionary rights. A reference has been made to the CJEU to determine whether this is indeed the position.

While *Woolwich* and mistake of law are now the grounds of recovery generally relied on by English claimants bringing actions at common law,[19] the recognition of these grounds does not alone account for the explosion of overpaid tax litigation that has occurred over the past decade. This may also be attributed to other factors on the European and the domestic planes, factors which have combined to create a perfect storm for HMRC.

The first factor is the new assertiveness of the Court of Justice of the European Union[20] in tax matters. Value Added Tax (VAT) is rooted in European directives, so that the CJEU has always had the last word. In contrast, direct taxes, such as corporation tax and income tax, find their source in national law. The CJEU has nonetheless increasingly insisted that these taxes should not be structured in such a way as to infringe basic principles of European law. A series of references beginning in 1998 with *ICI plc v Colmer*,[21] and including most prominently *Metallgesellschaft Ltd v IRC*[22] and *Test Claimants in the FII Group Litigation v IRC*,[23] 'turned into a root and branch onslaught on many established features of the system for taxing companies'.[24] At the same time the European and English courts have also held that other types of tax have been wrongly collected.[25] All said, a great deal of tax has been paid that should not have been paid.

A second factor is the CJEU's uncompromising requirement that taxes collected contrary to European law should be repaid.[26] This European right to repayment must be given effect by the national courts applying the procedures available to them, but European law regulates that process closely. The CJEU has taken a very strict line in relation to the defences which national legal systems may legitimately allow to such claims, apparently restricting this to reasonable time-bars and literal passing on.[27] So, for example, the

[18] *FII* (SC) (n 11).

[19] *Woolwich* has had a mixed reception internationally. It has been followed in Ireland, but it has neither been received into Australian law nor rejected there. Meanwhile, Canadian law has taken an altogether different path. For discussion see chapters 13, 14, and 15 of the present volume.

[20] Hereafter 'CJEU'. In this chapter, references to the CJEU include the former European Court of Justice (ECJ).

[21] Case C-264/96 *ICI Chemical Industries plc v Colmer (HM Inspector of Taxes)* [1998] ECR I-4695.

[22] Joined Cases C-397/98 and C-410/98 *Metallgesellschaft Ltd v Inland Revenue Commissioners* and *Hoechst AG v Inland Revenue Commissioners* [2001] ECR I-1727.

[23] Case C-446/04 *Test Claimants in the Franked Investment Income Group Litigation v Inland Revenue Commissioners* [2006] ECR I-11753.

[24] A Park, 'A Judge's Tale: Corporation Tax and Community Law' [2006] *British Tax Review* 322, 332.

[25] For a few examples that have prompted restitution claims currently under consideration see Case C-169/04 *Abbey National plc v HM Revenue & Customs* [2006] ECR I-4027 and Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust plc v HM Revenue & Customs* [2007] ECR I-5517 (VAT); Case C-569/07 *HSBC Holdings plc v HM Revenue & Customs* [2009] ECR I-9047 (stamp duty reserve tax); and *Waste Recycling Group Ltd v HM Revenue & Customs* [2008] EWCA Civ 849, [2009] STC 200 (landfill tax).

[26] In England, this requirement is commonly associated with the CJEU's decision in *San Giorgio* (n 6), and claims made under it are commonly called '*San Giorgio* claims'. This is perplexing, and may reflect only the fact that Lord Goff cited that case in *Woolwich* (n 4). The issue in *San Giorgio* concerned the defence of passing on; the EU law principle requiring repayment of taxes collected contrary to EU law had already been established, for example in Case 68/79 *Hans Just I/S v Danish Ministry for Fiscal Affairs* [1980] ECR 501. The CJEU does not accord the *San Giorgio* case the seminal importance that the English courts appear to.

[27] See most recently Case C-398/09 *Lady & Kid A/S v Skatteministeriet*, CJEU, 6 September 2011, [2012] STC 854, and Case C-310/09 *Ministre du Budget, des Comptes Publics et de la Fonction Publique v Accor SA*, 15 September 2011. For discussion see R Williams, 'Unjust Enrichment and the Court of Justice of the European Communities: A Loss of National Competence and Principle?' [2011] *British Tax Review* 631.

'prevailing practice' defence, which has historically provided an important protection to tax authorities, is not allowed.[28] Moreover, while reasonable time-bars are allowed, the courts have struck down, as contrary to European law, attempts by Parliament to stem the tide of claims by curtailing limitation periods without advance notice.[29]

A third factor is the absence of a comprehensive and satisfactory statutory scheme regulating the repayment of unlawfully collected tax. In England there is a patchwork of tax-specific schemes, each with its own peculiar features. Some taxes are not subject to any such scheme, so that common law claims can be freely brought. Other statutory schemes have proven to be unduly restrictive and offensive to European law, and have therefore been restrictively construed or disapplied,[30] again allowing claimants to bring common law claims.

The conjunction of these factors has been an irresistible enticement for some taxpayers. It has also caught the attention of accountancy firms which, with the same enthusiasm that they once dedicated to the creation and marketing of tax avoidance schemes (now less saleable following the enactment of anti-avoidance legislation), have focused their attention on the creation and marketing of schemes to challenge aspects of UK tax legislation with a view to obtaining restitution of money paid to HMRC. If tax can be shown to have been collected unlawfully, and especially in breach of European law, then the taxpayer need only find a way to escape from any restrictive statutory scheme that may cover the case in order to recover payments going back for many years, along with interest that may well outstrip the principal sums claimed, particularly if compound interest is awarded.[31]

This volume takes a detailed look at all these developments and their ramifications for the recovery of money paid as tax and for the law of unjust enrichment in England, the European Union, and other jurisdictions. In the remainder of this introductory chapter, we set the contributors' work in context and offer some critical observations of our own. Our discussion tracks the division made in the book between chapters on English law, European law, and comparative law.

[28] Case C-188/95 *Fantask A/S v Industriministeriet (Erhvervsministeriet)* [1997] ECR I-6783; *FII* (SC) (n 11) [116]–[120] and [204]–[205].

[29] In addition to *FII* (SC) (n 11) see Case C-62/00 *Marks & Spencer plc v Customs & Excise Commissioners* [2002] ECR I-6325 (hereafter '*Marks & Spencer*'); *Fleming (trading as Bodycraft) v HM Revenue & Customs* [2008] UKHL 2, [2008] 1 WLR 195 (hereafter '*Fleming*').

