Chapter VI

RESTITUTION FROM PUBLIC AUTHORITIES

6.1 Introduction

It is only relatively recently that the law of restitution has developed in a principled and structured fashion; it was previously considered to be “no more than a heterogeneous collection of unrelated topics.”¹ The modern rationalization of restitution law has been underpinned by the principle that “unjust enrichment” should be reversed.² Assessing whether enrichment is “unjust” is not a matter of judicial discretion;³ rather, there are established grounds of recovery, and where one of those grounds is made out there is (subject to any good defence) a right to recovery. Public bodies are subject to private restitution law.⁴ However, there are distinctive features of restitution law in its application to public bodies. First, in some situations there is a statutory right to restitution against public bodies. For example, there is statutory provision for the recovery of wrongly-paid income tax, corporation tax, capital gains tax and petrol vehicle duty, but this has stringent limits. In particular, the overpayment must have been due to an error or mistake in the tax return, and no recovery is allowed where the error was part of the revenue’s settled practice at the time.⁵ Where a special or qualified statutory remedy exists, it may be inferred that Parliament intended to exclude any common law right to restitution which would or might have arisen on the same facts.⁶ Whether common law remedies are excluded is a matter of construction of the relevant statutory provision.⁷ Additionally there is a ground of recovery in cases involving public bodies which does not apply in cases

² Lipkin Gorman (a firm) v Karpale Ltd. (1991) 2 AC 548.
³ Id at p. 578.
⁴ Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners (2006) UKHL 49.
⁵ Taxes Management Act, 1970, Sec. 33.
⁶ Monro v Revenue and Customs Commissioners, 2007 EWHC 114 (CH).
between private individuals, namely recovery of payments made pursuant to an ultra vires demand by a public authority for tax or other impost (the ‘Woolwich’ ground).\(^8\) It is also possible that the usual defences to a restitutionary claim cannot be relied upon by an individual where public moneys are paid to him without legal authority. There are, too, particular procedural considerations in cases involving public bodies. Each of these matters is dealt with below.

### 6.2 Nature of Restitution

The law of restitution is that body of law which is concerned with the award of gain-based remedies.\(^9\) Although the matter has been particularly controversial the accepted view is that these gain-based remedies will be awarded in three different situations.

1. Where the defendant has profited from the commission of a wrong. This could apply to a public authority if it has profited from the commission of a tort or, exceptionally, breach of contract.

2. Where the defendant has received property in which the claimant has a proprietary interest, the claimant will be able to vindicate that property right.

3. Where the defendant has been unjustly enriched at the claimant’s expense. It is this principle which is likely to be most significant to restitutionary claims against public authorities. To establish such a claim four different issues must be considered:

   (i) Whether the defendant was enriched. This will invariably be satisfied by means of showing that the defendant received money.

   (ii) This enrichment was at the expense of the claimant, which means that

---

\(^8\) Woolwich Equitable Building Society v IRC (1993) AC 70.

it was obtained directly from the claimant.

(iii) This enrichment can be characterized as unjust within one of the recognized grounds of restitution. It is the identification of an appropriate ground of restitution which has proved to be the most controversial aspect of establishing a restitutionary claim against public authorities.

(iv) No defences are available to reduce or limit the claim. Key defences include change of position and estoppel.

This chapter is concerned with the application of the grounds of restitution and principles in one particular context, namely, where a restitutionary claim is brought against public authorities. There is a public law dimension to such a claim which always requires careful consideration. Indeed, there is growing evidence that a distinct ground of restitution exists to establish a restitutionary claim in unjust enrichment against a public authority and only this ground of restitution is available for such claims. Furthermore the researcher in discuss about the constitutional considerations and establishment of unjust enrichment as reasons why public authorities should be treated differently from other defendants, the grounds of restitution (including mistake, duress, extortion by colour of office, and total failure of consideration), and recommendation of the Law Commission as to the right to restitution and the special defences.

