RESTITUTION: MISTAKES OF LAW AND ULTRA VIRES PUBLIC AUTHORITY RECEIPTS ANI PAYMENTS

LAW COMMISSION

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LAW COM No 227

The Law Commission

(LAW COM.No.227)

RESTITUTION: MISTAKES OF LAW AND ULTRA VIRES PUBLIC AUTHORITY RECEIPTS AND PAYMENTS

REPORT ON A REFERENCE UNDER SECTION 3(1)(e) OF THE LAW COMMISSIONS ACT 1965

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SECTION A
INTRODUCTION

PART I
INTRODUCTION AND SUMMARY OF MAIN RECOMMENDATIONS

1.1 In March 1990 the Lord Chancellor made a reference to the Commission in the following terms:

> To examine the law relating to payments made but not lawfully due and in particular the common law rule that payments made under a mistake of law are irrecoverable, and to make recommendations.

1.2 In 1991 we published a Consultation Paper.[1] In that paper we dealt with payments made under a mistake of law and, in the case of payments to and by public authorities, all ultra vires payments.[2] As a result of consultation we sought[3] and were granted an extension to our terms of reference to include services rendered and non-pecuniary benefits conferred under a mistake of law. We now report on all these matters.

1.3 In the Consultation Paper we made a number of provisional recommendations. First, in relation to the recovery of payments for mistake of law generally, we concluded that there was a strong case for abolishing the current bar on restitutionary recovery for mistake of law.[4] We also concluded that if the mistake of law rule is to be abolished, it is important that the newly recognised defence of change of position and the existing defence of compromise of, or submission to, an honest claim should apply; but we suggested that the development of these defences should be left to the common law.[5]

1.4 Secondly, we provisionally recommended that there should be a general right to recover payments made pursuant to ultra vires levies, irrespective of whether the payment was made under a mistake of law. A number of possible safeguards were discussed and comment was invited on this basic proposal and as to the safeguards

1 Consultation Paper No 120 "Restitution of Payments Made Under a Mistake of Law".

2 Ie payments made to a public authority following an ultra vires demand or where the payment is otherwise not due because of a breach of public law and payments made by a public authority which are either ultra vires or otherwise in breach of public law.

3 Our reasons are set out at paras 4.11-4.12 below.

4 Consultation Paper No 120, paras 2.36-2.37. See further paras 2.1-2.38 below, where the present law is set out.

5 Consultation Paper No 120, paras 2.66-2.79, see paras 5.14-5.18 below.

which were desirable. Thirdly, we invited comments on three options for the reform of the law governing recovery of payments made *by* public authorities without legal authority but made no provisonal recommendations.

The Response on Consultation

1.5 We received a considerable measure of response from a broad cross-section of interested persons and bodies, from the judiciary, practising lawyers and academics and from legal professional and public bodies. We are particularly grateful for the time and effort spent by consultees. We also conducted a number of meetings with representatives of bodies which were particularly likely to be affected, whether directly or in their representative capacities, by any proposed reforms to the law governing the recovery of charges levied ultra vires. A list of respondents and the bodies with whom meetings were held appears at Appendix 3 to this Report. There have also been a number of articles and notes[6] dealing with issues raised in the paper and by the decisions of the Court of Appeal and House of Lords in *Woolwich Equitable Building Society v Inland Revenue Commissioners,*[7] discussed below.

1.6 The views of the persons and bodies we consulted supported our own provisional conclusions. There was overwhelming support for our provisional view that there should be legislative reform of the mistake of law rule. There was also almost unanimous support for the provisional proposal that there should be a wide general right to recover ultra vires levies by public bodies. Most considered that recovery rights should be embodied in a special public law rule, allowing recovery of all overpayments (though subject to defences), rather than being dependent on the private law grounds for restitution - even if the private law was reformed to allow recovery for mistake of law. There was, however, less agreement as to the defences and safeguards that were necessary for a broad restitutionary right in respect of ultra vires receipts of public authorities and in particular on whether a short limitation period was justified to deal with the problem of disruption to public finance and as to the proper position in the various circumstances where the payer of the tax has himself suffered no loss.

1.7 Few respondents dealt with the recovery of payments made ultra vires by public authorities. There was no support for a rule which would limit recovery to cases where the payee is at fault and no strong preference was expressed between a rule allowing automatic recovery and one based on the private law.

6 P Birks, [1991] LMCLQ 473, 497; [1992] PL 580, 585-6; A Burrows, (1993) 143 NLJ 480; E McKendrick, (1991) 107 LQR 526; [1993] LMCLQ 88; G Jones, [1992] CLJ 29; G Virgo, [1993] CLJ 31, [1993] BTR 442. Members of the Law Commission's team also contributed to the literature: see S Arrowsmith, (1991) 141 NLJ 1105 and 1154; J Beatson, (1993) 109 LQR 1 and 401.

7 [1993] AC 70.

Developments since publication of our Consultation Paper

1.8 Since our Consultation Paper was published, there have been three important developments. First, and most important is the decision of the House of Lords in *Woolwich Equitable Building Society v Inland Revenue Commissioners*[8] handed down in July 1992 - a year after publication of our Consultation Paper. The House of Lords overturned the traditional common law rule on overpaid levies, which allowed recovery only on grounds recognised by the private law, and substituted a new public law rule providing that such levies are prima facie recoverable. In a decision of constitutional importance the House affirmed the Court of Appeal but made it clear it was "developing" principle and not simply applying the existing law. Essentially this is the principle advocated in Part III of our Consultation Paper.[9]

1.9 This development has obviously affected the focus of our Report, as it has fundamentally altered the common law background to our proposed recommendations on ultra vires levies by public authorities. There is now a general restitutionary right where there was previously a bar to recovery. It does not, however, affect the need to deal in the Report with the various issues which were raised in the Consultation Paper; nor, it will be suggested, does it obviate the need for legislation on this subject. The *Woolwich* rule has only a limited impact in certain of the potential areas of its application, since it does not apply where statutory recovery rights are already in place, as they are for most of the major taxes.

1.10 Secondly, there have been further indications both in the *Woolwich* case and in Commonwealth decisions that the mistake of law rule may be susceptible to judicial abrogation.[10] The third development since the Consultation Paper is the series of decisions in the "swaps" litigation.[11]

1.11 We did not consider the rules governing rescission of contracts made under mistakes of law or the rules governing recovery of payments made under such contracts in our Consultation Paper. Payments made under void or voidable contracts (which may be so other than for mistake) may sometimes be recoverable in a restitutionary

8 [1993] AC 70 (Lord Goff, Lord Browne-Wilkinson and Lord Slynn; Lord Keith and Lord Jauncey dissented).

9 And referred to, particularly by Lord Goff: [1993] AC 70, 163, 164, 168, 169, 176. See also 193 (Lord Jauncey).

10 See *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 AJLR 768; *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202(A); *Woolwich Equitable Building Society v IRC* [1993] AC 70; paras 2.39-2.41 below.

11 *Westdeutsche Landesbank Girozentrale v Islington LBC* and *Kleinwort Benson Ltd v Sandwell BC* (1993) 91 LGR 323, aff'd by the CA [1994] 1 WLR 938, but under appeal to the House of Lords; *Kleinwort Benson Ltd v South Tyneside MBC* (12 March 1993); *Morgan Grenfell & Co Ltd v Welwyn Hatfield DC, The Times*, 1 June 1993. See para 2.41 below.

action.[12] Such payments may be said to be made under a mistake of law, in that they are made pursuant to a contract which may itself be made under a mistake of law, but the legally relevant cause of the payment in such cases is the erroneous belief in the existence of a valid contract. This belief has been treated as a mistake of fact[13] rather than a mistake of law. Although considerations of security of transactions are relevant to restitutionary claims, the question of when a mistake of law should affect the validity of a contract also involves further considerations concerning issues such as sanctity of contract, re-allocation of contractual risk and, in the case of ultra vires contracts such as "swaps" contracts by local authorities, issues of policy.[14] For all these reasons we did not and do not regard the rules governing contracts made under mistakes of law, or payments made under mistaken contracts, as appropriate for consideration in the context of this project.[15] For similar reasons we did not and do not consider it appropriate to deal with questions such as the one in the "swaps" litigation in respect of ultra vires contracts: when, given a contract which is not legally effective for some reason other than mistake, may payments made under that contract be recoverable under the law of restitution.

Co-operation with the Scottish Law Commission

1.12 Following the reference to this Commission the Scottish Law Commission began work on restitution[16] and in September 1993 published Discussion Paper No 95, *Recovery of Benefits Conferred under Error of Law*.[17] The Scottish Law Commission is also planning to publish a Discussion Paper on the recovery of ultra vires public authority receipts and disbursements.[18]

1.13 Co-operation between the two Commissions has been particularly important in the area of ultra vires payments made by and to public authorities, since, as the tax system and administration is broadly speaking uniform across the United Kingdom,

12 See eg G H Treitel, *The Law of Contract* (8th ed, 1991) p 933.

13 See eg *George (Porky) Jacobs Enterprises Ltd v City of Regina* [1964] SCR 326 in relation to bylaws, on which see Consultation Paper No 120, para 2.22.

14 See S Arrowsmith "Ineffective transactions and unjust enrichment: a framework for analysis" (1989) 9 LS 121; S Arrowsmith "Ineffective transactions, unjust enrichment and problems of policy" (1989) 9 LS 307.

15 Consultation Paper No 120 para 1.8.

16 The Scottish Law Commission is also considering the structure of the entire Scottish law of unjustified enrichment and has been considering, among other things, a codification of that law.

17 This was in two volumes, the second of which contains background research papers on the historical development of the error of law rule, the *condictio indebiti* and recovery of payments made under improper compulsion.

18 Scottish Law Commission Discussion Paper No 95, paras 1.6-1.7. Publication of the second discussion paper referred to has been delayed; however a position paper *(Recovery of Ultra Vires Public Authority Receipts)* was prepared by the Scottish team for a seminar on unjustified enrichment that the SLC organised with Strathclyde University on 23 October 1993.

both Commissions believe it to be desirable that, if possible, a uniform approach should be adopted in both jurisdictions. There has been much discussion and communication between the two Commissions and we provided the Scottish Law Commission with details of our proposed reforms. It agreed that existing statutory rights of recovery of overpaid taxes should be harmonised and rationalised; but has consistently taken the position that there should be no express statutory right to recover ultra vires payments to public authorities on the grounds that the gap in the law after reform of the error of law rule in the private law would not be wide, and because it had grave reservations about aspects of the *Woolwich* principle, especially its scope.[19]

Discussions with the Inland Revenue, HM Customs & Excise and other interested public bodies

1.14 Meetings have been held between us and the Inland Revenue, bodies representing local authorities, and representatives of the gas, water and electricity regulatory bodies (OFGAS, OFWAT and OFFER). We have also carried on a substantial correspondence with the Inland Revenue and HM Customs and Excise. These contacts were primarily directed to the issues raised in Section C, relating to recovery of ultra vires levies.

1.15 The Commissioners of Inland Revenue made two responses to our Consultation Paper. The first was made prior to the decision of the House of Lords in *Woolwich Equitable Building Society v IRC*,[20] and the second subsequent to that decision. Later, a meeting took place between representatives of the Inland Revenue and ourselves. We provided the Inland Revenue with details of our proposed reforms to the law in this area, but unfortunately, due to the pressure of work on the Department, it was unable to provide us with comments on our proposals prior to finalisation of our Report. HM Customs and Excise also responded to our Consultation Paper, and the Solicitor's Office was subsequently provided with details of our proposed reforms and gave us extremely useful and comprehensive comments on our draft proposals.

1.16 As a result of the discussions with the Scottish Law Commission and the revenue authorities we will not now, in Section C, be recommending the enactment of a wide ranging statutory recovery provision governing all taxes, charges or levies raised by all public or quasi-governmental authorities. We are concerned that a conflict between such a right and the existing statutory framework for the collection of most central and local government revenue might occur. In addition, the introduction of a wide ranging statutory right of recovery would be unlikely to command support from the bodies concerned with the administration of the taxation system. Recovery

[19] See Scottish Law Commission No 146, 28th Annual Report 1992-93, para 2.23.