[30] eg *FII* (SC) (n 11) (statutory scheme construed as being non-exclusive of common law claims where an exclusive scheme would have offended European law by reason of the statutory prevailing practice defence); *Investment Trust Companies (in liquidation) v HM Revenue & Customs* [2012] EWHC 458 (Ch), [2012] STC 1150 (hereafter '*ITC*') (statutory scheme disapplied where it provided no remedy for end consumers).

[31] As the House of Lords effectively held that it should be in *Sempra* (n 13). In Case C-591/10 *Littlewoods Retail Ltd v HM Revenue & Customs*, 19 July 2012, [2012] STC 1714 (hereafter '*Littlewoods* (CJEU)'), the compound interest on a principal amount of some £205 million was said to be some £1.25 billion. The CJEU declined in that case to rule whether Littlewoods' European law right to repayment also entitled it to compound interest. Media reports suggest that HMRC are facing claims whose total value runs to billions of pounds: eg N Huber, 'Retailers Hope to Bag VAT Windfall from European Ruling' *Accountancy Age*, 22 February 2012; published online at: www.accountancyage.com/aa/analysis/2154026/retailers-hope-bag-vat-windfall-european-ruling. This is borne out by the provision made for repayment claims in HMRC's 2008/09 accounts, which was increased from £2.22 billion to £8.545 billion: HM Revenue & Customs, *2008–09 Accounts* pp 101–2, paras 9 and 11; published online at www.hmrc.gov.uk/about/hmrc-accs-0809.pdf.

B. ENGLISH LAW

The chapters collected in Section II of this book concern the English law governing the recovery of money paid as tax which is not due. In practice, most claims of this kind are brought under statutory recovery schemes, such as those established by the Taxes Management Act 1970, section 33, and the Value Added Tax Act 1994, section 80. These schemes are generally exclusive, ie claimants who fall within their scope are forbidden to rely on their common law rights, and may only rely on their statutory rights. Nevertheless, a series of very high-value claims have been made in recent years by claimants who have sought to rely on their common law rights, either because they have no statutory rights or (more commonly) because their statutory rights are more limited than their common law rights, for example because they are subject to shorter limitation periods or because the statutory schemes make less generous provision for the award of interest than would otherwise be available. To overcome these disadvantages, some claimants have argued that they should be permitted to rely on their common law rights because their case falls outside the scope of any statutory regime,[32] while others have argued that although their case falls within the scope of a statutory regime, it would be contrary to EU law to confine them to their statutory rights because these are insufficiently generous to give them an effective remedy for their EU law-sourced rights of recovery.[33]

This litigation has caused the English courts to focus their attention on the content and scope of common law claims in unjust enrichment to recover money paid as tax. Their findings have an obvious significance for tax lawyers, and they also have important ramifications for the law of unjust enrichment. To make out a claim in unjust enrichment, the claimant must show that the defendant was enriched, that this enrichment was gained at the claimant's expense, and that it was 'unjust', meaning that the circumstances in which it occurred coincided with, or were analogous to, those of a previous case in which restitution was awarded.[34] Where all these elements are present, a remedy will be awarded unless the defendant can raise a defence. Questions relating to all of these matters have arisen in the overpaid tax cases, and we will say something here about each of them.

(1) Enrichment

Money is obviously beneficial, and so one might have thought that enrichment would not be a difficult issue in the context of claims to recover money paid as tax. However, there are some complexities. These derive from the fact that money not only has an exchange value, but also has a use value. The exchange value of money is always simply its face value, reflecting the fact that money is not only a store of value, but also a measure of value. However the use value of money varies with the recipient's identity, as it is measured by

[32] As in eg *DMG* (n 12) esp [19], [55], and [135].

[33] As in eg *Monro v HM Revenue & Customs* [2008] EWCA Civ 306, [2009] Ch 69 esp [34]; *Test Claimants in the Franked Investment Income Group Litigation v HM Revenue & Customs* [2010] EWCA Civ 103, [2010] STC 1251 (hereafter, '*FII* (CA)') esp [261], but compare *FII* (SC) (n 11) [116]–[119] and [204]–[205]; *ITC* (n 30) [111]–[171].

[34] *Woolwich* (n 4) 196–97; *Kleinwort Benson* (n 8) 737; *Gibb* (n 8) [26]–[27].

asking what it would have cost the recipient to borrow the same amount, and some recipients (for example, the government) can borrow money more cheaply than others. Thus, in *Sempra*,[35] the majority of the House of Lords held that the Revenue were enriched by the use value of money received from the claimants, measured as compound interest because this was the type of interest that would have been charged had the government borrowed the same sum on the market. However, the rate charged would have been lower than other lenders would have had to pay and so this lower rate was the measure of the government's enrichment.[36]

More difficult enrichment issues have arisen in cases where claimants have not paid money as tax, but have foregone a valuable right. One such is the *FII* case,[37] where the claimants used tax reliefs to offset invalid tax liabilities that they would otherwise have used to offset valid tax liabilities. According to the Court of Appeal, '[u]tilisation of the reliefs may have been a detriment to the claimants, but did not represent a gain to the Revenue for the purpose of a restitutionary cause of action'.[38] In reaching this conclusion, Arden LJ reasoned that recovery could not be permitted because the claimants' valid tax payments were ex hypothesi payments that HMRC would have been entitled to receive. Unfortunately this missed the point of the claimants' argument. As Maximilian Schlote observes in chapter ten, the enrichment in respect of which the claim was made was not the value of the money paid to HMRC in respect of later, lawful tax liabilities, but the value of HMRC's discharged obligation to allow the claimants a credit against lawfully due tax. The value of that discharged obligation could not be calculated until later, but even so it was an enrichment in HMRC's hands at the time when the reliefs were used.