Again the study gives emphasis and examines restitutionary claims that are founded on the commission of a wrong by the defendant. Four types of wrongdoing may trigger the award of restitutionary remedies i.e. tort, breach of contract, equitable wrongdoing, and the commission of a criminal offence. The issue of whether, once the claimant has shown that the defendant has committed a wrong, the claimant can obtain a restitutionary remedy from the defendant is discussed. The consideration of the essence of restitution for wrongs, including the relationship between restitution for wrongs and the reversal of the defendant's unjust enrichment; the principles underlying the
award of restitutionary remedies for wrongs; types of restitutionary remedy for wrongdoing; relationship between restitutionary and compensatory remedies for wrongdoing; causation; available defences for restitution for wrongs; and recommendations for reform.

When an offender has committed a criminal offence, the law of restitution may be relevant in two ways. First, the offender may have received a benefit as a result of the commission of the crime, so the question for the law of restitution is whether there is a cause of action which will enable the victim or the State to recover the proceeds of the crime. Secondly, a consequence of the offender committing the crime may be that he or she is entitled to obtain a benefit, and the question is whether the offender can be prevented from obtaining this benefit.

Two different principles on which restitutionary claims can be founded are unjust enrichment and wrongdoing. And the third and final principle on which such claims may be based, namely, the vindication of the claimant's property rights. All restitutionary claims which are founded on the vindication of the claimant's proprietary rights are properly classified as proprietary claims, since they are dependent solely upon the identification and protection of proprietary rights. But the restitutionary remedies by virtue of which these property rights are vindicated are not necessarily proprietary remedies, since, depending on the particular circumstances of the case, the appropriate remedy may either be proprietary or personal.

For reasons of public policy, most civil actions are subject to a time bar whose effect is that, once a particular period of time has passed, the defendant can no longer be sued on that particular action. There are two distinct legal regimes relating to the barring of restitutionary actions by the passage of time. The first and most important regime is contained in the Limitation Act, 1980 which specifies particular limitation periods for different types of actions. The second regime is the equitable defence of laches, which determines whether
an equitable action is time barred by reference to the justice of the case having regard to all the surrounding circumstances. The researcher has discussed reversal of the defendant's unjust enrichment, qualification of the general limitation period for particular restitutionary claims, restitutionary claims founded on the commission of tort or breach of contract, restitutionary claims founded on equitable wrongs, vindication of proprietary rights, and function of the laches defence.

6.3 Past Restitution

6.3.1 Policy

Whether a restitutionary claim grounded on unjust enrichment can be brought against a public authority has proved controversial because of the public law dimension to such claims, which might justify distinguishing these claims from those which operate generally within the private law.

There are two most important contradictory questions of policy which need to be taken into account.

6.3.1.1 Constitutional Considerations

There is a constitutional dimension to restitutionary claims brought against public authorities which derives from the principle that, where a public authority is not entitled to the money which it has received, that money should be repaid to the citizen from whom it was unlawfully taken. The justification for this principle is that since, the power of the public authority to demand payment from the citizen can only exist under the law, if the demand was made unlawfully then the public authority has no right to retain what it received and must make restitution to the payer. That the payer should be entitled to restitution as of right seems even more obvious in the light of the fact that, where the Crown pays money out of the consolidated fund without

---

10 Bill of Rights Act, 1689, Art. 4.
11 Supra note 8 at p.172.
statutory authority, it is able to recover it by virtue of its incapacity to make the payment in the first place.\textsuperscript{12}

\textbf{6.3.1.2 Implications for the General Community}

However, the right to restitution founded on constitutional principles is limited by a countervailing principle of public policy. This derives from the fact that restitutionary claims which concern public authorities are likely to involve large sums of money and the award of restitutionary remedies may seriously jeopardise the availability of public funds with consequent deleterious effects on the community.\textsuperscript{13} It follows that restitutionary claims against public authorities should be deterred, for reasons of public policy.