[20] [1993] AC 70.

rights built into the existing statutory framework are, in our view, more appropriate for the reasons which we set out below.[21]

Summary of Main Recommendations

1.17 Our main recommendations on the mistake of law rule are:

(a) The rule precluding restitution of payments made, services rendered and benefits conferred under a mistake of law be legislatively abrogated (Paragraphs 3.12 and 4.12; Draft Bill, clause 2).

(b) The proposed legislation should provide that the classification of a mistake as a mistake of law or as a mistake of fact shall not of itself be material to the determination of a claim for restitution and that restitution should not be denied on the ground that the mistake in question is a mistake of law (Paragraphs 4.3 and 4.10; Draft Bill, clause 2).

(c) A restitutionary claim in respect of any payment, service or benefit that has been made, rendered or conferred under a mistake of law should not be permitted merely because it was done in accordance with a settled view of the law at the time, which was later departed from by a subsequent judicial decision (Paragraphs 5.3-5.13; Draft Bill, clause 3).

(d) The legislation should not deal expressly with the position of compromises and submissions to honest claims, or the defence of change of position (an account of the common law is given in the Report) (Paragraphs 5.15 and 5.19).

1.18 In respect of ultra vires receipts and payments by public authorities, we believe there should be a series of specific amendments to the recovery provisions for overpaid tax in the taxation legislation to reflect the emergence of the *Woolwich* principle, the proposed abolition of the mistake of law bar and the need for defences against the exercise of both rights.[22] Our main recommendations are:

(e) The present recovery right for income tax, capital gains tax, corporation tax and petroleum revenue tax (Taxes Management Act 1970, section 33) should be replaced by a provision permitting recovery of taxes paid but not due by any taxpayer, subject to the defences:-

(i) that the taxpayer exercised or failed to exhaust statutory appeal rights against an assessment to the amount of tax in question,

(ii) that repayment of the amount would unjustly enrich the taxpayer,

21 See paras 8.20-8.39 below.

22 See para 8.20 below.

(iii) that the amount was paid as part of a settlement of the taxpayer's liability or in response to litigation commenced by the Inland Revenue, and

(iv) that, in the case of recovery claims brought on the grounds of mistake of law (but not ultra vires subordinate legislation) recovery should not be permitted merely because the taxpayer paid in accordance with a settled view of the law that the amount in question was due at the time of payment, which was later changed by a decision of a court or tribunal.

(Paragraphs 9.25, 10.20-10.21, 10.34, 10.35, 10.42, 10.43, 10.46, 10.48 and Draft Clause A)

(f) This recovery right should extend to sums paid under the PAYE system, or the self-assessment system, when introduced, and similar recovery provisions should apply to overpaid Inheritance Tax and Stamp Duty (Paragraphs 12.7, 12.17, 13.11, 13.25 and Draft Clause B).

(g) The present recovery provisions for overpaid VAT (VAT Act 1994 s 80, previously Finance Act 1989 s 24) and Insurance Premium Tax (Finance Act 1994, Schedule 7 para 8) should not be amended, and a similar recovery provision should be introduced for Excise Duties (Paragraphs 14.19, 14.23 and 14.24 and Draft Clause C).

(h) The existing scheme for the recovery of social security contributions paid in error should be unaltered, except for the inclusion, by the amendment of the Contributions Regulations, of payments made under ultra vires secondary legislation (Paragraph 15.12).

(i) The existing provisions for the recovery of Council Tax and the Uniform Business Rate should be unaltered, except for the inclusion by amendment of the Regulations of payments made under ultra vires secondary legislation (Paragraph 15.26).

(j) The common law right to restitution of ultra vires receipts by public authorities should not be replaced by a comprehensive statutory recovery right for such receipts, and the development of the right to restitution of ultra vires receipts by public authorities should, save for the specific recommendations we have made in this report, be left to the common law (Paragraphs 16.8 and 16.10).

(k) The present rule which allows the Crown to recover all payments which are made by it ultra vires should not be altered (Paragraph 17.21).

Arrangement of the Rest of this Report

1.19 Section B (Parts II-V) considers payments made under a mistake of law generally, and contains recommendations for reform of the general rule and to clarify specific aspects of the law.

Section C (Parts VI-XVI) considers the problem of taxes or charges paid pursuant to an ultra vires levy by public authorities (with a discussion of the *Woolwich* decision) and contains recommendations for specific reforms of the statutory recovery provisions for the principal central government taxes.

Section D (Part XVII) considers the issue of ultra vires payments made by public authorities.

Section E contains a summary of our recommendations.

A draft Bill giving effect to the recommendations in Section B is to be found in Appendix 1 and draft clauses[23] giving effect to the recommendations in Section C concerning income tax, inheritance tax and excise duty are to be found in Appendix 2.

1.20 We are grateful for the assistance we received from all respondents, and those who have helped us with this project. In particular, we would like to thank our consultant Professor Sue Arrowsmith of the University College of Wales at Aberystwyth. We are also grateful for assistance from Mr John Avery Jones CBE of Messrs Speechly Bircham, a Chairman of VAT Tribunals and a Special Commissioner of Income Tax, Mr John Gardiner QC, Professor Peter Birks, Regius Professor of Civil Law at the University of Oxford, and the Solicitors' Offices of both the Inland Revenue and HM Customs and Excise.

[23] These are model clauses for reasons which we set out in paragraphs 9.4-9.5 below. Our recommendations must, of course, be confined to England and Wales, although it is obviously highly desirable that recovery rights in relation to tax payments should be uniform across the United Kingdom.

SECTION B
RESTITUTION OF BENEFITS CONFERRED UNDER A MISTAKE OF LAW

PART II
THE PRESENT LAW

The General Rule

2.1 Mistakes can take many forms, the legal analysis of which may vary. Apart from the distinction between mistakes of fact and mistakes of law, two of the more obvious analyses are: first, mistake as to a liability to make the payment (a "supposed liability mistake") and secondly a mistake 'but for' which the payer would not have made the payment (a "causative mistake"). Examples of supposed liability mistakes are where the error relates to the proper construction of a contract[1] or a will[2] and as a consequence payment is made in the mistaken belief that there is an obligation to do so; and where an error relates to a statutory obligation, for instance, when a person pays a tax or charge to the government when no such charge is legally due.[3] An example of a causative mistake (where no supposed liability is involved) is when a person makes a gift to a body thinking that he is entitled to tax relief in respect of the gift; but on the true interpretation of the tax laws this is not in fact the case.

2.2 It is generally accepted that in English law the fact that a payment is made under a mistake of law is not of itself a ground for recovery of the payment. By contrast a payment made under a mistake of fact is prima facie recoverable. In *Barclays Bank Ltd v W J Simms (Southern) Ltd*[4] Robert Goff J reviewed the relevant authorities and summarised the principles relating to mistake of fact:

> (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or principal on whose behalf he is

1 Cf *Cooper v Phibbs* (1867) LR 2 HL 149 which may fall into the "private rights" exception, para 2.13 below.

2 Cf *Ministry of Health v Simpson* [1951] AC 251 which may be within the equitable exception, para 2.13 below.

3 There are two situations: a payment by the taxpayer who misconstrues his tax obligations - a proper mistake of law; and an ultra vires demand by the taxing authority; both situations will be considered in Section C of this Report in so far as they relate to payments of central and local government taxes.

4 [1980] QB 677, 695.

authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so.

In addition, recovery will be denied if it would frustrate the policy of a statutory or common law rule;[5] if payment was made in submission to or is a compromise of an honest claim;[6] or if the payer is estopped from alleging that he acted under a mistake of fact.[7]

2.3 The modern rule concerning payments made under a mistake of law has its origins in *Bilbie v Lumley*,[8] where Lord Ellenborough CJ, in a claim by an underwriter for recovery of payments made under an insurance policy which could have been avoided for non-disclosure, held that there could be no recovery of a payment made as a result of a mistake of law.

2.4 The decision was followed in *Brisbane v Dacres*.[9] The judgments in that case do not necessarily support a general rule that payments made under a mistake of law are irrecoverable; it is possible that the majority intended to confirm the decision in *Bilbie v Lumley* only as an example of a narrower rule that a voluntary submission to a claim is binding on the payer. Indeed, it has been argued that the case law since *Bilbie v Lumley* is best explained as illustrating the proposition that payments made voluntarily to close a particular transaction, or in submission to an honest claim are irrecoverable. Goff and Jones state that "the principle in *Bilbie v Lumley* should only preclude recovery of money which was paid in settlement of an honest claim. Any other payment made under a mistake of law should be recoverable if it would have been recoverable had the mistake been one of fact."[10] The approach of Lord Ellenborough CJ in *Bilbie v Lumley* was, however, later approved in *Kelly v Solari*,[11] in which the general proposition that recovery cannot be based on a mistake of law was clearly endorsed. Since then the proposition has been stated and followed in many cases concerning both public and private sector payees. By 1943 in *Sawyer and Vincent v Window Brace Ltd*[12] Croom-Johnson J considered it to be "beyond argument" in all courts below the House of Lords that a payment made as a result

5 *Morgan v Ashcroft* [1938] 1 KB 49 (The Gaming Acts); *Thavorn v Bank of Credit and Commerce International SA* [1985] 1 Lloyd's Rep 259 (Infants Relief Act).

6 See paras 2.25-2.38 and 5.18 below.

7 *Avon County Council v Howlett* [1983] 1 WLR 605; *The Deutsche Bank v Beriro & Co* (1895) 1 Com Cas 123; *RE Jones Ltd v Waring & Gillow Ltd* [1926] AC 670.

8 (1802) 2 East 469; 102 ER 448.

9 (1813) 5 Taunt 143; 128 ER 641.

10 Goff and Jones, *Law of Restitution* (4th ed, 1993) p 143-4.

11 (1841) 9 M & W 54; 152 ER 24.

12 [1943] KB 32, 34.

of a mistake of law is generally irrecoverable, a position confirmed recently in both *Woolwich Equitable Building Society v IRC*[13] and *Westdeutsche Landesbank Girozentrale v Islington LBC.*[14]

Qualifications and Exceptions to the General Rule

2.5 There are many qualifications and exceptions to the general rule that mistake of law is not a ground for recovery of a payment made to another. Qualifications are capable of being used by the courts to avoid the mistake of law rule, where the rule is seen to operate in a harsh and unfair manner. There are also situations in which relief is given in respect of payments made as a result of a mistake of law, which may be said to be exceptions to the general rule in that the mistake alone appears to be the ground for recovery.

Qualifications

(a) ILLEGAL CONTRACTS: LEGISLATION FOR THE PROTECTION OF THE PAYER

2.6 In *Kiriri Cotton Co Ltd v Dewani*[15] the appellants sought to recover a premium which had been paid for the lease of a flat. The payment of such a premium was illegal under legislation designed to protect tenants and an agreement to pay it was accordingly an illegal contract. The Privy Council appeared to treat the matter as in principle within the mistake of law rule; but nevertheless advised that the payment was recoverable on the ground that the parties were not *in pari delicto* (equally blameworthy).[16] In that case the duty of observing the law was placed on the landlord-payee by statute, but Lord Denning said that the principle also applied where the responsibility for the mistake lies more on the payee, for instance, if he has misled the payer.[17] The Supreme Court of Canada has applied the *in pari delicto* principle outside the context of illegal contracts to the situation where a public authority levied charges which were ultra vires, the levying officer being held not to be *in pari delicto* with the taxpayer.[18] That application of the principle has been doubted both judicially[19] and by commentators.[20] Moreover, the formulation of the

13 [1993] AC 70, 199 per Lord Slynn; but it was stated that the rule was open to review, see para 3.9 below.