As Charles Mitchell discusses in chapter six, a similar confusion was avoided by Henderson J in the *ITC* case.[39] There the claimants paid money as VAT to fund managers for supplies which were later discovered to be exempt. To pay their supposed output tax liability, the managers used a combination of cash and input tax credits to which it was assumed they were entitled. When the parties' mistake was discovered, the managers recovered the amount of their cash payments to HMRC and passed this money back to the claimants. However the Value Added Tax Act 1994, section 80(2A) did not allow the managers to recover the value of the credits. Hence the claimants brought their own common law claims against HMRC in respect of these. HMRC contended that they were not enriched by receipt of this value because it represented money which they had been legally entitled to receive as output tax from the managers' suppliers. Henderson J held this to be irrelevant because the enrichment claimed was not the value of the money paid to HMRC by the suppliers, but the value of HMRC's discharged obligation to allow the managers to set off their input tax credits against valid output tax liabilities. Following Schlote, Mitchell argues that Henderson J was right to reject HMRC's argument, but that he should have held that HMRC were not enriched for a different reason. This was that the Value Added

35 *Sempra* (n 13).

36 Many legal scholars consider that this decision illustrates the principle that a defendant need not make restitution of the objective market value of a benefit where he can show that subjectively he would only have been willing to pay a lower price for the benefit if he had been given a choice: eg A Burrows, *The Law of Restitution*, 3rd edn (Oxford, OUP, 2011) 51; C Mitchell, P Mitchell, and S Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment*, 8th edn (London, Sweet & Maxwell, 2011) paras 4.06–4.07 and 5.05–5.10. But for a different view see A Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Oxford, Hart Publishing, 2012) 76–77.

37 *FII* (CA) (n 33). This aspect of the CA's decision was not considered on appeal: *FII* (SC) (n 11).

38 *ibid* [179].

39 *ITC* (n 30).

Tax Act 1994 never gave the managers a legal right to an input tax credit. Section 26 provides that such a credit can only be claimed for 'input tax . . . attributable to . . . taxable supplies', and this condition was not satisfied as the managers had only provided the claimants with exempt supplies.

(2) At the Claimant's Expense

The *ITC* case also contains an interesting discussion of the requirement that a defendant's enrichment must have been gained at the claimant's expense. This requirement is barely mentioned in most overpaid tax cases, as these concern direct payments by a taxpayer to HMRC, and it is uncontroversial that HMRC's enrichment was received from the taxpayer. In the *ITC* case, however, the claimants had to show that the value of the money which they had paid the managers relevantly corresponded to the value of the benefits received from the managers by HMRC. That is, the claimants had to establish that HMRC were enriched at their expense although HMRC were only the 'remote' rather than the 'immediate' recipients of benefits emanating from the claimants.

As Mitchell discusses, it is a controversial topic whether, and if so, when, such claims are possible under the law of unjust enrichment. Henderson J considered that as a general rule they are not permitted, but that this rule is subject to exceptions, and that the circumstances of the *ITC* case were sufficiently exceptional for him to hold that HMRC were enriched at the claimants' expense. His reasons were specific to the scheme of the Value Added Tax Act 1994, under which 'in economic terms the person at whose expense unlawful VAT is paid to HMRC is indubitably the consumer'.[40] His conclusion is consistent with cases where the CJEU has held that a claim to recover money paid as indirect tax can sometimes be brought by the customer who was the ultimate source of the money.[41] It is also consistent with earlier English cases where businesses were ordered to account for the fruits of their actions to recover overpaid VAT to the customers who had borne the cost of paying for this.[42] However, there are other cases concerning different situations in which a negative answer has been given to the same general question, and this whole area of the law is in need of restatement and rationalisation by an appellate court.[43]

(3) Unjust Factors

An 'unjust factor' is a reason established by the cases why a defendant's enrichment at a claimant's expense should be reversed.[44] At least three unjust factors could be in play in

[40] *ibid* [81].

[41] Case C-35/05 *Reemstma Cigarettenfabriken GmbH v Ministero delle Finanze* [2007] ECR I-2425 and Case C-94/10 *Danfoss A/S and Sauer-Danfoss ApS v Skatteministeriet*, CJEU, 20 October 2011.

[42] *Grantham Cricket Club v Customs & Excise Commissioners* [1998] BVC 2272; *R v Customs & Excise Commissioners, ex parte Building Societies Ombudsman Co Ltd* [2000] STC 892. The significance of these cases is well explained in M Chowdry, 'Unjust Enrichment and Section 80(3) of the Value Added Tax Act 1994' [2004] *British Tax Review* 620, 629.

[43] For the case law to date see *Goff & Jones* (n 36) paras 6.12–6.62, and also *Menelaou v Bank of Cyprus plc* [2012] EWHC 1991 (Ch) [22] and *Relfo Ltd (in liq) v Varsani* [2012] EWHC 2168 (Ch) [86]–[87].

[44] For judicial use of 'unjust factor' terminology see eg *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227; *Kleinwort Benson* (n 8) 363, 386, 395 and 409; *FII* (SC) (n 11) [81].

cases where a claimant pays money to HMRC as tax that is not due: mistake, duress *colore officii*, and the *Woolwich* principle. These are discussed by several contributors: Rebecca Williams, Duncan Sheehan, Nelson Enonchong, and Charlie Webb. They examine the definition and scope of each unjust factor, and the interplay between them, asking whether the law should operate a hierarchy of claims, ie whether a claimant should be required to bring an action founded on *Woolwich* where the facts would support such an action, even though another unjust factor is also present on the facts, and although the claimant would prefer to rely on this other ground.

A special situation is also considered by Monica Bhandari in chapter eight, which concerns a line of cases in which trustees have invoked the rule in *Re Hastings-Bass (deceased)*[45] to undo the tax consequences of transactions they have entered, on the ground that they failed to take these consequences into account. Bhandari notes that the scope for trustees to invoke this rule has been curtailed by the Court of Appeal's decision in *Pitt v Holt*,[46] which confines its operation to cases where the trustees' failure to take all relevant considerations into account constitutes a breach of duty. However, she argues that the rule still places trustees (and by extension, their beneficiaries) in too favourable a position by comparison with other taxpayers who cannot recover money paid as tax on the ground that they would have arranged their affairs in a more tax-efficient way if they had known that they could do this.[47] Note that a trustee who seeks to recover money paid as tax by invoking the *Hastings-Bass* principle might rely on mistake as the ground of recovery, but he might also rely on his own want of authority and/or the beneficiaries' lack of consent to the transaction.[48] There are obvious reasons why a trustee might not feel much enthusiasm for bringing a claim based on his own breach of duty,[49] but he has a power and a duty to do so.[50]