\textbf{6.3.1.3 Balancing Principle and Pragmatism}

Consequently, the question of whether a restitutionary claim can successfully be brought against a public authority involves a clash of principle and pragmatism. For constitutional principle demands that a public authority which has unlawfully received money should return it, but pragmatism suggests caution, to preserve the security of the public authority’s receipts for the greater good, namely the benefit of the general community. These arguments are essentially incompatible but some form of compromise can be reached by accepting the right of the payer to bring a restitutionary claim but ensuring that the public authority has a number of special defences to protect the security of its receipt.

\textbf{6.3.2 Establishing Unjust Enrichment}

In the vast majority of cases involving restitutionary claims against public authorities it will be easy to show that the defendant has been enriched at the claimant’s expense. The real problem comes with the identification of the grounds of restitution.

\textsuperscript{12} Auckland Harbour Board v R. (1924) AC 318.
\textsuperscript{13} Glasgow Corporation v Lord Advocate 1959 SC 203, 230.
A number of grounds have been recognized. The most significant has been mistake, whether of law or fact. In many cases, but not all, where an *ultra vires* payment has been made to a public authority it will possible to show that the claimant had made a mistake of law but for which the payment would not have been made. The key advantage of founding a claim on mistake is that this will extend the limitation period. Under Section 32(1)(c) of the Limitation Act, 1980 states that, where an action involves relief from the consequences of a mistake, time does not begin to run until the claimant discovered the mistake or could with reasonable diligence have discovered it.

Other relevant grounds of restitution for claims against public authorities have included duress, where a public authority has made an unlawful threat to size goods in respect of a debt which was not lawfully due; extortion by colour of office, where ‘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’; total failure of consideration; and absence of consideration where the expected benefit from the defendant could not be provided as a matter of law.

However, the most important ground of restitution has proved to be that recognised in *Woolwich Equitable Building Society v IRC*.

---

14 Supra note 8 at p. 173.
15 *Kleinwort Benson Ltd. v Lincoln City Council* (1999) 2 AC 349, 382.
16 *Maskell v Horner* (1915) 3 KB 106.
18 *Westdeutsche Landesbank Girzoentrale v Islington LBC* (1994) 4 All ER 890.
19 Ibid.
The effect of this was that the claimant paid nearly £57 million more tax to the Revenue than was actually due. The Revenue repaid this money to the claimant with interest, but it refused to pay interest in respect of the period when it first received the payment until the decision of the trial judge that the regulations were void. Consequently, the claimant sought to recover this interest, amounting to £6.73 million. The success of the claim depended on whether the Revenue was liable to repay the claimant from the moment it received the payment or from the moment when the regulations were held to be void. If the Revenue’s liability arose by virtue of its unjust enrichment, this liability would have existed from the moment when it received the payment from the claimant. Clearly the Revenue had been enriched at the claimant’s expense. The key question, therefore, was whether the claimant’s claim fell within one of the recognized grounds of restitution.

In determining which grounds of restitution were applicable a number of features concerning the payment by the claimant to the Revenue need to be emphasised. The claimant paid the sums demanded by the Revenue, even though it disputed the legality of the demand since, it felt that it had no choice but to pay. This was because on its face the demand was lawful. If the claimant had refused to pay the money it would have been the only building society to do so. Consequently, any proceedings brought by the Revenue to recover the tax would have been gravely embarrassing and would have resulted in adverse publicity. If the claimant had failed to pay but the Revenue’s demand was eventually vindicated, the building society feared it would incur heavy penalties and the interest owing to the Revenue would have far outweighed any return that could have been obtained by investment of the disputed sum. Finally, at the time when the payments were made it was not possible to identify the amount which was in dispute. Therefore, the claimant decided to pay but lodged a protest with the Revenue when it did so.

It was observed that the claim did not fall within any of the recognized grounds of restitution. However, it was held that the actual ground of
restitution was 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.’

The essential feature of this ground of restitution, which was identified by Lord Goff and endorsed by Lords Slynn v Browne-Wilkinson, is that restitution should be awarded simply because the tax was unlawfully demanded under an ultra vires statute and no public authority can retain money which it had no authority to receive.

6.3.3 Determining the Ambit of the Ground of Ultra Vires Receipt

There are a number of outstanding questions about the ambit and effect of this ground of restitution.