14 (1993) 91 LGR 322, 372 per Hobhouse J; [1994] 1 WLR 938 (CA).

15 [1960] AC 192.

16 The principle has been applied or approved in *Alphacell Ltd v Woodward* [1972] AC 824; *Nash v Halifax Building Society* [1979] Ch 584; *Shelley v Paddock* [1980] QB 348.

17 *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192, 204.

18 *Eadie v Township of Brantford* [1967] SCR 573.

19 *Hydro Electric Commission of the Township of Nepean v Ontario Hydro* (1982) 132 DLR (3d) 193, 241 per Estey J. These criticisms were supported in *Air Canada v British Columbia* [1989] 1 SCR 1161.

20 Goff and Jones, p 152 describe it as a "novel extension of *Kiriri Cotton*". Maddaugh and McCamus, p 268 state that the doctrine was "wrenched out of its illegal contract context" in *Eadie*. See also Crawford (1967) 17 U of Toronto LJ 344.

principle and the reluctance of the courts to find that statutes are enacted solely for the benefit of a particular class of persons to which the plaintiff belongs means that its scope is in practice restricted.[21] There seem to have been no cases in England in which the *in pari delicto* principle has been applied outside its original context.

(b) IMPLIED CONTRACTS:

2.7 A payment made under a mistake of law may also be recovered where there is an agreement to repay if it turns out that the money is not in fact due. It may be possible to imply such an agreement on ordinary contractual principles where a payment is made under circumstances where there is some articulated dispute as to the existence of an alleged legal obligation to make the payment, particularly if the parties had taken steps to have the matter resolved by the courts at the time the payment was made.[22] Although it is difficult to persuade a court to imply such an agreement if both the parties are private individuals, the courts may be more willing when a public authority is involved.[23] Even if such an agreement is proved, this basis of recovery may not be entirely satisfactory for the payer, since it does not necessarily follow from the implication of a contract to repay that it will be implied that interest is payable.[24]

(c) OTHER GROUNDS FOR RESTITUTION:

2.8 The courts may grant relief against the consequences of mistakes of law in restitutionary actions where other grounds for restitution are available, for example, duress or undue influence. While mistake of law is not a ground for recovery, if other grounds exist the mistake of law rule will not act as a bar. In *Westdeutsche Landesbank Girozentrale v Islington LBC* Hobhouse J stated that:[25]

> [a]s the law at present stands, a mistake of law does not provide a ground for recovery on the basis of money had and received. But if a plaintiff does establish a prima facie right of recovery on some ground other than mistake, then the relevant question becomes whether or not the payment was

21 See eg *Harse v Pearl Life Assurance Co* [1904] 1 KB 558; *Phoenix General Insurance Co of Greece v Adas* [1988] QB 216; *Re Cavalier Insurance Co Ltd* [1989] 2 Lloyd's Rep 430, 450. Cf. *Stewart v Oriental Fire and Marine Insurance Co Ltd* [1985] QB 988. See now Financial Services Act 1986, s 132.

22 *Woolwich Equitable Building Society v IRC* [1989] 1 WLR 137 per Nolan J, following the decision of Vaisey J in *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] 1 Ch 409; see Section C paras 6.10-6.12 below.

23 *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] Ch 409; para 6.10 below.

24 Although Woolwich argued that any implied contract to repay should contain a term for payment of interest, Nolan J held that interest was only due after the date of the judicial review action (*R v Inland Revenue Commissioners, ex parte Woolwich Equitable Building Society* [1987] STC 654).

25 (1993) 91 LGR 323, 372. Affirmed by the Court of Appeal without specific reference to this ground: [1994] 1 WLR 938.

"voluntary" or made to "close the transaction". It may be that the payer, in making a voluntary payment or a payment to close a transaction, has taken a mistaken view of the law, but that is not the reason why he cannot recover the payment. The essence of mistake of law is that it does not provide a basis of recovery; it is not that, without more, it provides a defence to a claim for money had and received.

Exceptions

(a) OVERPAYMENTS BY TRUSTEES OR PERSONAL REPRESENTATIVES:

2.9 Trustees or personal representatives who make overpayments as a result of a mistake of law may obtain relief in equity against their error in some circumstances; they may normally deduct the amount of overpayments from future instalments due to the overpaid beneficiary.[26] Trustee-beneficiaries are not permitted to adjust accounts in their own favour, however, and may not recover overpayments made to other beneficiaries where they have underpaid themselves. In proceedings brought by next of kin against persons to whom parts of an intestate's estate had been wrongly distributed, it has been held that without mistake of fact there can be no action for money had and received.[27] However, next of kin may recover in equity from a volunteer who receives a distribution under a mistake of law provided that their remedies against the personal representatives have been exhausted.[28] There is no reported English case where a trustee or personal representative has himself recovered money paid under a mistake of law from the recipient although recovery is allowed in some other jurisdictions.[29]

(b) PAYMENTS MADE TO AN OFFICER OF THE COURT:

2.10 Payments made under a mistake of law to an officer of the court may be recovered. In *Ex parte James*[30] a trustee in bankruptcy who had been paid by an execution creditor who mistakenly believed that he was entitled to the money was required to repay it. The reasons given were that he ought to set an example to the world by paying it to the person really entitled to it and that "the Court of Bankruptcy ought to be as honest as other people."[31] The rule applies to an involuntary liquidator

26 *Dibbs v Goren* (1949) 11 Beav 483; 50 ER 904; *Re Musgrave* [1916] 2 Ch 417. See also Goff and Jones p 154-5. In the context of overpayments of rates permitting deductions has been said to be anomalous: *R v Tower Hamlets LBC, ex parte Chetnik Developments Ltd* [1988] AC 858, 876-7, and in the context of landlord and tenant such a deduction of an overpayment from a later payment of rent was not permitted: *Sharp Bros & Knight v Chant* [1917] 1 KB 771 (CA).

27 *Re Diplock* [1947] Ch 716, 725-6 per Wynn-Parry J.

28 *Re Diplock* [1947] Ch 716; [1948] Ch 465 (CA), sub nom *Ministry of Health v Simpson* [1951] AC 251 (HL).

29 For example, in the United States: *Old Colony Trust Co v Wood* (1947) 74 NE 2d 141 and see *Scott on Trusts* (4th ed, 1987) section 465.

30 (1874) LR 9 Ch App 609.

31 Ibid, 614 per James LJ.

under a compulsory winding up, but does not apply to a voluntary liquidator as he is not an officer of the court.[32]

(c) PAYMENTS MADE BY AN OFFICER OF THE COURT:

2.11 It has also been held that payments made by an officer of the court as a result of an error of law are recoverable, on the basis that the court has the right to order repayment as it was its own mistake that had caused the payments.[33]

(d) MISTAKES OF FOREIGN LAW:

2.12 Money paid under a mistake of foreign law is generally regarded as being recoverable, since questions of foreign law are treated in English law as questions of fact to be proved by evidence.[34]

(e) MISTAKES IN EQUITY:

2.13 The general principle of non-recovery in the case of a mistake of law is qualified by the equitable jurisdiction to grant relief from the consequences of mistake.[35] The general approach of equity has not involved a strict application of the mistake of law rule,[36] and equity applies a somewhat artificial distinction created between mistakes as to the general law in respect of which the no-recovery rule is applied, and mistakes as to "private rights"[37] where recovery may be allowed.

(f) ULTRA VIRES CHARGES AND TAXES:

2.14 The general no-recovery rule is also qualified in respect of ultra vires payments to and by public authorities. Recovery is now generally possible (subject to specific statutory provision) simply on the grounds that the payment was not lawfully due, whether or not the payment was prompted by a mistake of law. The cases will be

32 *Re TH Knitwear (Wholesale) Ltd* [1988] Ch 275.

33 *Re Birkbeck Permanent Benefit Building Society* [1915] 1 Ch 91.

34 *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 289; Goff and Jones p 161; Halsbury's Laws of England, 4th ed, Vol 32 para 9. See also RSC Order 38, r 7. Although there is no reported decision that establishes a right to recover a payment made under a mistake as to foreign law, the reasoning of the Court of Appeal in *Andre & Cie SA v Ets Michel Blanc & Fils* [1979] 2 Lloyd's Rep 427 (misrepresentation of foreign law held to give rise to a right to rescind) and *The "Amazonia"* [1990] 1 Lloyd's Rep 236 (mistake as to the effect of foreign legislation held to render an arbitration agreement void as made under a mistake of fact) is equally applicable in a restitutionary context.

35 *Gibbons v Mitchell* [1990] 1 WLR 1304, 1309 per Millett J: "the deed...will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it."

36 "[I]n Equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn": *Daniell v Sinclair* (1881) 6 App Cas 181, 190.

37 *Cooper v Phibbs* [1867] LR 2 HL 149; *Earl Beauchamp v Winn* (1873) LR 6 HL 223.

considered in Sections C and D.[38]

(g) MANIPULATION OF THE DISTINCTION BETWEEN FACT AND LAW:

2.15 The rule precluding restitution requires the courts to draw a distinction between mistakes of law and fact, a distinction which is notoriously difficult to make. The uncertainty resulting from the distinction may also be exacerbated by a temptation to avoid the perceived unfairness of the mistake of law rule. There are examples, albeit in the context of rescission rather than restitution, of cases in which the harsh effect of the mistake of law rule has been avoided by classifying the mistake as one of fact. There are two methods by which the fact-law distinction can be manipulated; on an individual basis, and by class of case. *Solle v Butcher*[39] illustrates the first method. A lease was entered into under a mistaken belief that repairs and alterations to a flat meant that it would no longer be subject to the statutory rent. Bucknill and Denning LJJ characterised this belief as a mistake of fact. They said that the mistake was as to whether or not the lease would be valid when entered into, that this was a mistake as to a question of fact and that the lease could therefore be set aside. Jenkins LJ, dissenting, stated that the mistake was one of law. He said that the parties were aware of all the material facts, but misapprehended the effect of the relevant statutes. The second method is illustrated by the classification of mistakes of foreign law and of mistakes of "private rights" as mistakes of fact. This method can be used to exempt whole classes of case from the operation of the mistake of law rule.[40]

Defences to Restitutionary Claims

2.16 The following defences are general defences to restitutionary claims. At present they apply to claims for restitution based on a mistake of fact, and we believe that, in principle, they should also apply to claims based on mistakes of law if the recommendations in this section of our Report are adopted.

(a) CHANGE OF POSITION:

2.17 This defence is based on the premise that it would be unfair to a payee or recipient of a non-pecuniary benefit acting in good faith who has relied on a receipt, or whose circumstances have otherwise changed, to require him to make restitution where this would leave him in a worse position than if the payment or non-pecuniary benefit had never been made or received. In *Lipkin Gorman v Karpnale Ltd*[41] the House of

[38] See also the position of payments under an ultra vires contract; see para 2.41 below.

[39] [1950] 1 KB 671; see also the decision of the Supreme Court of Canada in *George (Porky) Jacobs Ltd v City of Regina* [1964] SCR 326, where the plaintiff had paid licence fees to the municipality at a daily rate. Both parties believed these amounts to be due under a by-law but it only required the payment of an annual fee. The court held that the plaintiff had been mistaken as to the existence of a by-law requiring the payment of the particular fees; that was a mistake of fact and hence he could recover.

[40] Paras 2.12 and 2.13 above.

[41] [1991] 2 AC 548.

Lords held that English law[42] recognised that a claim to restitution based on unjust enrichment may be met by the defence that the defendant has changed his position in good faith.[43] Lord Goff (with whom Lord Bridge, Lord Griffiths and Lord Ackner agreed) stated that:[44]

> the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things.