Mistake is discussed in chapter three by Duncan Sheehan, who notes that mistakes are easy to prove on the facts of many overpaid tax cases, and who believes that 'retrospective mistakes' of the kind recognised in *Kleinwort Benson*[51] are 'real' mistakes, notwithstanding Lord Hoffmann's later concession in *DMG* that they are 'deemed' mistakes that ground recovery because of 'practical considerations of fairness'.[52] Given the court's decision in the latter case, that the claimant could take advantage of the limitation rule established by the Limitation Act 1980, section 32(1)(c), it seems that Lord Hoffmann thought that this rule could be invoked even by claimants relying on a 'deemed mistake'. This liberal interpretation of the subsection sits uneasily alongside the Supreme Court's restrictive finding in the *FII* case that the subsection may only be invoked by claimants who rely on mistake as an element of their cause of action.[53]

45 *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

46 *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 (hereafter '*Pitt*').

47 cf *Test Claimants in the Franked Investment Income Group Litigation v HM Revenue & Customs* [2008] EWHC 2893 (Ch), [2009] STC 254 (hereafter, '*FII* (Ch)') [257], where Henderson J accepted counsel's supposition that HMRC owes no liability to repay money paid as inheritance tax following the taxpayer's mistaken failure to make an election in a deed of variation pursuant to the Inheritance Tax Act 1984, s 142.

48 *Goff & Jones* (n 36) paras 8.94–8.101.

49 cf *Pitt* (n 46) [130].

50 *Goff & Jones* (n 36) paras 8.109–8.119.

51 *Kleinwort Benson* (n 8).

52 *DMG* (n 12) [23]. For the view that retrospective mistakes are not real mistakes see eg A Nair, '"Mistakes of Law" and Legal Reasoning: Interpreting *Kleinwort Benson v Lincoln City Council*' in R Chambers, C Mitchell, and J Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford, OUP, 2009) 373.

53 *FII* (SC) (n 11) [42]–[63] and [177]–[185].

In chapter four, Nelson Enonchong makes the point that the courts have not clearly defined the scope of the *Woolwich* rule; that this makes it uncertain when claims can be brought in reliance on the rule; and that it also makes it uncertain when claims cannot be brought in reliance on the rule, so that claimants must rely on some other unjust factor. Thus he argues that duress *colore officii* may still have some practical relevance as an unjust factor because the *Woolwich* rule probably does not apply to every type of payment received by a public authority acting beyond its powers, and cases to which it does not apply might be pleaded as duress cases. Enonchong quotes from Lord Walker's speech in *Deutsche Morgan Grenfell* where his Lordship considered the different types of payment that might conceivably fall within the scope of the *Woolwich* principle, and emphasised the difficulty of drawing

> a clear dividing line within a spectrum which stretches from central government taxes and duties through rates, community charge, drainage rates and charges, special levies and licence fees imposed by statute on different industrial and commercial activities, and charges made by statutory undertakers.[54]

In chapter five, Charlie Webb also stresses how little work the courts have done to define the *Woolwich* principle, observing that their Lordships' speeches in the case neither specify the circumstances in which recovery should be allowed nor spell out the principle of justice that actuated their decision. Webb notes textbook treatments of the case which identify the constitutional principle of 'no taxation without Parliament' as the reason for recovery. However he prefers the different, claimant-focused, explanation that the claimant building society did not truly consent to the Revenue's enrichment in the case, albeit that it made no mistake and was not subject to illegitimate pressure, because its intention to benefit the Revenue was conditional upon the money being due. If this is correct, then Webb's analysis suggests that 'vitiation of a claimant's intention to benefit the defendant' may be a larger category of unjust factors than has been generally appreciated. However, his claimant-focused analysis puts him at odds with many other legal scholars who consider that the rule is defendant-focused, in the sense that its point is to control the behaviour of public authority defendants because this lies in the public interest.

One writer who espouses this view is Rebecca Williams, who sets out her conception of the *Woolwich* rule in chapter two.[55] She argues that the reason for restitution in the *Woolwich* cases is that an ultra vires public law event has taken place, and that if this were fully recognised then the law would become simpler and more certain because public lawyers have a clear and well-defined idea of what the ultra vires doctrine entails. Williams also argues that in cases where a *Woolwich*-based hybrid public–private law action would lie, claimants should be confined to bringing such an action, and should not be allowed to bring a purely private law action based on mistake or duress, even if this would also be available on the facts. She considers that restricting claimants to hybrid claims is in the public interest because it will enable greater understanding of public law issues in play in such cases and reduce the risk that these will be overlooked.

In contrast, Sheehan and Enonchong believe that concurrency of actions should be the norm, and Sheehan objects to Williams' proposed hierarchy of claims that it would deprive

[54] *DMG* (n 12) [140]. See too Lord Walker's comment in *FII* (SC) (n 11) [80]: 'there are bound to be borderline cases'.

[55] See also her monograph on the subject: R Williams, *Unjust Enrichment and Public Law* (Oxford, Hart Publishing, 2010).

claimants of causes of action that fulfil their needs, and would force them to engage in more complex and more expensive enquiries; in Williams' rendering, it would also expose them to much tighter time limits. Williams would not deny that her rule might have such effects, but considers this justifiable in light of the special nature of public body defendants; she also stresses that it is a commonplace of public law, exemplified by *O'Reilly v Mackman*[56] and the *Clark* case,[57] that litigants may be treated less generously when they sue the government than they would when suing other private individuals. Whichever of these positions is preferable in principle, the trend of recent cases is against Williams, since the House of Lords refused to limit the claimants to a *Woolwich* claim in *DMG*, and the Supreme Court assumed this finding to be correct in *FII*. In the latter case Lord Sumption acknowledged that there were reasons for doubting *DMG*, but declined to reopen the debate.[58]

Identifying the content and scope of the *Woolwich* rule remains difficult although the Supreme Court addressed their minds to this in *FII*. One question before the court was whether it forms part of the rule that the claimant's payment must have been made pursuant to an official demand, as the Court of Appeal had previously held in *NEC Semi-Conductors Ltd v IRC*.[59] In their leading judgments, Lord Walker and Lord Sumption held that it does not, but that it must somehow have been communicated to the taxpayer that a payment was required in circumstances where the tax authority had no power to require the payment.[60] They both considered that for these purposes it suffices for a statute to exist which apparently requires the payment, although in fact the payment is not due.[61] According to Lord Sumption, however, it does not suffice for a taxpayer to pay money in the mistaken belief that a statute requires him to do so because he has miscalculated his tax liability or has forgotten that he has already paid it.[62] In such a case, though, the taxpayer only pays because he believes that he is required to do so by the legislation. So why should this situation fall outside the scope of the *Woolwich* rule as stated in *FII*? Presumably Lord Sumption conceives the point of the rule to be that public authorities should be deterred from acting beyond their powers, and thinks that this consideration does not arise in cases where a public authority defendant has taken no positive step to mislead the taxpayer.