6.3.3.1 Does this Ground Apply to all types of Ultra Vires Payment?

It is unclear whether this ground of ultra vires receipt is confined to cases where money was demanded under an invalid statute, as was the case in Woolwich itself. Although the point was expressly left open in Woolwich, there is no reason why recovery should be confined to such demands. The essential feature of this ground of restitution is that money was paid to a public authority which was not authorized to receive the payment. This lack of authority may arise, as in Woolwich, because a statutory regulation was invalid or it may arise where a valid statute has been misconstrued. The Law Commission has suggested that the notion of an ultra vires payment should cover all payments collected by a person or body who was acting outside its statutory authority, whether because it was acting in excess of its statutory power or because of procedural abuses, abuses of power or errors of law.

---

22 Ibid at p. 177.
23 Id at p. 196.
24 Id at p. 172.
25 Supra note 8 at p. 177.
26 Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments
   Law Com. No. 227, 1994 at p. 66.
6.3.3.2 Is the ground of restitution confined to the recovery of overpaid taxes?

Although *Woolwich* was concerned with the recovery of overpaid taxes, this ground of restitution should be applicable to the recovery of any overpaid levy from a public authority. Consequently, this ground of restitution would be applicable to unlawful demands for payment made for the supply of services by a public authority. In *Waikato Regional Airport Ltd. v A-G* the Privy Council recognized that the *Woolwich* principle extended to the recovery of governmental levies. Similarly, the *Woolwich* principle should also be applicable where charges have been levied in breach of European Community law. 28

6.3.3.3 Must the claimant have protested about the lawfulness of the demand?

Although in *Woolwich* the claimant had protested to the Revenue when it made its payment that the money was not lawfully due, the success of the restitutionary claim should not be conditional on the claimant protesting against the validity of the demand, for in many cases the claimant will be unaware that the demand was unlawful. But the fact that the claimant did protest is of vital evidential importance, suggesting that the payment was not made voluntarily.

6.3.3.4 Restricting the right to Restitution

Where the claimant seeks to obtain restitution from the defendant on the ground of *ultra vires* receipt the right to restitution at common law may be restricted in two ways. First, it may be removed by statute so that the claimant will have to rely on the statutory mechanism for restitution. 29 It follows that

---

29 *Autologic Holdings plc v Commissioners of Inland Revenue* (2005) UKHL 54, para. 20.
the common law defences to restitution will not apply and the defendant will be confined to the defences under the statute. Secondly, the parties may have made express provision for restitution of overpayments by contract or such an agreement can be implied.\textsuperscript{30} Again, the consequence of this will be that the common law restitutionary mechanism, including the general defences to restitutionary claims, will not apply.

6.4 Restitution Present

6.4.1 The relationship between the grounds of Restitution

The crucial issue now concerning restitutionary claims against public authorities relates to whether the operation of the \textit{Woolwich} principle excludes the operation of the other private law grounds of restitution.

In \textit{IRC v Deutsche Morgan Grenfell Group plc.}\textsuperscript{31} the Court of Appeal established that claims for restitution of tax paid by mistake can only arise by reference to particular statutory provisions\textsuperscript{32} or at common law by virtue of the \textit{Woolwich} principle. In reaching this decision the Court of Appeal drew a distinction between public and private restitutionary claims and recognized that, for the recovery of overpaid taxes at least, restitution occurs by virtue of a specific public law regime which is distinct from the private law regime which governs the bulk of the law of unjust enrichment.