2.18 Our Consultation Paper invited views on the circumstances which should suffice to establish a change of position and the relevance of fault on the part of either of the parties.[45]

2.19 We welcome the broadly formulated defence of change of position.[46] If the basis of

[42] Such a defence has been recognised in many United States jurisdictions; see the American Law Institute, *Restatement of the Law of Restitution* (1937) § 142 for a definition. See Palmer *Law of Restitution* (1978) vol III § 16.8; in Canada (*Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* [1976] 2 SCR 147), the Supreme Court took a narrow view of the defence and held that specific expenditure must be proved to have resulted from specific receipts, it is not enough to show that general expenditure has increased in line with income. It seems that it is now well on the way to being judicially recognised in Australia: *Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 ALJR 768, 780. The New South Wales Law Reform Commission *Restitution of Benefits Conferred Under a Mistake of Law* (LRC 53 (1987), p 60-61), on the basis of the former case, expressed sufficient confidence in the likely acceptance of the defence by the courts to consider legislation unnecessary. In addition New Zealand and Western Australia have enacted a statutory defence of this kind applicable to all restitutionary claims based on mistake: Judicature Act 1908, s 94B (as amended by Judicature Amendment Act 1958, s 2)(New Zealand); Law Reform (Property, Perpetuities and Succession) Act 1962, s 24, repealed and re-enacted as Property Law Act 1969, s 125 (Western Australia); also recommendation by Law Reform Committee of South Australia *Report Relating to the Irrecoverability of Benefits Obtained by Reason of Mistake of Law* (84th Report, 1984) p 31-32.

[43] Prior to this decision a general defence was precluded by several decisions including *Baylis v Bishop of London* [1913] 1 Ch 127 (CA) and had received recognition only in two rather limited cases: (a) where an agent who has received a payment on behalf of his principal paid it over to the principal; and (b) where money was paid by the plaintiff on a forged bill of exchange and the defendant has changed his position following receipt - Goff and Jones p 739-745; Birks p 410-415; Burrows p 421-431.

[44] [1991] 2 AC 548, 580.

[45] It also invited views on the relationship between the defences of change of position and estoppel.

[46] See also A Burrows *The Law of Restitution* (1993) p 427-428: "there is much to be said, at this stage in its development, for holding the law of restitution in check by a wider, rather than a narrower, change of position defence".

the plaintiff's claim is the unjust enrichment of the defendant, in principle any available defences should similarly be based on the extent of any enrichment and should apply where the enrichment has been erased. In the context of mistake, it is particularly necessary to accept a broad defence of change of position in order to protect the bona fide recipient.[47] This is because of the width of the ground of recovery for mistake. The payer can recover if he proves that he would not have made the payment if he had known the true facts even though he was negligent in making the payment.

2.20 The paradigm case of change of position is where the payee has relied to his detriment on a payment made to him which he has received in good faith.[48] In such a case he should not prima facie be required to return it: the loss ought to lie where it falls, on the payer who has initiated the loss-causing event, at least where neither party is at fault. It can also be argued that such a policy promotes the general public interest in the security of receipts, allowing payees to use their receipts freely without fear of loss. The Canadian approach,[49] requiring proof that specific items of expenditure have resulted from specific receipts, can exclude deserving cases from the ambit of the defence. For instance, an employer may erroneously pay a sick employee his full salary instead of the reduced sick pay to which he is entitled and the employee may simply fail to adjust his outgoings in the light of his reduced income. Again, there may be cases where it is difficult to characterise the expenditure as unusual, such as buying "a better cut of meat, maybe, from time to time, or something extra from the grocer",[50] and where a person with a complicated pattern of expenditure cannot attribute any particular items to the payment.[51] A narrow formulation of the defence would also mean that it would hardly ever be available to commercial payees, those whose pattern of receipts and expenditure is likely to be such that it would be impossible for them to establish specific links between income and outgoings. The broad defence as formulated in *Lipkin Gorman* does not require a link between specific expenditure and specific receipts and avoids this problem as well as the undesirable distinction between active and passive

47 Goff and Jones, p 741-742.

48 See the examples given in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 559 (Lord Templeman) and 579 (Lord Goff). Change of position cannot cover losses prior to the receipt of the benefit: *Westdeutsche Landesbank Girozentrale v Islington LBC* (1993) 91 LGR 323, 390 (Hobhouse J); Burrows, *The Law of Restitution* (1993) p 424. See further paras 11.10-11.17 and 11.31 below.

49 *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* [1976] 2 SCR 147, on which see Section C, para 11.16 below.

50 *Avon CC v Howlett* [1981] IRLR 447, 449-450 (Sheldon J); [1983] 1 WLR 605, 622 (CA).

51 See Law Reform Commission of British Columbia, LRC 51 (1981), p 74-76; Needham, (1978) 12 UBCLR 159; *Avon CC v Howlett* [1983] 1 WLR 605, 622.

reliance.[52] The discussion of the defence by the High Court of Australia in *David Securities*[53] and by Hobhouse J in *Westdeutsche Landesbank Girozentrale v Islington LBC*[54] also suggests that there is no need for a link between specific expenditure and specific receipts.

2.21 In cases falling outside the paradigm of reliance following the payment, we further consider that only the broad test enunciated in *Lipkin Gorman* is able to deal with situations in which the enrichment of the payee is clearly illusory and it would be unjust to order repayment.[55] For instance, where the payee's loss may be due not to his reliance on the payment but to some other factor, such as where the money mistakenly paid is stolen from him or where its loss is the result of a natural event, such as fire. While it is clear that hardship unrelated to the payment is irrelevant and will not establish the defence, we believe that in the case where the very notes are stolen or consumed by fire it would be easier to show hardship related to the payment and to allow the defence.[56]

2.22 The second issue concerning the defence is whether the fault of the parties in failing to avoid the mistaken payment being made, or the reasonableness of the payee's conduct subsequent to the payment, can affect their ability to claim restitution. It is unclear how the broad formulation in *Lipkin Gorman* would deal with the relevance of fault on the part of either of the parties. The defendant's "contributory negligence" might be taken into account to reduce the extent to which he can rely on a change of position, as it is in New Zealand.[57] Alternatively, fault may be relevant to exclude the defence where the defendant was clearly more at fault than the plaintiff, a "relative fault" approach, as appears to be the case under §142(2) of

52 See *Home Office v Ayres* [1992] ICR 175: employer's deduction from wages to recoup amount erroneously overpaid to sick employee not lawful under statute, but indications given by the Employment Appeal Tribunal that spending money on normal living expenses, ie failing to adjust standard of living, would probably have qualified as a change of position.

53 (1992) 66 ALJR 768, 780-781, apparently approving *Moritz v Horsman* 9 NW 2d 868 (1943) where although the defendant's expenditure was beyond his means apart from a mistakenly paid supposed inheritance there was nothing to point to the inheritance being the cause of any one item of expenditure.

54 (1993) 91 LGR 323; affirmed [1994] 1 WLR 938.

55 See also Consultation Paper No 120 para 2.72. The SALRC thought that the New Zealand legislation's concept of reliance was too narrow and proposed that the altered position should reasonably flow from the mistake: 84th Report (1984) p 31-32.

56 Burrows, *The Law of Restitution* (1993), p 427 states that to require repayment in such a case would be "grotesque". See also Goff and Jones, p 743 note 25; cf Birks [1991] LMCLQ 473, *Restitution -The Future* (1991) p 141-143; Watts, "Judicature Amendment Act 1958 - Mistaken Payments" in *Contract Statutes Review*, NZLC 25 p 187.

57 *Thomas v Houston Corbett & Co* [1969] NZLR 151.

the Restatement of Restitution.[58] Consultees favoured the relative fault method. Also, the New Zealand approach has been criticised by the other law reform agencies which have considered this matter[59] on the ground that it goes far beyond what is required to give effect to a change of position defence. It has also been criticised as involving too much uncertainty and complexity and hampering out of court settlements.[60] While noting these criticisms, we have not found it necessary to take a position on this matter which, in our view is best left to resolution by common law development.

2.23 Examples of situations where the payee's conduct after receipt of the mistaken payment may be called into question are where the payee suffers heavy losses as a result of making highly speculative investments; or where he pays more than the market price for an item he particularly wants. On consultation there was no express support for a limit on recovery in such situations and some opposition to it on the ground that it would be difficult to develop criteria to decide the reasonableness of the payee's behaviour. In addition, we believe that, in principle, a person ought to be able to spend money to which he appears entitled as he chooses. Individuals' perceptions of their own wealth are likely to influence the extent to which they are willing to take risks or are indifferent to price.[61] The relevant issue is whether the payee has suffered a loss as a result of his change of position and we consider that it is to his *real* loss the law should look.

(b) ESTOPPEL:

2.24 A payee who acted in reliance on the receipt of a payment may be able to rely on the principle of estoppel to avoid a claim for restitution. It will be available only where the payer was in breach of a duty to give accurate information to the payee or has made a representation to him which has been relied on.[62]

58 The difference between the two can be illustrated by taking the case of £1,000 paid by mistake where the payee has spent £500 on a luxury holiday. If the parties are equally at fault, on the "contributory negligence" approach P will recover £750 [£1,000 - £500 + (£500/2)], but on the relative fault approach £500. If the respective fault of the parties is P 25% and D 75%, P will recover £875 on the "contributory negligence" approach and £1,000 on the relative fault approach.

59 British Columbia Law Reform Commission LRC 51 (1981) p 79; South Australian Law Reform Committee (84th Report, 1984), p 31-32; New South Wales Law Reform Commission LRC 53 (1987) para 5.35.

60 A Burrows, *The Law of Restitution* (1993) p 429-430; Watts, "Judicature Amendment Act 1958 - Mistaken Payments" in *Contract Statutes Review* NZLC 25, 187 is content with the importation of ideas of contributory negligence and on balance does not think the wide discretion in section 94B is dangerous.

61 *Skyring v Greenwood* (1825) 4 B & C 281, 289; 107 ER 1064, 1066 (Abbott CJ); Goff and Jones, p 744. Cf JP Dawson, "Restitution without Enrichment" (1981) 61 Boston ULR 563.

62 Goff and Jones p 746-59; Burrows p 431-9; and *Chitty on Contracts* (26th ed, 1989), para 2055.

(c) SUBMISSIONS TO AN HONEST CLAIM AND COMPROMISES:

2.25 The mistake of law bar to recovery and the defence that the payment was made in submission to an honest claim or as part of a compromise are closely linked. Goff and Jones consider that "many of the English cases where recovery has been denied because of mistake of law are examples of payments to close transactions in settlement of honest claims" in which recovery could also have been denied on that ground.[63] Greater doubts surround questions of law than questions of fact and so it does seem more likely that there will be a compromise or submission where the issue in doubt is one of law rather than one of fact. Conversely, it has been suggested[64] that this can be seen as a justification for the mistake of law bar as there are "many doubtful questions of law: when they arise the defendant has an option either to litigate the question, or to submit to the demand, and pay the money",[65] and as a consequence to allow those payments to be recovered would prove a threat to the security of receipts.

2.26 It has been stated that "[t]here are at least three arguments of public policy which favour the upholding of a settlement rather than its dissolution on the grounds of mistake: (a) bargains are to be upheld; (b) finality is to be respected; and (c) litigation is to be avoided."[66] There are four propositions behind (a):[67] it is not easy to distinguish between actual and apparent intentions, and to try to do this leads to prolonged litigation; there is a risk of fraudulent claims; there is a public interest in the security of receipts; and setting aside bargains may inflict hardship on the party who wishes to uphold the agreement. The second reason, (b), shades into the doctrine of res judicata and process of law.[68] Lastly, addressing the third reason, (c): the expense of litigation and the requirement of efficiency precludes adjudicating every dispute and so settlements should be upheld and litigation avoided.

2.27 These policy considerations are reflected in the following statements relating to this defence:

(1) "If indeed the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false,

63 Goff and Jones, p 144. See also Sutton "*Kelly v Solari*: The Justification of the Ignorantia Juris Rule", (1966) 2 NZULR 173.