Against this, Williams argues that public authorities lack the power to receive payments that are not legally due, and that such payments should therefore be recoverable under the *Woolwich* principle whether or not the defendant authority has taken positive steps to induce the claimant's belief that the payment is due. On this understanding of the principle, it looks identical to a rule that money paid as tax can be recovered simply on the ground that it is not due, and it is possible that Lord Walker had this in mind when he stated in *FII* that eliminating the 'demand' requirement

> would not be a decisive step towards a general 'absence of basis' principle in place of the 'unjust factors' approach that has prevailed in the past. It would merely be creating . . . a rather larger island of recovery in respect of undue tax.[63]

[56] *O'Reilly v Mackman* [1983] 2 AC 237 (HL).
[57] *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 (CA).
[58] *FII* (SC) (n 11) [168].
[59] *NEC Semi-Conductors Ltd v Inland Revenue Commissioners* [2006] EWCA Civ 25, [2006] STC 606; not considered on appeal: [2007] UKHL 25, [2007] 1 WLR 1386. The case is referred to by this name in the *FII* judgments, but it is reported as *Boake Allen Ltd v HM Revenue & Customs*.
[60] *FII* (SC) (n 11) [64]–[81] and [171]–[174].
[61] *ibid* [79] and [174].
[62] *ibid* [186].
[63] *ibid* [81].

Lord Walker's use of the word 'general' suggests that he may have meant to say that an 'absence of basis' principle does now govern the recovery of undue tax payments. However, Lord Sumption does not seem to have understood Lord Walker in this way, or if he did, then he disagreed with him, since he said that the *FII* decision has not changed the law 'by allowing an action for the recovery of payments on the simple ground that they were not due'.[64]

(4) Defences

Various defences have been raised in response to claims for overpaid tax, limitation defences prominent among them, but also including the defence of change of position, which is discussed by Niamh Cleary in chapter seven.[65] She reviews several first instance cases in which this defence has been allowed,[66] and argues that in each case the court adopted an unrealistic and overly generous approach when accepting the proposition that the government commits to public expenditure because it anticipates particular levels of tax income. Cleary also argues that proponents of the view that public authority defendants should be permitted to rely on change of position, and variants such as 'fiscal chaos' and 'exhaustion of benefits', point to policy concerns that favour the state's retention of overpaid tax but marginalise, or completely ignore, policy concerns that favour restitution. She contends that this is contrary to principle, and also contrary to Article 1 of the First Protocol to the European Convention on Human Rights, in accordance with which the state should be required to prove that denying restitution to the taxpayer by appealing to such defences is a justified and proportionate interference with the taxpayer's right to property.

C. EUROPEAN LAW

Given that recent developments in England have – perhaps more than in any other legal system – been prompted by the case law of the CJEU, Section III of the book looks at the specific impact of European principles on the interpretation and application of the English law governing restitution of overpaid taxes. There are various levels at which European law can become relevant. First, individual Treaty provisions, Regulations and even untransposed Directives may be 'directly effective' so as to take automatic precedence over inconsistent national rules and thus help enforce citizens' rights against the offending Member State. Secondly, the concept of 'sympathetic construction' requires national courts to interpret domestic law as far as possible in a way which makes it compatible with EU requirements. Thirdly, where it is not possible either to read national law in an EU-friendly

[64] *ibid* [162].

[65] For additional discussion of defences in this area see E Bant, 'Change of Position as a Defence to Restitution of Unlawfully Exacted Tax' [2012] *Lloyd's Maritime and Commercial Law Quarterly* 122; J Lee, 'Defences to Claims for Restitution of Overpaid Tax' [2012] *Restitution Law Review* 13.

[66] *FII* (Ch) (n 47) (not considered on appeals to the CA and SC); *Bloomsbury International Ltd v Sea Fish Industry Authority* [2009] EWHC 1721 (QB), [2010] 1 CMLR 12; *Littlewoods Retail Ltd v HM Revenue & Customs* [2010] EWHC 1071 (Ch), [2010] STC 2072.

way or to disapply it altogether, the Member State concerned will often be held liable to make up for the resulting breach by providing a monetary remedy to the party affected by it.

In the tax context, English courts are frequently faced with the task of determining whether one statutory provision or another is – or can be sympathetically construed to be – compliant with EU law. While the preliminary reference procedure enables them to obtain some guidance on the exact scope and meaning of the latter (a hope not always fulfilled in the past), the CJEU cannot rule on the substantive content and interpretation of domestic law as such. Against this background, the approach adopted by English courts towards sympathetic construction specifically in relation to statutory remedies for overpaid taxes is critically analysed by Catherine Barnard and Julian Ghosh in chapter nine. They argue that English courts have gone further in stretching the meaning of domestic legislation in order to make it EU-compliant than required by the CJEU ever since the *Marleasing* case[67] or warranted by previous House of Lords authority. They illustrate the dangers of such an 'over-expansive' interpretative approach by reference, inter alia, to the Court of Appeal decision in the *FII* case,[68] which in their view disregarded the limitation that statutes cannot be construed *contra legem*, offended the doctrine of 'no reverse direct effect' and also impinged on the principle of legal certainty. They therefore welcome the reassertion by the Supreme Court in *FII*[69] of a more orthodox and restrictive interpretative approach.