In \textit{Deutsche Morgan Grenfell} the claimant sought a restitutionary remedy in the form of interest\textsuperscript{33} in respect of taxes which it had paid too early.\textsuperscript{34} Some of these taxes had been paid more than six years before the claim was brought, so that the claim was time-barred unless the claimant could found the claim on a mistake of law for which time would not begin to run until the mistake

\textsuperscript{30} \textit{Sebel Products Ltd. v Commissioners of Customs and Excise} (1949) 1 Ch. 409.
\textsuperscript{32} Taxes Management Act, 1970, Sec. 33 and Value Added Tax Act, 1994, sec. 80.
\textsuperscript{33} \textit{Sempra Metals Ltd v Inland Revenue Commissioners}(2005) EWCA Civ. 389.
\textsuperscript{34} Metallgesellschaft Ltd. v IRC. (2001) Ch. 620.
could reasonably have been discovered\textsuperscript{35}. In considering whether this ground of mistake could be relied on the Court of Appeal focused on a crucial dictum of Lord Goff in \textit{Kleinwort Benson v Lincoln CC}\textsuperscript{36}. In our law of restitution we now find 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 \textit{ultra vires}, are recoverable as of right at common law under the principle in \textit{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.

Jonathan Parker LJ interpreted\textsuperscript{37} this as meaning that overpaid taxes can be recovered either by virtue of a statutory regime, where the demand for payment was lawful, or, by reference to the \textit{Woolwich} principle at common law, where the demand was unlawful. Crucially, he considered that these are the only regimes which are available for the recovery of overpaid taxes. It follows that, at least as regards claims for the recovery of overpaid tax, it is not possible to rely on the ground of mistake of law and so gain the benefit of the extended limitation period. Although the matter is not free from doubt it appears that this ruling applies to the recovery of all payments from public authorities, at least when the authority has received the payment in its public capacity. Consequently, mistake is not available as a ground of restitution in claims involving public authorities.

The recognition in \textit{Deutsche Morgan Grenfell} that the \textit{Woolwich} principle is rooted firmly in public law is important, both as regards the proper analysis of the claim but also as regard the practicalities of bringing it. Until recently it appeared that if claimants wished to challenge a demand from a public authority as an \textit{ultra vires} demand, then, because this constituted a public law

\textsuperscript{35} Limitation Act, 1980, Sec. 32(1)(c).
\textsuperscript{36} (1999) 2 AC 349, 382.
claim, they had to do so by virtue of judicial review under CPR 53.\textsuperscript{38} It is not, however, possible to obtain restitutionary relief in judicial review proceedings.\textsuperscript{39} This meant that if the claimant wished to obtain restitution from a public authority he or she would have to adopt a dual procedure. The claimant would first need to apply by judicial review for a declaration that the demand was unlawful and then seek restitution of the money in separate proceedings. This was the procedure which the Woolwich Building Society had to adopt to obtain restitution from the Revenue. The need for judicial review has important implications in that the limitation period for such an application is three months from the date when the ground for challenge arises, though this is subject to the discretion of the court\textsuperscript{40}

But later on it was accepted by the Court of Appeal that, where the claimant wishes to obtain restitution on the ground of \textit{ultra vires} receipt, it is not necessary first to bring judicial review proceedings\textsuperscript{41} The claimant can bring a restitutionary claim at common law\textsuperscript{42} to show that the money was not due and, once this has been established, to recover the overpaid tax from the public authority. This is a perfectly acceptable approach, since the dominant issue for the claimant relates to the existence of a private law right,\textsuperscript{43} namely the right to restitution because the defendant was unjustly enriched at the claimant’s expense, even though the existence of this right is dependent on the consideration of a public law issue, concerning whether the public authority is authorized to receive the particular payment. This decision is of vital importance, both because it avoids the cumbersome procedure involving both judicial review and a separate claim for restitution, but also because it avoids the very short limitation period which is inherent in an application for judicial review. It consequently makes \textit{ultra vires} receipt a particularly