64 P Birks *An Introduction to the Law of Restitution* (paperback ed with revisions, 1989), p 165.

65 *Brisbane v Dacres* (1813) 5 Taunt 142, 152; 128 ER 641, 645 per Gibbs J.

66 NH Andrews "Mistaken Settlements of Disputable Claims" [1989] LMCLQ 431, 432.

67 Reformulated recently by Steyn J in *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255, 268: "The first imperative must be that the law ought to uphold rather than destroy apparent contracts."

68 *Arnold v National Westminster Bank* [1989] Ch 63, 69-70 per Sir Nicolas Browne-Wilkinson V-C; see also Section C paras 8.27-8.28 below.

the latter is certainly entitled to retain it ..." (*Kelly v Solari*);[69]

(2) "If a person with knowledge of the facts pays money, which he is not in law bound to pay, and in circumstances implying that he is paying it voluntarily to close the transaction, he cannot recover it. Such a payment is in law like a gift, and the transaction cannot be reopened" (*Maskell v Horner*);[70]

(3) "... a payment may be said to be voluntary, in this context and for present purposes, when the payer makes it deliberately with a knowledge of all relevant facts, and either being indifferent to whether or not he be liable in law, or knowing, or having reason to think, himself not liable, yet intending finally to close the transaction" (*Mason v New South Wales*);[71]

(4) "if the plaintiff chooses to make the payment even if he or she believes a particular law or contractual provision requiring the payment is or may be invalid, or is not concerned to query whether payment is legally required; he or she is prepared to assume the validity of the obligation, or is prepared to make the payment irrespective of the validity or invalidity of the obligation, rather than contest the claim for payment" (*David Securities Pty Ltd v Commonwealth Bank of Australia*).[72]

2.28 There are four fact situations where recovery could be barred: first, payment after commencement of legal proceedings; secondly, payment after threat of legal proceedings; thirdly, payment made after receipt of a simple demand; and lastly, payment made in compromise of a disputed claim (where there is "give and take"). However, as the statements above indicate there is no consensus as to terminology in this area of law: this common law concept has been variously described as compromise, submission to an honest claim, voluntary payment, payment to close the transaction, and contractual compromise. Because of its importance should the mistake of law rule be abrogated and because we did not fully deal with it in our Consultation Paper, we discuss the defence in some detail here.

2.29 The defence can be looked at in two ways - as an issue of causation, or as a separate, distinct limitation on recovery. A mistake is not *causative* if a payment is made for some reason other than the mistake. It is then this lack of connection between the motive and the payment which precludes restitution of the payment, rather than whether or not the payment was made in compromise of or submission to an honest claim. There are differing opinions as to whether the mistake must be a "necessary", or a merely "sufficient", cause of the payment to allow recovery.

[69] (1841) 9 M & W 54, 59; 152 ER 24, 26 (Parke B). See also *Barclays Bank Ltd v WJ Simms Ltd* [1980] 1 QB 677, 695 (proposition 2(a)); *Woolwich Equitable Building Society v IRC* [1993] AC 70, 192 (Lord Jauncey).

[70] [1915] 3 KB 106, 118 (Lord Reading CJ), cited in *Woolwich* [1993] AC 70, 98, 140, 165, 185, but in the context of duress.

[71] (1959) 102 CLR 108, 143 (Windeyer J), cited in *Woolwich* [1993] AC 70, 98.

[72] (1992) 66 ALJR 768, 778 per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, who gave a single judgment.

Palmer[73] believes that the mistake must be a necessary cause of the payment; where the mistake has no influence on conduct, it cannot be the basis for recovery. However, the situation where there are two reasons for payment is more problematic, so that neither is a necessary cause. Goff and Jones[74] suggest, by analogy with contractual and tortious principles,[75] that the correct test of causation in restitution is whether the mistake was a sufficient cause of the payment.[76]

2.30 Compromises and submissions can also be analysed as a distinct limitation on recovery, stemming from the requirements of the principles of finality.[77] This would mean that even though the payment was made under a causative mistake, recovery would be denied simply because the payment was made in compromise of, or submission to, an honest claim.

2.31 It seems to us that a compromise of or a submission to an honest claim acts as a distinct limitation on recovery in its own right, and the issue of causation is only relevant to the extent that recovery will only be allowed if there is a causative mistake. In most of the cases of compromise or submission there will not be a causative mistake as the payment will have been made as a result of, for example, the threat of legal proceedings rather than the mistake itself. However, as a compromise or a submission forms a distinct limitation recovery will be denied even if there was a causative mistake: the importance of finality of transactions tips the scales away from the strict issue of causation.

2.32 We believe that the current position of a payment made to a bona fide payee (a payee who does not know that he is not entitled to the money, but who may have doubts) can be stated in the following way: first, where the payer knows or believes the money is not due but pays in any event the money will not be recoverable on the ground of mistake.[78] If a claim has been made and disputed but payment eventually made, whether in order to avoid threatened litigation or for some other reason such as to preserve good commercial relations or to secure some advantage, it will either be a compromise or a contractual submission to the claim. If there has

73 *Law of Restitution* (1978) vol III §14.7.

74 P 122-3.

75 *Barton v Armstrong* [1976] AC 104 (a contract was set aside for duress where a death threat and commercial pressure were both sufficient causes). See also *Performance Cars Ltd v Abraham* [1962] 1 QB 33; *Baker v Willoughby* [1970] AC 467 (where two consecutive wrongful acts are both sufficient causes of damage the first is considered a cause of action even though the damage would have occurred anyway because of the second act).

76 This approach cannot be adopted where the other cause of the payment does not give rise to restitution.

77 Para 2.26 above.

78 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 ALJR 768, 775; Goff and Jones p 113 n 44. The causation test was not satisfied.

been no overt dispute, the reason for irrecoverability may be more difficult to characterise as submission and is better analysed as waiver. In any event in such cases there is no mistake.

2.33 Secondly, where the payer has doubts but pays nevertheless: (a) if the payee has made a claim accompanied by a threat to sue, recovery will be denied;[79] (b) where there has been no overt dispute, if the payer does not care which way that doubt is resolved but consciously makes a decision to pay, there will be no recovery. In other cases recovery is unlikely, particularly where the payer's doubt concerns a crucial issue,[80] but will depend on the degree of the doubt: while *some* doubt will not prevent recovery,[81] the greater the doubt the less likely it is that recovery will be ordered. In the context of a question of law, a payer who adverted to the issue and nevertheless decided to make the payment is likely to be held to have been indifferent to what the law really was; (c) if he would have paid in any event, the mistake of law would not have caused the payment and it would therefore not be recoverable on this ground.[82]

2.34 Thirdly, where the payer has no doubts as to his liability (he is mistaken and inadvertence or, possibly, "sheer ignorance" suffices): (a) he will recover if the mistake is one of fact or, if our recommendations below are enacted, of law;[83] (b) if the payment is in response to a claim accompanied by a threat to sue, recovery

79 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 ALJR 768, 788 per Dawson J.

80 *Wason v Wareing* (1852) 15 Beav 151; 51 ER 494, cited by S Arrowsmith in A Burrows ed, *Essays on the Law of Restitution* (1991) p 27; *Cushen v City of Hamilton* (1902) 4 Ont LR 265, 266, 270; *Pollock on Contracts* (6th ed) p 579, "the common principle is that if a man chooses to give away his money or take his chance whether he is doing so or not, he cannot afterwards change his mind. But it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice."

81 *Charfield v Paxton* (1799) 2 East 471 n (a) per Ashurst J, cited by Goff and Jones p 128 n 41. See also A Burrows *The Law of Restitution* (1993) p 102, albeit in the context of mistake of fact (the payer's doubt precludes restitution if he does not believe that, on the balance of probabilities, he is liable to do so); cf in *Westdeutsche Landesbank Girozentrale v Islington LBC* (1993) 91 LGR 323, 373 Hobhouse J stated that any right of recovery would normally be negatived where the payments had been made with a conscious appreciation that the contracts were or might be void but that this principle could not be applied unless there was "an actual conscious appreciation": "a situation has to be disclosed which is tantamount to a willingness to make a gift of the money to the recipient."

82 *Home and Colonial Insurance Co Ltd v London Guarantee and Accident Co Ltd* (1928) 45 TLR 134 per Wright J (regarding the fact that in practice underwriters did not refuse to pay out on unstamped marine insurance policies, although they were not valid).

83 See, albeit in the context of an ultra vires demand, Lord Jauncey in *Woolwich Equitable Building Society v IRC* [1993] AC 70, 192: "[T]here is some illogicality in treating as voluntary payment by someone who justifiably believes that the demand is lawful whereas in fact it turns out to be unlawful. Voluntary to my mind suggests that the payer being aware of all the relevant circumstances including the true state of the law or perhaps having a doubt but not caring which way that doubt is resolved consciously makes a decision to pay."

will be denied even if the payer is mistaken;[84] (c) if the payer has waived any claim to recover the money or has assumed the risk of any mistake, recovery will be denied. While in the context of mistake of fact it appears that a mistaken payer will only rarely be held to have so waived his right or assumed the risk, in the context of mistake of law we believe that courts will be more willing so to hold.[85] This is particularly the case where the payer has adverted to the issue but decided to make the payment anyway: in such cases "the limiting principle...assumes significant importance".[86] The reasons for this difference are not articulated but probably lie in the greater prevalence of "doubtful questions of law" and the fact that courts are less likely to accept that a payment under a mistake of law has been made with no doubts as to liability.[87]

2.35 This analysis is supported by the cases. The classic statement of the law on submissions was made in *Moore v Vestry of Fulham*[88] by Lord Halsbury. He said:

> [T]he principle of law is not that money paid under a judgment, but that money paid under the pressure of legal process cannot be recovered. The principle is based upon this, that when a person who has had an opportunity of defending an action if he chose, but has thought it proper to pay the money claimed by the action, the law will not allow him to try in a second action what he might have set up in the defence to the original action.

A number of other cases are also authority for the proposition that a submission to an honest claim will preclude recovery. This is true regardless of the merits of the particular case. In *Longridge v Dorville*[89] the ship "Carolina Matilda" ran foul of the "Zenobia", and its owners paid money over in fulfilment of the claim for damages after proceedings had been instituted in the Admiralty Court. However, the claim was doubtful, and the owners of the "Carolina Matilda" attempted to recover the

84 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 ALJR 768, 788 per Dawson J; *Moore v Vestry of Fulham* [1895] 1 QB 399; cf *Re Roberts* [1905] 1 Ch 704, 710-11 although the mistake there (and the agreement to the compromise) appears to have been induced by misrepresentation.

85 See eg *South Australia Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 CLR 65, 73-5 which suggests that recovery could be barred even in the case of payments made in total ignorance of the true legal position; see Bryan (1993) 15 Syd L Rev 461, 479-80, 481.

86 Goff and Jones p 144. See also p 51, 128-9 and *Avon CC v Howlett* [1983] 1 WLR 605, 620; *Akt Dampskibbs Steinstad v William Pearson & Co* (1927) 137 LT 533; *Westdeutsche Landesbank Girozentrale v Islington LBC* (1993) 91 LGR 323, 373 per Hobhouse J.

87 See Birks *An Introduction to the Law of Restitution* p 166-7. Although we do not agree with Brennan J's view in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 ALJR 768, 784 col 1 that this warrants a separate *rule* for mistake of law; see para 4.7 below, we accept there may be *factual* differences about the way mistake operates in the two contexts.

88 [1895] 1 QB 399, 401-2.