Barnard and Ghosh also draw attention to the 'potentially seismic' implications of the CJEU's recent jurisprudence on age discrimination,[70] which – if translated into the tax context – could effectively impose on national courts a 'general and absolute duty to confer a remedy [for the breach of EU law] in all circumstances' by simply disapplying any domestic provision standing in the way of this goal. Yet, as EU law still stands at present, the duty to provide a remedy is neither absolute nor general. Where national rules, however sympathetically construed, prevent or impede citizens exercising their EU rights and freedoms, specific enforcement may yield to financial redress at a secondary level. The most well-known form of such redress is constituted by a damages claim under the so-called *Francovich* principle.[71] In practice, it is limited by the requirement that the breach of EU law committed by the defendant Member State must have been 'sufficiently serious'. Less widely appreciated despite its venerable age (and indeed surprisingly often ignored by the general literature on EU law), but nevertheless of fundamental importance in the tax context, is a claim under the principle usually ascribed in England to the *San Giorgio* case[72] demanding that charges levied in contravention of (what is now) EU law have to be refunded by the offending Member State.

[67] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1991] ECR I-4135 esp [8]: national courts are under a duty to interpret all national law (not merely implementing legislation) as far as possible 'in the light of the wording and the purpose of [EU law] in order to achieve the result pursued by the latter', such that even pre-existing domestic provisions must be construed by reference to later untransposed Directives (so-called 'indirect effect').

[68] *FII* (CA) (n 33).

[69] *FII* (SC) (n 11).

[70] Especially Cases C-144/04 *Mangold v Helm* [2005] ECR I-9981 and C-555/07 *Kücükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365.

[71] Named after Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Republic of Italy* [1991] ECR I-5357 (hereafter '*Francovich*').

[72] *San Giorgio* (n 6), but note our comments in n 26.

The incidents of *San Giorgio*-type claims are not, however, wholly determined by EU law. Pursuant to the principle of 'national procedural autonomy' the CJEU leaves it to the domestic legal system of each Member State to lay down the exact rules of recovery, and this includes the question of whether the claim is best characterised as restitutionary or compensatory.[73] To ensure that the economic burden imposed on citizens by taxes or other charges levied in breach of EU law is sufficiently 'neutralised', the CJEU circumscribes national procedural autonomy by the twin principles of equivalence and effectiveness. The former maintains that the conditions under which claims may be brought for the recovery of offending charges must not be less favourable than those concerning similar domestic actions, while the latter stipulates that national law must not make the enforcement of an individual's EU rights impossible or excessively difficult.

As far as the principle of equivalence is concerned, the CJEU has so far been fairly generous with Member States. By contrast with its extremely strict jurisprudence on the recovery of state aid found to be incompatible with the Common Market (in a sense the reverse of the *San Giorgio* scenario),[74] the Court does not invariably require national law to make its most favourable rules of recovery available in the context of taxes and charges violating EU law.[75] A minimum standard is in any event secured by the principle of effectiveness. The impact of this principle on recent English cases is explored and assessed by Maximilian Schlote in chapter ten. He illustrates the interaction between the EU principle of effectiveness and the domestic English law of unjust enrichment with a particular view to defences that may be raised against *San Giorgio*-type claims, considers in detail the legal position of indirect taxpayers such as those in the *ITC* case,[76] subjects the most recent statements of the CJEU[77] on the availability of interest and the recovery of other sums 'directly related to the overpaid tax' to a critical analysis, and examines the question of concurrency of remedies raised by the Supreme Court's *FII* decision.

Schlote also puts into focus the sometimes tricky relationship between the principle of effectiveness and national limitation periods, especially where such limitation periods are specifically introduced to discourage potential claimants from pursuing their rights. This famously happened when, in the course of and following the *DMG* litigation,[78] the UK government sought to counteract taxpayers relying on their mistake-based claim (as opposed to the *Woolwich* principle)[79] in order to take advantage of the extended limitation period provided by the Limitation Act 1980, section 32(1)(c). Given that the principle of effectiveness itself competes with other principles of EU law, including that of legal certainty, the curtailment of limitation periods is not precluded wholesale. However, as the CJEU had already pointed out in its *Marks & Spencer* decision (another case from the UK),

[73] The CJEU has so far not squarely faced up to the tensions arising from the fact that a *Francovich* claim requires there to have been a 'sufficiently serious' breach of EU law (see text to and following n 71), while a compensatory remedy under *San Giorgio* (n 6) would apparently not be subject to such a limitation.

[74] See generally A Jones, *Restitution and European Community Law* (London, Mansfield Press/LLP, 2000) ch 5; T Köster, 'Recovery of Unlawful State Aid' in M Sánchez Rydelski (ed), *The EC State Aid Regime: Distortive Effects of State Aid on Competition and Trade* (London, Cameron May, 2006) 653; M Angeli, 'The European Commission's "New Policy" on State Aid Control: Some Reflections on Public and Private Enforcement of Recovery of Illegal Aid' (2009) 30 *European Competition Law Review* 533.

[75] cf *Littlewoods* (CJEU) (n 31) [31].

[76] *ITC* (n 30).

[77] In *Littlewoods* (CJEU) (n 31).

[78] *DMG* (n 12).

[79] *Woolwich* (n 4).

the new limitation period must be reasonable and be flanked by adequate transitional arrangements so as not to deprive individuals of their right to repayment retroactively.[80] It is remarkable that the UK legislature has repeatedly fallen foul of these criteria. Following the *Marks & Spencer* ruling, which concerned a time-cap on the recovery of output tax (without any transitional period), it took a House of Lords decision to establish that the input tax regime suffered from comparable defects.[81] Most recently, the Supreme Court in *FII* unanimously held that the Finance Act 2007, section 107, contravened EU law, and by a majority of 5:2 found that the same was true of the Finance Act 2004, section 320, on the ground that claimants had to be given a free choice between relying on the *Woolwich* principle and bringing a mistake-based claim.[82] In the light of the division of opinion, however, the Supreme Court considered that the latter was not *acte clair* and has thus referred it to the CJEU for a preliminary ruling.

It has already been noted that the CJEU's guidance to domestic courts on the appropriate remedy in tax cases has in the past not always been as helpful as it might have been, partly perhaps on account of the ambivalence between a loss- and gain-centred interpretation of *San Giorgio*-type claims. The hope expressed by Schlote that the CJEU will use the opportunity provided by *FII* to enunciate more clearly the principles governing the recovery of charges levied in breach of EU law is therefore to be endorsed.