\begin{itemize}
\item \textsuperscript{38} \textit{Wandsworth London Borough Council v Winder} (1985) AC 461.
\item \textsuperscript{39} \textit{O’Reily v Mackman} (1983) 2 AC 237.
\item \textsuperscript{40} CPR 53.4.
\item \textsuperscript{41} \textit{British Steel v Customs and Excise Commissioners} (1997) 2 All ER 366.
\item \textsuperscript{42} \textit{Autologic Holdings plc v Commissioners of Inland Revenue} (2005) UKHL 54.
\item \textsuperscript{43} \textit{Roy v Kensington and Chelsea and Westminster Family Practitioner Committee} (1992) 1 AC 624.
\end{itemize}
attractive ground of restitution for the claimant to plead. However, the emphasis in Deutsche Morgan Grenfell that a restitutionary claim grounded on the Woolwich principle is properly characterized as a claim involving the public law regime may serve to undermine this sensible approach to restitutionary claims against public authorities, such that the former dual process of judicial review and then restitutionary claim might be resurrected. This appears to have been the approach of the Court of Appeal in Boake Allen Ltd v IRC\textsuperscript{44} where Sedley LJ\textsuperscript{45} emphasized that it was ‘an abuse of process to ignore the primary mode of challenge provided by law and instead to bring an action which evades the controls on that mode.’ Indeed, the emphasis on the public law claim might mean that both the judicial review and the restitutionary aspects should be dealt with in the Administrative Court, because the right to restitution is properly characterized as being a public law rather than a private law right.\textsuperscript{46} This would require the courts to accept that a restitutionary remedy could be awarded in judicial review proceedings by means of the mandatory order\textsuperscript{47} but it would follow that the much shorter limitation period would be applicable and that the awarding of a restitutionary remedy would lie in the discretion of the court.

\textbf{6.4.2 Limiting the Right to Restitution}

Since the recognition of the Woolwich principle attention has also turned to whether specific defences should be available. The Law Commission\textsuperscript{48} has acknowledged the need for specific defences to limit the right to restitution because of the peculiar circumstances arising from money being repaid by public bodies which may have deleterious effects upon the general public.\textsuperscript{49} The need to protect public finances was recognized as a legitimate

\begin{flushright}
\textsuperscript{44} (2006) EWCA Civ 25. \\
\textsuperscript{45} Ibid. \\
\textsuperscript{46} Alder, ‘Restitution in Public Law: Bearing the Cost of Unlawful State Action’ (2002) 22 LS 165. \\
\textsuperscript{47} Ibid p. 179. \\
\textsuperscript{48} Restitution: Mistakes of Law and Ultra Vires Public Authority Receipts and Payments (Law Com. No. 227, 1994). \\
\textsuperscript{49} (2005)STC 329 at para 237.
\end{flushright}
policy aim,\textsuperscript{50} which is justified because in certain cases the amount of tax or charge which must be repaid could amount to millions of pounds, with disastrous consequences for the public authority and the relevant projects which it finances. Although the Law Commission rejected a general defence of serious disruption to public finances on the round that such a defence would be too uncertain in operation, it did recommend the creation of four specific defences to protect public authorities against serious fiscal disruption.

\textbf{6.4.2.1 Failure to Exhaust Statutory remedies}

The policy behind this defence is to encourage the submission of disputed assessments to appeal before the appropriate statutory tribunal.

\textbf{6.4.2.2 Change in an established view of the Law}

Where the claim to restitution is founded on a mistake of law the Law Commission recommended that restitution should be denied where the payment was made in accordance with a settled view of the law that the money was due and that view was subsequently changed by a decision of a court or tribunal.\textsuperscript{51}

But can any defence of change in a settled view of the law ever be justified where restitution is sought from a public authority? If the claimant seeks restitution of money from the public authority because payment was not due to it, the particular reason why the money was not due should be irrelevant. Even if the money was paid on the basis of a settled view of the law which is later proved to be mistaken, restitution should follow simply because it is subsequently acknowledged that the money was not due. 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.

\textsuperscript{50} Law Com. No. 227, para 10.5-108.

\textsuperscript{51} Supra note 15.
6.4.2.3 Compromise

The Law Commission has also recommended that restitution should be denied where the restitutionary claim has either been contractually compromised or where the payment was made in response to litigation which had been commenced by the public authority, but not where the litigation was merely threatened.