89 (1821) 5 B & Ald 117; 106 ER 1136.

money, but failed as "the giving up of a suit, instituted to try a question respecting which the law is doubtful, is a good consideration to support a promise."[90] These propositions of law also apply to claims that are made after a mere threat of legal proceedings. If the policy is that a cause should not be permitted to be tried twice, there is no difference in principle between a threat to litigate and a demand made after commencement of the proceedings. Also, no distinction is made between the different stages of action: "the authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have been instituted makes no difference."[91]

2.36 Recovery will also be denied if there has been a compromise of the claim. A compromise involves some degree of concession (or consideration) on each side, and this can include the forbearance to sue.[92] Again, it may be binding regardless of the validity of the claim. This, of course, assumes that in cases where the only pressure on the party who makes the payment is the probability of being sued, the claimant bona fide believes he has a fair chance of success. In *Llewellyn v Llewellyn*[93] the defendant was held unable to recover an annuity he had paid in compromise of the plaintiff's doubtful claim; claims which are clearly invalid in the eyes of the court can also found a binding compromise.[94] The compromise can be pecuniary, as in *Atlee v Backhouse*,[95] a distillery could not recover money paid to Customs and Excise to retrieve confiscated property.

2.37 The final situation is where there is a payment following a simple demand. Money paid in response to a mistaken demand can be recovered, as there is neither a compromise of or a submission to an honest claim. For example, in *Baylis v Bishop of London*[96] restitution was granted where the plaintiffs had paid a rentcharge under a mistake of fact to the sequestrator of a benefice, thinking that a lease was in force when in fact it had expired. Money cannot be recovered for mistake if it was paid for reasons other than the mistake as there is no causal link between mistake and payment. It should be noted that money paid in response to a demand may

90 Ibid, (1821) 5 B & Ald 117, 123; 106 ER 1136, 1138-9 per Holroyd J.

91 *Callisher v Bischoffsheim* (1870) LR 5 QB 449, 451; *Brown v M'Kinally* (1795) 1 Esp 279; 170 ER 356 and *Marriott v Hampton* (1797) 2 Esp 546; 170 ER 450. Lord Kenyon (who decided both cases) also drew no distinction between the different stages of action.

92 *Callisher v Bischoffsheim* (1870) LR 5 QB 449.

93 (1845) 3 Dow & L 318; 15 LJ QB 4; 6 LTOS 158; *Longridge v Dorville* (1821) 5 B & Ald 117; 106 ER 1136; *Haigh v Brooks* (1839) 10 Ad & E 309; 113 ER 119.

94 *Callisher v Bischoffscheim* (1870) LR 5 QB 449; *Cook v Wright* (1861) 1 B & S 559; 121 ER 822; *Binder v Alachouzos* [1972] 2 QB 151 (compromise of illegal contract).

95 (1838) 3 M & W 633; 150 ER 1298.

96 [1913] 1 Ch 127.

sometimes be recoverable as paid under duress: when there is pressure on the payer apart from the possibility of being sued (for example, duress of goods) it is less likely that the court will find that there has been a binding compromise of, or submission to, a claim for payment.[97] Recovery was allowed in *Woolwich Equitable Building Society v IRC*[98] even though the Building Society did not believe the money was due, and paid for commercial reasons. Although this may suggest that the Building Society compromised, or submitted to, the Inland Revenue's demand, we believe recovery in this case can be explained as follows. First, the situation was approaching duress - arguably whenever a public authority is involved the parties are in a position of great inequality, and the Building Society also felt it had to pay because its commercial standing might have been jeopardised if it did not. Secondly, and more importantly, the Building Society expressly made the payment subject to a reservation and commenced proceedings for recovery immediately. Accordingly, the issue of submission was not before the court, and was understandably not dealt with in the speeches, although the House of Lords recognised the existence of the bar on recovery where the payment was made in compromise of, or submission to, an honest claim.

2.38 The above discussion can be summarised in tabular form.

	Causative Mistake	Non-causative Mistake
Payment made after commencement of legal proceedings	No Recovery	No Recovery
Payment made after threat of legal proceedings	No Recovery	No Recovery
Payment made pursuant to a simple demand	*Recovery Allowed*	No Recovery
Compromise of a disputed claim	No Recovery	No Recovery

97 *Atlee v Backhouse* (1838) 3 M & W 633; 150 ER 1298; *Keegan (TD) Ltd v Palmer* [1961] 2 Lloyd's Rep 449.

98 [1993] AC 70.

Recent Developments

2.39 There have been a number of strong indications that the mistake of law rule may be susceptible to judicial abrogation. First, the rule has been abrogated by the Supreme Court of Canada (*Air Canada v British Columbia*),[99] by the High Court of Australia (*David Securities Pty Ltd v Commonwealth Bank of Australia*)[100] and by the Appellate Division in South Africa (*Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*).[101]

2.40 Secondly, in *Woolwich Equitable Building Society v IRC*[102] the House of Lords overturned the traditional common law rule on invalidly demanded taxes and levies, which had allowed recovery only on grounds recognised by the private law (for example, compulsion), and substituted a new public law rule providing that such taxes and levies are prima facie recoverable. This case and the rule's possible scope in the context of overpaid taxes are discussed in Section C of this Report. However, there were also indications given in this case that the mistake of law rule was unlikely to survive reconsideration by the House of Lords. Lord Jauncey said: "I very much doubt whether the distinction between mistake of fact and of law can be justified any longer".[103] Likewise Lord Goff said: "I do not think that the principle of recovery should be inapplicable simply because the citizen has paid the money under a mistake of law."[104] Lord Slynn also cast doubt on the mistake of law rule and said "it seems to me that it is open to review by your Lordships' House."[105]

2.41 The third development is the series of decisions in the "swaps" litigation.[106] In those cases, the first of which has been affirmed by the Court of Appeal, it was held that restitution is available in respect of benefits transferred under void contracts on the basis that there was an "absence of consideration" and in effect added an additional ground of restitution in such cases.[107] Payments made under void or voidable

99 [1989] 1 SCR 1161.

100 (1992) 66 ALJR 768; 109 ALR 57, on which see Bryan, (1993) 15 Syd L Rev 461.

101 1992 (4) SA 202(A).

102 [1993] AC 70.

103 [1993] AC 70, 192.

104 Ibid, 177.

105 Ibid, 199.

106 *Westdeutsche Landesbank Girozentrale v Islington LBC* and *Kleinwort Benson Ltd v Sandwell BC* (1993) 91 LGR 323 (Hobhouse J), aff'd by the CA [1994] 1 WLR 938, but under appeal to the House of Lords; *Kleinwort Benson Ltd v South Tyneside MBC* (12 March 1993); *Morgan Grenfell & Co Ltd v Welwyn Hatfield DC, The Times*, 1 June 1993.

107 For criticism see A Burrows "Restitution of Payments Made Under Swap Transactions" (1993) 143 NLJ 480; P Birks "No Consideration: Restitution After Void Contracts" (1993) 23 UWALR 195.

contracts may sometimes be recoverable in a restitutionary action.[108] The mistake of law rule does not preclude recovery because, although mistake of law does not give any right of recovery, it likewise does not of itself bar recovery if a right of recovery exists independently of the mistake.[109] In the light of the decisions in the "swaps" cases, it is clearly arguable that if restitution is available for benefits conferred under ultra vires contracts, payments made ultra vires are also recoverable.

108 See eg GH Treitel, *The Law of Contract* (8th ed, 1991) p 933. See also para 1.11 above.

109 (1993) 91 LGR 323, 372. See *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, 129, 177, 205; *Ministry of Health v Simpson (Re Diplock)* [1951] AC 251.

PART III
REFORM OF THE MISTAKE OF LAW RULE

The Case for Reform

3.1 The rule that payments made under a mistake of law are irrecoverable has been the subject of dissatisfaction for a long time. The courts themselves have shown a dislike for a no-recovery rule of such a general nature: this is evidenced by their creation of the many exceptions to the rule and the way in which the distinction between law and fact has been manipulated. It is also evidenced by judicial statements that it may not always be consistent with the highest standards of probity and fair dealing for a payee to rely on the general rule.[1] Reliance on it has been said to be "dishonourable"[2] and "shabby"[3] and a practice has developed under which the Crown does not rely on the mistake of law rule to avoid repayment without the Attorney General's approval. The rule has also been condemned repeatedly by commentators;[4] and its abrogation has been advocated by a number of law reform bodies.[5] Since our Consultation Paper was published, the Scottish Law Commission has provisionally recommended the abrogation of the rule precluding recovery of payments and other benefits made under an error of law.[6] No comparable rule is to be found in continental legal systems,[7] in several common law jurisdictions the rule has been substantially repealed by statute,[8] and we have noted that in several

1 *Ex parte James* (1874) LR 9 Ch App 609; *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] Ch 409.

2 *Re TH Knitwear (Wholesale) Ltd* [1988] 1 Ch 275, 289 per Slade LJ.

3 *Re Carnac* (1885) 16 QBD 308, 312 per Lord Esher MR.

4 See Goff and Jones, Ch 4; McCamus "Restitutionary Recovery of Moneys Paid to a Public Authority Under a Mistake of Law: Ignorantia Juris in the Supreme Court of Canada" (1983) 17 UBCLR 233; Knutson "Mistake of Law Payments in Canada: A Mistaken Principle?" (1979) 10 Man LJ 23; Needham "Mistaken Payments: A New Look At An Old Theme" (1978) 12 UBCLR 159. There is also voluminous literature in the United States, much of it condemning the rule: see Palmer section 14.27(a). Tentative support for the rule is expressed by Birks p 166. See also Sutton "*Kelly v Solari*: The Justification of the Ignorantia Juris Rule" (1966) 2 NZULR 173.

5 Law Reform Commission of British Columbia, *Report on Benefits Conferred under a Mistake of Law* LRC 51 (1981); New South Wales Law Reform Commission, *Restitution of Benefits Conferred under a Mistake of Law* LRC 53 (1987); Law Reform Committee of South Australia, *Report Relating to the Recoverability of Benefits Obtained by Reason of Mistake of Law* (84th Report, 1984). There appears to be no law reform body which has recommended retention of the rule after an examination of its operation.

6 Scottish Law Commission, *Recovery of Benefits Conferred Under Error of Law*, Discussion Paper No 95 (1993).

7 Zweigert and Kötz, *Introduction to Comparative Law* (2nd ed, 1992), p 606-614.

8 New Zealand (Judicature Amendment Act 1958, s 2, which inserts s 94A(1) into the Judicature Act 1908); Western Australia (Law Reform (Property, Perpetuities, and Succession) Act 1962, s 23(1)); New York (NY Civ Prac Law §3005); India (Indian Contracts Act 1872, s 72); see below para 4.3, n 1.

Commonwealth jurisdictions the rule has recently been judicially abolished. It has been asserted that "[i]t would be difficult to identify another private law doctrine which has been so universally condemned" or another reform measure which enjoys such widespread support.[9]

3.2 The first argument for reform is that the current rule allows the payee to retain money in circumstances in which it is unjust for him to do so as against the payer. The payee is enriched by the receipt of the payment which the mistaken payer would not have intended him to have and which would not have been made but for the mistake; the payment was involuntary. In the context of mistake of fact the consequence is that the payee's enrichment is prima facie unjust and recoverable in accordance with the rules outlined above.[10] The same considerations apply where the mistake is of law and here too the payee should prima facie be liable to repay a "windfall" benefit which he was not intended to have.

3.3 Secondly, the present law does not treat like cases alike. Inconsistency arises from the different treatment given to mistakes of law and mistakes of fact. Thus, an insurer who pays forgetting that the premium has not been paid and the policy has lapsed, has made a mistake of fact and can recover;[11] while one who pays not appreciating that facts within his knowledge (or of which he had the means of knowledge) would have enabled him to repudiate liability for non-disclosure has made a mistake of law and cannot recover.[12] Inconsistency also arises from the apparent arbitrariness of the exceptions and qualifications to the mistake of law rule, so that there is inconsistency in the treatment of what are really "like" cases of mistake of law itself. The distinctions between payments made under a mistake of law in voluntary and compulsory winding up[13] and the approach of equity, in particular the distinction between mistake as to the general law and as to private rights,[14] exemplify this kind of inconsistency.