D. COMPARATIVE LAW

The fourth and final section of the book adopts a comparative perspective and looks at how different jurisdictions deal with some of the issues raised by the English case law governing restitution of overpaid tax. Two chapters explore these questions from a Civilian angle, using German law as a point of contrast and comparison,[83] while the remaining three consider the background and proper classification of *Woolwich*-type claims in the Republic of Ireland, Canada and Australia respectively.

As far as German law is concerned, it is important to realise that many of the problems with which English courts have been grappling over the past decade or so could not have arisen in the same way in Germany. This is because German tax law (like German administrative law generally) embraces the doctrine of the so-called 'administrative act'[84] by virtue of which tax assessments – if unchallenged by the taxpayer – become final and binding very quickly. As a result, the tax payable in accordance with it will be treated as owing even if it subsequently emerges that the assessment was false or based on a legal provision which contravened EU law. Now and then, interestingly, arguments are advanced to challenge the orthodox legal position. It is claimed that national authorities are under an obligation to disregard or disapply tax assessments which offend EU law or – relying in part on the

[80] See *Marks & Spencer* (n 29); to be distinguished from the other well-known *Marks & Spencer* case: Case C-446/03 *Marks & Spencer plc v Halsey (HM Inspector of Taxes)* [2006] STC 237, [36] ff, esp [38].

[81] *Fleming* (n 29). In consequence, the offending domestic provision (reg 29(1A) of the Value Added Tax Regulations 1995) was disapplied to the extent that this was necessary to enable taxpayers to seek recovery on the basis of accrued rights within an appropriate period. cf now Finance Act 2008, s 121.

[82] *FII* (SC) (n 11), Lords Sumption and Brown dissenting.

[83] For comparative analysis of the French approach see Williams (n 55) ch 6.

[84] This doctrine is explained in chapter 12 of this volume (at pp 248–51).

CJEU's *Kühne & Heitz* ruling[85] – at least to reopen the case and exercise a discretion to revoke the administrative act in question.[86] So far, such arguments have largely fallen on deaf ears.[87] This is because most contraventions of EU law are not serious enough to warrant treating a tax assessment as void *ab initio*[88] and because the CJEU itself recognises that the principle of effectiveness may be counter-balanced by the need for finality and legal certainty which is itself a value enshrined in EU law. Moreover, a provision has been introduced into the General Tax Code allowing for tax assessments to be made explicitly provisional where legal proceedings concerning the compatibility of a German tax statute with (inter alia) European law are pending at the time when the assessment is issued.[89]

In light of this, the present volume does not specifically consider the German law relating to restitution of overpaid tax.[90] Instead, it has been thought more conducive to the comparative discussion of *Woolwich*-type cases to draw on the German experience more broadly defined with respect to two issues. First, there is the question raised by *Woolwich*, partially answered by *DMG* and still exercising their Lordships in the *FII* litigation,[91] of whether English law would be well-advised to switch from the orthodox 'unjust factor' analysis of unjust enrichment to an 'absence of basis' approach similar to that operated by German law. And secondly, instructive lessons are to be learnt from exposing the parallels and divergences between the English post-*Woolwich* debate and corresponding developments pertaining to so-called 'public law restitutionary claims' in Germany.

Accordingly, Section IV of the book starts with Anne Sanders considering in chapter eleven 'absence of basis' as a general concept of (German) enrichment law and critically assessing its suitability for transplantation into the English common law. She does not deny that cases such as *Woolwich* and *FII* could be decided under an absence of basis approach, but cautions that English law may thereby import a whole host of problems not evident at first sight. In order to corroborate her assessment, Sanders explains the historical background of the 'absence of basis approach' and how its understanding evolved under the German Civil Code (BGB); she closely scrutinises the notion of a 'legal basis' and its invalidity or voidability (pointing out that English law would struggle to rein in restitution even if it could come up with a satisfactory concept of 'basis'); she outlines some German defences to restitutionary claims which look very much like harbouring unjust factors in disguise; and warns about the potential practical difficulties of adequately distributing the burden of proof and operating limitation periods. All in all, her conclusions suggest that

85 Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-837 (hereafter '*Kühne & Heitz*').

86 But note that, by contrast to other areas of German administrative law (especially §§ 48 ff VwVfG), the General Tax Code (*Abgabenordnung*, abbreviated AO) in its current form does not give tax authorities much leeway in changing assessments once the relevant period for challenging them has expired: cf §§ 172 ff AO.

87 See only the recent spate of cases decided by the Federal Fiscal Court (BFH) on 16 September 2010, case refs V R 46/09, 48/09, 49/09, 51/09, 52/09, and 57/09, on which the Federal Constitutional Court (BVerfG) has now indicated that a preliminary reference to the CJEU was not warranted despite some uncertainty about the precise ramifications of the *Kühne & Heitz* ruling (n 85): case refs 1 BvR 1234/11, 1390/11, 1395/11, and 1403/11.

88 For the same reason, a compensatory claim under the *Francovich* principle (n 71) – to the extent that one regards such a claim as theoretically conceivable in the context of tax recovery – would typically fail for lack of a 'sufficiently serious' breach of EU law.

89 § 165 I 2 no 4 of the *Abgabenordnung* (AO).

90 The interested reader wishing to follow up on the substantive rules and their procedural backdrop may be referred to the monograph by U Lange, *Der Anspruch auf Erstattung gemeinschaftsrechtswidrig erhobener Steuern* (Berlin, Duncker & Humblot, 2008).

91 *FII* (SC) (n 11) [81] (Lord Walker) and [187]–[190] (Lord Sumption).

the rather frosty reception with which the absence of basis argument was met in *FII* is to be welcomed.

Chapter twelve turns from the general German law of unjustified enrichment to the public law context. In it, Birke Häcker investigates similarities and differences between *Woolwich*-type claims in England and the German concept of specific 'public law restitutionary claims' as developed since the beginning of the twentieth century. She highlights striking parallels in the reasoning adopted by judges deciding the seminal cases and argues that although German law sees public law restitutionary claims as having been fully emancipated from their private law counterparts, the overall impression is nevertheless not far removed from the 'hybrid approach' advocated by Rebecca Williams in her monograph and in chapter two of the present volume. With regard to the incidents of public law restitutionary claims, Häcker demonstrates that German courts still accord special privileges to the fisc as far as disgorgement of the use value of money is concerned, which would be unthinkable under English law following the *Sempra Metals* decision.[92] On the other hand, however, she finds the German categorical denial of the change of position defence in respect of state defendants preferable to the less clear-cut position under current English law.