6.4.2.4 Unjust Enrichment

Finally, the Law Commission recommended that public authorities should have a defence to a restitutionary claim where the consequence of the public authority repaying the claimant would be that he or she was unjustly enriched. This effectively constitutes a defence of passing on and would apply where the claimant has passed on the loss to a third party. The recognition of the defence is justified because, where the claimant has recouped his or her loss following the transfer of a benefit to the defendant by passing that loss on to a third party, it appears that the defendant’s enrichment has been at the expense of the third party and not the claimant. If the defendant made restitution in full to the claimant in such circumstances this would mean that the claimant becomes unjustly enriched at the expense of the third party by the receipt of a windfall gain. This can be illustrated by the following example. The defendant public authority demands the payment of a statutory duty from the claimant. The claimant pays this money to the defendant and then recoups it from its customers by increasing the price of its goods. The claimant later discovers that the defendant had no authority to demand the duty and so the claimant seeks restitution from the defendant. Since the claimant has not suffered any loss, because the initial loss was passed on to the customers, the defendant’s enrichment does not appear to have been at the claimant’s expense, but is instead at the expense of the customers, since they have ultimately borne the burden of the defendant’s unauthorized demand.

The defence has been recognized in England. In *Marks and Spencer plc v*
Lord Walker of Westingthorpe recognized that passing on is a possible defence to any restitutionary claim, although his Lordship cited *Roxborough v Rothmans of Pall Mall Australia Ltd.* in support of this conclusion, even though that decision expressly rejected the passing on defence in Australia. Consequently, this dictum cannot be considered to be authoritative. However, certain statutory provisions relating to the recovery of overpaid VAT, Excise Duty and Car Tax effectively recognize the defence. For example, recovery of overpaid VAT is denied if repayment would unjustly enrich the person who paid the VAT. This encompasses a defence of passing on, which would be applicable where, for example, the taxpayer had passed on the burden of the VAT to its customers. However, the interpretation and ambit of this provision is to be considered by the European Court of Justice.

Nevertheless, the authorities are generally opposed to the recognition of a passing on defence. It has been expressly rejected in Australia. Although the point was left open by Lord Goff in *Woolwich Equitable Building Society v IRC*, the defence was expressly rejected by the Court of Appeal in *Kleinwort Benson Ltd. v Birmingham CC* because the law of restitution is concerned with the defendant’s gain and not the claimant’s loss. That case involved a claim for repayment from a local authority following a decision that interest rate swap transactions made with that authority were void. Although the defence of passing on was rejected on the facts of the case, its availability was left open generally and particularly as regards claims for the recovery of tax and other duties. Evans LJ did not consider these cases to be relevant to the

---

54 Value Added Tax Act, 1994, Sec. 80(1).
56 *Marks and Spencer plc v Commissioners of Customs and Excise* (2005) UKHL 53.
60 Id at p. 389.
Swaps cases because they involved public law claims, but most of the swaps cases also involved a public law element since the restitutionary claim was brought against public authorities, albeit for a private law claim. Indeed, *Kleinwort Benson* itself involved a claim brought against a public authority. A preferable method for distinguishing the swaps cases from the tax cases is that, in the tax cases where the claimant taxpayer has passed on the burden of the tax to his or her customers, he or she can be considered to have collected the tax from his or her customers on behalf of the taxing authority. Consequently, it is permissible to treat the tax authority as having been enriched at the expense of the customers, because the claimant is simply acting as the agent for the authority, so the customers should be able to sue the tax authority directly. This analysis will, however, depend on the nature of the tax liability.

The preferable view is that the defence should not be recognized. The reality is that it will invariably be impossible to prove that the claimant has actually passed on the loss to a third party. For example, if the claimant has paid money to the defendant and seeks to recoup this loss from his or her customers by increasing prices, it does not follow that the claimant will necessarily be able to recoup the loss.