3.4 A third argument favouring reform is the uncertainty and complexity of the present law. The uncertainty arises for similar reasons to the inconsistency; the fineness of the fact-law distinction and the many exceptions and qualifications to the general no-recovery rule. Uncertainty also results from the way in which other grounds of recovery - such as duress or implied contracts to repay - can be deployed in order

9 Maddaugh and McCamus, p 256.

10 Recovery might also be justified on other grounds, for example, economic efficiency, but the need to prevent the unjust enrichment of the payee at the payer's expense is normally considered the primary justification for allowing recovery.

11 *Kelly v Solari* (1841) 9 M & W 54; 152 ER 24.

12 *Bilbie v Lumley* (1802) 2 East 469; 102 ER 448 (paras 2.3-2.4 above); also contrast the approach in *Solle v Butcher* [1950] 1 KB 671.

13 Para 2.10.

14 Para 2.13.

to avoid the mistake of law rule. This uncertainty has resulted in much argument about the distinction between mistakes of fact and mistakes of law, a distinction which, as we have seen, is notoriously difficult to make.

Summary of the Consultation Paper's Provisional Conclusions

3.5 In relation to the recovery of payments under a mistake of law, we provisionally concluded that there was a strong case for changing the current law whereby mistake of law does not provide a general ground for restitutionary recovery.[15] The preferred approach to reform was the enactment of legislation to require the courts to allow recovery of payments made under a mistake without regard to whether the mistake is one of fact or law. It was also provisionally concluded that if the mistake of law rule was to be changed, it is important that the newly recognised change of position defence should apply; but it was suggested that the development of this defence should be left to the common law.[16]

Response on Consultation

3.6 The responses to the Consultation Paper overwhelmingly favoured our provisional view that there should be reform of the mistake of law rule. There was also very strong support for reform by means of legislation which would provide for recovery by analogy with the common law on mistake of fact - although there was some division of opinion over whether it is desirable to assimilate the rules on mistake of fact and mistake of law completely.

Conclusion on Reform

3.7 The response on Consultation as well as the decisions in *Air Canada v British Columbia,*[17] *David Securities Pty Ltd v Commonwealth Bank of Australia,*[18] *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*[19] and *Woolwich Equitable Building Society v IRC*[20] suggest that there is a significant need for reform of the mistake of law rule, as provisionally suggested in our Consultation Paper.

3.8 We stated in our Consultation Paper that we considered that it would be desirable for reform of the mistake of law rule to be introduced legislatively, rather than simply leaving the matter to judicial development.[21] Judicial change would have to come at the level of the House of Lords, and it may thus be some time before the opportunity for change occurs. In any case, it was suggested that even if the House

15 Consultation Paper No 120, paras 2.36 - 2.37.

16 Consultation Paper No 120, paras 2.66 - 2.79.

17 [1989] 1 SCR 1161.

18 (1992) 66 ALJR 768; 109 ALR 57.

19 1992 (4) SA 202 (A).

20 [1993] AC 70.

21 See Consultation Paper No 120, paras 2.39 - 2.40.

felt a need for reform it might consider that this should not be introduced judicially.

3.9 Since we started work on this area the House of Lords has shown that it is prepared to introduce significant changes in the common law of restitution. First, there was the recognition of the principle of unjust enrichment and the defence of change of position in *Lipkin Gorman v Karpnale Ltd.*[22] Since the Consultation Paper was published the decision in *Woolwich Equitable Building Society v IRC*[23] has been handed down and the indications are that the House would be sympathetic to a change in the general mistake of law rule.[24] The case for reform has, it must be recognised, altered. Basically, as seen from *Hydro Electric Commission of Nepean v Ontario Hydro,*[25] *Air Canada v British Columbia,*[26] *David Securities Pty Ltd v Commonwealth Bank of Australia,*[27] and *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*[28] the recognition of the principle of unjust enrichment in a common law system removes any vestige of principle for the rule precluding recovery for payments made under a mistake of law and it becomes easier for it to be reconsidered judicially. We believe that the combined effect of the developments described above have left the rule in a decidedly fragile condition. There, nevertheless, remain three reasons for recommending legislation.

3.10 First, it should not be forgotten that one reason for the dissent of the minority in *Woolwich* was the view that such changes should be made by Parliament, and it may be noted that Lord Keith, one of the minority judges, expressly stated in *Woolwich* that he considered the general mistake of law rule "too deeply embedded in English jurisprudence to be uprooted judicially".[29] Also, it may be some time before this issue reaches the House of Lords. Indeed, in the light of recent decisions it is perhaps unlikely that the issue will reach that court at all, since litigants will be likely to settle or compromise claims turning on this point. Secondly, the existence of the rule will continue to affect cases in lower courts and may even distort the arguments used to achieve what is perceived to be the correct result.[30]

22 [1991] 2 AC 548.

23 [1993] AC 70 (HL).

24 See para 2.40 above.

25 [1982] 1 SCR 347.

26 [1989] 1 SCR 1161.

27 (1992) 66 ALJR 768; 109 ALR 57.

28 1992 (4) SA 202.

29 [1993] AC 70, 154C-D; cf Lord Jauncey, para 2.39 above.

30 Eg (a) other less desirable innovations may have to be used, as some believe has happened in the swaps cases, para 2.41 above, (b) recovery may be denied on the basis of the rule as in *Morgan Guaranty Trust Co v Lothian Regional Council* [1994] SCLR 213, a decision of the Outer House of the Court of Session (under appeal to the Inner House) arising out of a "swaps" transaction, or (c) the rule may obscure other routes to recovery, as the Scottish Law Commission has suggested to us occurred in *Morgan*

3.11 The third reason for recommending legislation is the fact "that the rule barring restitution for mistakes of law is intertwined with the public law problem"[31] considered in Sections C and D and that, despite the decision in the *Woolwich* case, legislation is needed to deal with aspects of that problem. There thus seems no reason to depart from the provisional conclusion that legislation should be enacted to introduce the recommended reform. Consultees generally made their replies on the assumption that legislation would indeed be required.

3.12 We also concluded (with some reluctance) that, for the reasons given in paragraphs 5.4-5.7 below, the important and difficult question of changes in the law made by judicial decision must be addressed in legislation. For all these reasons we believe that it would be unsatisfactory to leave the abrogation of the mistake of law rule to the common law and that a legislative solution is necessary. Accordingly, **we recommend:**

(1) that the rule precluding recovery of payments made under a mistake of law be legislatively abrogated (Draft Bill, clause 2).

Guaranty Trust Co v Lothian Regional Council in respect of the claim based on recompense.

31 P Birks "When Money is Paid in Pursuance of a Void Authority: A Duty to Repay?" [1992] PL 580, 590.

PART IV
METHOD OF REFORM

Method of Reform

4.1 There are two options to be considered as to the course of legislative reform. The first option is to enact a statutory rule which expressly gives a right to recover payments made under a mistake of law. The second is to seek to remove the mistake of law bar and for the legislation to facilitate development by analogy with the rules which currently apply to mistakes of fact.

4.2 The first approach (a comprehensive right of recovery) has certain disadvantages and it has not been adopted in any other jurisdiction. The Consultation Paper took the view that it would not be appropriate to adopt this approach and this was overwhelmingly supported on consultation. It would be necessary to define "mistake" and "mistake of law" and there are particular difficulties in relation to the definition of mistake of law. It would also be necessary to identify and resolve many questions which have still to be conclusively resolved by the common law in relation to mistake of fact. These include the gravity of the nature of the mistake required for restitution, the treatment of payments made in the mistaken belief that a debt is not statute barred and the effect of fault on the part of the payer or payee. To deal with these legislatively for mistakes of law but not for mistakes of fact would in our view balkanise the law of mistake unnecessarily. As a result of these problems we have concluded that it is unwise to attempt a legislative statement of the principles governing recovery of payments made under a mistake of law. Therefore, **we recommend:**

(2) that there should not be a comprehensive statutory right of recovery for payments made under a mistake of law.

The Options for Reform

4.3 Once one sets aside a comprehensive statutory right of recovery, there are several ways in which reform of the mistake of law bar by analogy with the rules on mistake of fact might be effected. It is noteworthy that different techniques have been adopted in the various jurisdictions which have already attempted reform. It is useful at this point to review the four options identified in the Consultation Paper, which did not involve a comprehensive right of recovery:

(a) Legislation could expressly *permit* the courts to grant recovery in mistake of law cases in those circumstances where recovery would be allowed were the mistake one of fact.[1] This approach leaves it to the courts to develop new rules

[1] This is the approach adopted in New Zealand and Western Australia and recommended in New South Wales. The New Zealand Judicature Amendment Act 1908 (as amended by the Judicature Act 1958, s 2), s 94A(1) provides:

on mistake of law as appropriate, though it is a precondition of recovery that recovery would have been granted in a mistake of fact case.[2] This approach does not preclude a law-fact distinction in some circumstances, if the courts think it suitable. The main advantage of this approach is that it leaves open the *possibility* of such a distinction in circumstances (if any) in which this would be desirable.[3] Conversely, the disadvantage of this approach is that it may lead courts to make a distinction between law and fact where in reality this cannot be justified; in theory it would even be possible for the courts to permit recovery for mistake of law only in very limited cases, which would clearly not give effect to the reforms which we recommend.

(b) Legislation could abrogate the mistake of law rule, and also require the court to have regard to the mistake of fact rules when deciding mistake of law cases, rather than assuming they will do so (as in (a) above). This could be combined with the more specific requirement that it is a precondition for recovery in a mistake of law case that recovery would have been given had the mistake been one of fact (as in (a)).[4] The advantages and disadvantages of this approach are similar to (a) above, except that the specific directions given would reduce the likelihood of the recommended reforms being undermined by a restrictive judicial interpretation of the provisions.

(c) The court could be directed to apply the mistake of fact rules to mistakes of

> "Subject to the provisions of this section, where relief in respect of any payment that has been made under mistake is sought in any Court, whether in an action or other proceeding or by way of defence, set off, counterclaim, or otherwise, and that relief could be granted if the mistake was wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law whether or not it is in any degree also one of fact."

The Western Australian provision (Law Reform (Property, Perpetuities, and Succession) Act 1962, s. 23(1)) is identical in terms to the equivalent provision in the New Zealand legislation. Other aspects of the Western Australian reforms are modelled on those of New Zealand although the provisions are not identical. For the New South Wales proposals see New South Wales Law Reform Commission Paper No 53 (1987), para 5.1. See Consultation Paper No 120 paras 2.46-2.49 and Scottish Law Commission Discussion Paper No 95 para 2.101. The New Zealand Law Commission has recently reviewed the legislation and recommends no change: *Contract Statutes Review*, NZLC No 25, paras 4.73-4.79.

2 In Scottish Law Commission Discussion Paper No 95, para 2.101 it is stated that the New Zealand provision *requires* that relief would have been given if the error had been one of fact but (see Consultation Paper No 120 para 2.49 quoting the Law Reform Commission of British Columbia Paper 51 para 5.3) this requirement is not *sufficient* to ground recovery for mistake of law and it is open to the court to decline to grant relief having due regard to the character of the mistake.

3 Even if no such circumstances presently come to mind, it might be thought wise to leave open this possibility in case it might be desirable in circumstances which have not yet been envisaged.

4 See Consultation Paper No 120 paras 2.49-2.50; Scottish Law Commission Discussion Paper No 95 paras 2.102-2.103.

law in exactly the same way - the "assimilation approach".[5] Unlike (a), (b) and (d) this leaves no room for any difference in the treatment of mistakes of law and mistakes of fact. The advantages of this approach are, first, that it gives a much greater degree of certainty than (a) or (b) above, or (d) below, in removing the scope for arguments about possible differences between mistake of fact and mistake of law, and, secondly, that it removes any possibility of the courts making unwarranted distinctions between the two types of mistake. However, the courts could differentiate between different types of mistake, but without relying on the fact-law distinction.