The picture conveyed by this book would not be complete without a side-glance at other Common law jurisdictions. Although their constitutional setup often differs greatly from that of the UK (not least because most countries with written constitutions have courts that can declare offending statutes null and void), the close connections these legal systems have with English law on the private law side make it particularly interesting to see how they cope with *Woolwich*-type cases and – to the extent that they allow recovery – how they classify the appropriate claims. Of the three jurisdictions considered in this collection, two (Ireland and Canada) have already openly grappled with the issue of granting restitution for unlawfully levied taxes, though only one (Canada) has tackled the classificatory problem head-on. The third jurisdiction (Australia) has yet formally to accommodate the idea that taxes exacted ultra vires have to be repaid as a matter of right.

Since the Republic of Ireland – unlike Australia or Canada – is a Member State of the EU, the potential repercussions of the CJEU's jurisprudence on the *San Giorgio* line of cases and its reception in England are likely to be felt more strongly than anywhere else in the Common law world. This is amplified by the fact that Irish courts have expressly endorsed the *Woolwich* principle as being a part of Irish law.[93] At the same time, however, Ireland has its own leading authority on the recovery of unlawfully exacted taxes in the shape of a pre-*Woolwich* decision called *Murphy v Attorney General*.[94] Against this background, Niamh Connolly in chapter thirteen examines how the *Murphy*/*Woolwich* right to restitution is best characterised as a matter of Irish domestic law. Despite a widespread tendency to subsume *Murphy* under an expansive definition of duress *colore officii*, she argues that the case can actually be understood as supporting a constitutional principle, based on the principle of legality, to the effect that prima facie: 'State actions which are not mandated by law should . . . be undone and a remedy granted to persons adversely affected'. In her view, such a public law understanding also helps explain why, on the facts of *Murphy*, redress could (exceptionally) be denied on the ground that allowing too many claimants to recover would lead to fiscal chaos. In *Murphy* itself, the defence was described as being all about 'change of position', but – as Connolly points out – it would seem that it had less to

92 *Sempra* (n 13).
93 See *O'Rourke v Revenue Commissioners* [1996] 2 IR 1; *Harris v Quigley* [2006] 1 IR 165.
94 *Murphy v Attorney General* [1982] 1 IR 241 (hereafter '*Murphy*').

do with the state's disenrichment than with broader public policy concerns. Whatever its domestic pedigree, it seems unlikely that the *Murphy* defence could ever succeed in a case where taxes levied in breach of EU law are at stake.[95]

In Canada, the 'constitutional approach' advocated by Connolly has already won the day. Very shortly after the House of Lords ruling in *DMG*, the Supreme Court of Canada handed down its judgment in the *Kingstreet* case,[96] maintaining that the right to recover payments exacted ultra vires was a 'public law remedy' grounded in the rule of law and was thus distinct from the ordinary private law of unjust enrichment.[97] Robert Chambers' contribution in chapter fourteen discusses the pros and cons of the *Kingstreet* decision to segregate overpaid tax cases in this way and explains that

> although the Canadian rejection of unjust enrichment and its replacement with a form of public law restitution of ultra vires taxes appear to open a vast gulf between the English and Canadian law on the subject, the gap is much less significant than it seems.

He suggests that the difference between the law of unjust enrichment in England and Canada is not merely the latter system's acceptance – in *Garland*[98] – of an 'absence of juristic reason' approach, but that the Canadian concept of unjust enrichment is strongly influenced by its case law concerning the proper division of the family home after the breakup of long-term relationships (cases which English law does not treat as part of the law of unjust enrichment at all). As a result, he argues, the Canadian law of unjust enrichment now finds it difficult to accommodate overpaid tax scenarios and, remarkably, even plain mistaken payment cases. Chambers sees the solution to this dilemma as lying in the adoption of the 'hybrid approach' put forward by Williams or – alternatively, but closer to *Garland* – in openly recognising that public law considerations may show that a tax was imposed without sufficient justification, thereby invalidating the juristic reason for the state's enrichment.

In chapter fifteen, Simone Degeling describes the Australian position with regard to unlawfully exacted taxes. Despite a number of sympathetic dicta, she notes that the *Woolwich* principle has not as yet been formally received into Australian law. The aim of her contribution is not primarily to discuss whether it should be so received, but to investigate what possible routes there are to allowing recovery. Besides the 'convoluted web of indirect protections' offered to affected taxpayers (such as specific statutory provisions or simple common law claims based on duress, the doctrine of *colore officii*, mistake, or 'failure of basis'), Degeling makes out two main paths which would allow for the development of a *Woolwich*-style claim, and she explains them both by reference to and inferences from existing Australian authorities. The first would be to acknowledge the existence of common law claims that are 'parasitic on some constitutional invalidity'. As she explains, the opportunity to establish such claims arose – but could ultimately not be seized – in the *British American Tobacco* case,[99] a sequel to the *Roxborough* litigation.[100] The second vehicle for recovery could lie in recognising a direct constitutional right to restitution (similar to

[95] See ch 13 of this volume text to fn 27.

[96] *Kingstreet Investment Ltd v New Brunswick* 2007 SCC 1, [2007] 1 SCR 3 (hereafter '*Kingstreet*'). Perhaps due to the short interval between the two decisions, the Supreme Court of Canada in *Kingstreet* did not refer to *DMG* (n 12).

[97] *ibid* [40] (Bastarache J).

[98] *Garland v Consumers' Gas Co* 2004 SCC 25, [2004] 1 SCR 629.

[99] *British American Tobacco Australia Ltd v State of Western Australia* (2003) 217 CLR 30.

[100] *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

that established by the Supreme Court of Canada in *Kingstreet*), albeit that this is contrary to the orthodox understanding that private causes of action cannot be founded straight on the Australian Constitution and would therefore be potentially much more controversial than developing the common law via the first route. Yet, she concludes, if it is an important constitutional value that no tax be levied without proper parliamentary authorisation, then '[t]he corollary of this principle must surely be that such amounts are recoverable'.