6.5 Restitution Future

The decision of the Court of Appeal in *Deutsche Morgan Grenfell* is dubious for the following reasons, and so should be rejected:

1. The dictum of Lord Goff in *Kleinwort Benson* arose in the course of a discussion about the availability of a settled law defence to claims to recover different types of payment, and was not concerned with the

---

62 Supra note 59 at p. 389..
63 *Commissioner of State Revenue v Royal Insurance Australia Ltd.* (1994) 126 ALR 1, 14.
64 Virgo, ‘Restitution of Overpaid VAT’ 1998 BTR at pp.582, 587-8
more important question of whether a mistake of law claim is unavailable where taxes are involved. If Lord Goff had intended to draw such a fundamental distinction he might have been expected to do so explicitly. Anyway, the dictum of Lord Goff was *obiter* because the case did not concern restitution of taxes or other charges.

(2) More fundamentally, the purported distinction between so-called ‘public’ and ‘private’ transactions is both unworkable and unnecessary. The assumption appears to be that in *Woolwich* the transaction was ‘public’ because it involved payments of taxes to the Revenue, whereas in *Kleinwort Benson* the transaction was ‘private’ because it involved an interest rate swap transaction between a bank and a local authority. But why is the latter transaction treated as ‘private’? Certainly it appears to be a commercial transaction which was voluntarily made, but the transaction was with a public authority and, crucially, the only reason why the transaction was considered to be void was because the council lacked the capacity to enter into it as a public authority. 66 This was also true of the *Woolwich* case which involved an *ultra vires* transaction with a public authority. Surely 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. Both *Woolwich* and *Kleinwort Benson* concerned restitutionary claims against public authorities and should, therefore, be treated as complementary and not contradictory, in the sense that the cases together should be interpreted as recognizing alternative claims for the recovery of overpayments from public authorities, one founded on the *ultra vires* nature of the receipt and the other founded on the mistake of the claimant. The claimant should be allowed to choose whichever claim best suits his or her circumstances. Indeed, Buxton LJ came close to recognizing the significance of the recipient

---

rather than the underlying transaction when he stated that.\textsuperscript{67}

It is therefore difficult to escape the conclusion that in \textit{Woolwich} the House of Lords recognized, or created, a right and a remedy that were specific to the particular circumstances of the demander and of the payer, and which stood outside the main stream of restitution as understood in a private law context.

But he then went on to reach the unnecessary conclusion that \textit{Woolwich} constituted a complete code for the recovery of overpaid taxes and so this prevented the claimant from relying on the main-stream ground of mistake of law to secure restitution.

One interpretation for the decision of the Court of Appeal was identified by Buxton LJ, namely that the justification for restitution under the \textit{Woolwich} principle and for mistake of law are fundamentally different because they involve different reasons why the payment should be returned, namely the unlawful demand under the \textit{Woolwich} principle and the mistake of law under \textit{Kleinwort Benson}.\textsuperscript{68} But this is an irrelevant distinction, because in both cases the restitutionary claim is grounded on the same unifying principle, namely unjust enrichment, albeit with different grounds of restitution.

\textbf{(3) A consequence of the failure to recognize alternative common law claims for the recovery of overpaid taxes is that the court is depriving the claimant of a restitutionary remedy which would have been available had the transaction been characterized as private, by virtue of preventing an extension of the limitation period. Surely the recovery of overpaid taxes should, at the very least, be just as readily available as other types of payment to a public authority where those payments are mistaken.}

Thus, it can be said that a position where there is a conflict between two

\textsuperscript{68} Id, para. 289.
fundamental principles. On the one hand we have a fundamental principle of constitutional importance that public authorities are not able to demand or receive *ultra vires* payments. On the other hand, we have judicial and statutory developments, in the forms of the Court of Appeal in *Deutsche Morgan Grenfell* 69 and recent Finance Acts, which make the recovery of such payments more difficult by qualifying the limitation period or expanding the defences available to the taxing authorities. Constitutional principles appear to have been rejected for the benefit of public authorities. Further, the perceived distinction between public law and private law claims is unworkable and unnecessary. It is to be hoped that the House of Lords in *Deutsche Morgan Grenfell* 70 will recognise that the claimant has a choice as to the ground of restitution on which it relies. The significance of the defendant being a public authority should primarily only be relevant as regards the definition and interpretation of particular defences to such claims.

---

69 Supra note 4
70 Ibid