(d) Statute could abrogate the mistake of law rule without reference to the existing rules on mistake of fact at all,[6] stating that recovery shall not be denied simply because the mistake is one of law. It is generally assumed that if this is done the courts will have regard to the mistake of fact rules and will normally allow recovery where it would have been given in a mistake of fact case - though, as in (a), nothing in the legislation requires this. This has the same basic disadvantages and advantages as (a) and (b) above[7] but also has a particular defect. Simple abrogation may not be effective to create a right of recovery since it could be said that currently there is no *bar* to recovery for mistake of law, but rather the absence of any positive cause of action.[8]

5 See Consultation Paper No 120 paras 2.50 -2.52; Scottish Law Commission Discussion Paper No 95 para 2.104. This approach was favoured in South Australia where the Law Reform Committee recommended the enactment of a provision that relief for mistake should "not be denied by reason that the mistake is one of law" (84th Report (1984) p 29-30, 32). This is identical to the New Zealand provision save for the omission of the word "only".

6 Consultation Paper No 120 paras 2.53-2.54; Scottish Law Commission Discussion Paper No 95 para 2.98. This was the technique used by the NY Civ Prac Law §3005 and by the Finance Act 1989, s 29 in respect of excise duty or car tax.

7 The main disadvantage being that it leaves open the possibility of the creation of separate rules for restitution of payments made under a mistake of law and payments made under a mistake of fact.

8 In Consultation Paper No 120 it was stated that under the present law the ground for restitution is "mistake of fact". If so, the assumption that, on this option, a court would have regard to the mistake of fact rules and normally allow recovery where it would have been given in a mistake of fact case may be unfounded. The Customs & Excise noted our comments on the drafting of the Finance Act 1989, s 29 but said that this was not a point it would wish to take in a dispute. The Scottish Law Commission have doubted that, at least in Scots law, the relevant ground of restitution is "mistake of fact" rather than "mistake", noting that such a theory would not explain why in the cases of mistake of law falling within the exceptions to the mistake of law rule, recovery is allowed, but accepting that a simple abrogatory provision would not be watertight; Scottish Law Commission Discussion Paper No 95 para 2.98. See also Ralph Gibson LJ's formulation in the *Woolwich* case [1993] AC 70, 121B, and 129B-C ("payment under mistake of law is not, and, I think, has never been itself a ground for relief: frequently it is used to describe a payment made under mistake where there was no mistake of fact *and hence no ground of recovery.*" [emphasis added]; *Westdeutsche Landesbank Girozentrale v Islington LBC* (1993) 91 LGR 323, 372 (Hobhouse J), and the cases cited at para 5.2 n 3 below, especially *Akt Dampskibbs Steinstad v William Pearson & Co* (1927) 137 LT 533.

4.4 In our Consultation Paper we provisionally favoured option (c), the assimilation approach, since we could not see circumstances in which it would be justifiable to distinguish between mistake of law and fact.

Response on Consultation

4.5 There was a significant division amongst consultees as to whether total assimilation between mistake of law and fact is desirable or not. The reason generally given by those who did not favour assimilation was that there may be circumstances where a fact-law distinction can be justified - although two commented that they could not see what these circumstances might be. Some consultees who opposed the assimilation approach preferred a comprehensive statutory scheme and some did not state a preference as between the various options which do not provide for assimilation - that is, options (a), (b) and (d). Those who did express a preference tended to favour option (d), simple abrogation. However, preferences were not strong. One consultee, whose first choice was a comprehensive statutory scheme, said that almost any of the choices proposed would be better than the present position.

4.6 The consultation suggests the real choice is between (c) ("assimilation") and (d) ("simple abrogation"). The assimilation approach requires a confident assumption that there are no circumstances in which a fact-law distinction is appropriate, and some consultees clearly thought that this assumption cannot be made - that such a distinction may be desirable in circumstances as yet unforeseen. Options (a), (b) and (d) give rise to uncertainty, and leave open the possibility that unsustainable distinctions between fact and law will return. The prospect of this happening cannot be discounted; indeed, such a distinction was advocated in *David Securities* by Brennan J, in his dissenting judgment.[9]

4.7 In *David Securities*, Brennan J considered that, although there should be a prima facie right to recover payments made as a result of a mistake of law, the rules governing this right of recovery should not be the same as those applying in mistake of fact cases. In particular, he suggested that there should generally[10] be a defence to a claim based on mistake of law whenever the payee honestly believes he is entitled to retain the payment - a defence which would considerably reduce the importance of the general recovery right. This defence was considered desirable because of the need to protect security of receipts, but was stated not to apply in relation to mistakes of fact which, unlike mistakes of law, tend to affect only individual transactions. Brennan J stated that the obscurity of much of the law meant that the assimilationist approach favoured by the majority "would infect

9 (1992) 66 ALJR 768, 784.

10 The defence would not apply where the principle in *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 applied; ie where the payment was made in ignorance of a rule of law designed to protect the payer from making a payment of the sort made.

many payments with a provisional quality incompatible with ordinary commerce".[11] This distinction between fact and law seems to us, however, to be unwarranted. The payer's interest in the security of his receipt is the same regardless of the nature of the mistake and Brennan J's limitation is, in any event, not framed by reference to the number of transactions or persons affected. Save in the situations considered in paragraphs 2.25-2.38 above, and in Section C, we do not consider that the fact that others are affected by the same mistake is of significance. Although in the case of a mistake of law it is possible that a number of payments made to the same payee are more likely to be affected, such a payee should be adequately protected in each case by the change of position defence.

4.8 Option (d), the simple abrogation of the mistake of law rule, was favoured by some consultees. We believe that, standing alone, two reasons make it unsuitable as the basis of reform. First, the courts could apply different rules for recovery to mistake of fact and to mistake of law. Secondly, simple abrogation might conceivably leave English law without a cause of action in cases of mistake of law if the cause of action under the existing law is restricted to "mistake of fact".[12] In relation to the second consideration, of course, as was also pointed out in the Consultation Paper, it is likely that the courts would construe an option (d) provision as permitting the courts to grant recovery, and this was stressed by consultees who supported reform based on this model. However, if it is proposed to approach reform simply by abrogating the current "bar" to recovery, in the sense of freeing the court from the shackles of precedent, it would seem preferable to draft a provision to achieve this which is as watertight as possible, rather than one which is known to have defects, however unlikely it is that the court would allow these defects to be exploited.

4.9 Where the rule has been judicially abrogated the approach has been to assimilate the rules on recovery for mistakes of fact and of law. In *Air Canada v British Columbia*[13] the distinction between a mistake of fact and a mistake of law was described as "a fluttering, shadowy will-o'-the-wisp". In *David Securities Pty Ltd v Commonwealth Bank of Australia*[14] the High Court of Australia endorsed the view that the rules on mistake of law should be the same as those on mistake of fact: "It would be logical to treat mistakes of law in the same way as mistakes of fact, so that there would be a prima facie entitlement to recover moneys paid when a mistake of law or fact has caused the payment."[15] The High Court went on to consider whether recovery rested on a "but for" causation test, as held by Robert Goff J in *Barclays Bank Ltd*

11 (1992) 66 ALJR 768, 784.

12 See para 4.3(d) above.

13 [1989] SCR 1161, 1199-1200 (although a distinction was made by the majority in the context of unconstitutional tax statutes).

14 (1992) 66 ALJR 768; 109 ALR 57.

15 Ibid, at 776, 780 (per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ, who gave a single judgment) and 787 (per Dawson J).

v WJ Simms (Southern) Ltd,[16] or whether the mistake had to be fundamental as well as causative, and concluded that there was no additional requirement of fundamentality. In *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue*[17] it was held that the rules governing recovery in cases of mistake of law should be assimilated to those governing mistake of fact.

Conclusion on Reform

4.10 We remain unconvinced that a distinction between mistakes of law and mistakes of fact as such can be justified at all. We have taken the view that the best, and most watertight, approach is a combination of options (c) and (d) - assimilation and abrogation. This will mean that the provision has the simplicity and directness of the abrogation approach, but avoids its possible defects by making it clear that no legal consequences flow from the artificial distinction between mistakes of law and mistakes of fact. Clause 2 of the Draft Bill attached to this Report gives effect to our policy by the propositions (a) that the classification of a mistake as a mistake of law or as a mistake of fact is not of itself to be material to the determination of a claim (the assimilation proposition); and (b), that no restitutionary claims shall be denied on the ground that the alleged mistake is a mistake of law (the abrogation proposition). We believe that the second proposition follows logically from the first, but that it is important that abrogation of the bar should be expressly stated. The legislative purpose is apparent from these propositions themselves, which are more positive statements than a simple abolition of the mistake of law rule without more. Proposition (a) assimilates the approach to be taken by the courts for all mistake claims, while leaving open the possibility of differentiating between mistakes without relying on the distinction between fact and law. The proposition could hardly be viewed as leaving in place a different kind of impediment to a mistake claim having exactly the same effect as the bar on recovery which would be abolished by the operation of the draft clause. As in New Zealand we believe the legislation should apply to payment by cheque, negotiable instrument and credit card as well as cash.[18] Accordingly, **we recommend:**

(3) that the proposed legislation should provide that the classification of a mistake as a mistake of law or as a mistake of fact shall not of itself be material to the determination of a claim for restitution and that restitution should not be denied on the ground that the mistake in question is a mistake of law (Draft Bill, clause 2).

16 [1980] QB 677.

17 1992 (4) SA 202(A), 220-221.

18 The New Zealand legislation applies to "relief in respect of any payment that has been made" and this has been said to include cheques and negotiable instruments: Cameron, (1959) 35 NZLJ 4, 5; Sutton, in Northey ed *The AG Davis Essays in Law*, 242. It is also important that the legislation should apply to money allowed in an account, since the mistake of law bar applied to that: *Skyring v Greenwood* (1825) 4 B & C 281; 107 ER 1064; *Daniell v Sinclair* (1881) 6 App Cas 181, 190; New Zealand Law Reform Commission para 5.9. As our Bill is not limited to payments, see paras 4.11-4.12 below, there should be no doubt that these are included.

Services

4.11 While a money payment is generally regarded as a manifest benefit, this is not necessarily the case with services: "the identity and value of the resulting benefit to the recipient may be debatable".[19] There is also the fact that services as such cannot be restored: "One cleans another's shoes; what can the other do but put them on?".[20] These difficulties have meant that recovery has been granted in a narrower class of cases than in respect of payments. Restitution in respect of services rendered has been granted where the defendant had requested[21] or "freely accepted" (acquiesced in the provision of)[22] the services, in the knowledge that they must be paid for. The basis of recovery was often stated to be request or acquiescence, and as a result the English courts have not traditionally had to rely on the principle of incontrovertible benefit. Nor has it been necessary for the courts to determine whether a service that has no end product is an "enrichment" or a "benefit".[23] Plainly some kinds of service may be readily regarded as conferring a benefit on another, but for others that analysis is highly artificial. The principal categories in which claims in restitution based on the rendering of services have succeeded are cases of mistaken improvements to chattels,[24] and of discharge of another's common law[25] or statutory duty.[26]

4.12 The Consultation Paper dealt only with recovery of mistaken payments: our terms of reference were confined to payments and, in fact, most of the difficulties with the mistake of law rule have arisen in respect of payments. However, a number of factors have led us to reconsider our position. First, the abrogation of the rule by

19 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783, 799.

20 *Taylor v Laird* (1856) LJ Ex 329, 332 per Pollock CB.

21 A true request, express or tacit, by the defendant to the plaintiff to render the services or supply the goods will, in the absence of special circumstances which show that they were not intended to be paid for, impose on the defendant a contractual obligation to pay for services rendered or goods supplied pursuant to such a request: see *Ellis v Hamlen* (1810) 3 Taunt 52, 53; 128 ER 21, 22 per Sir James Mansfield CJ; Goff and Jones p 18-26.

22 The defendant as a reasonable man should have known that the plaintiff who rendered the services expected to be paid for them, and yet did not take a reasonable opportunity open to him to reject the proffered services.

23 *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880; *Brewer Street Investments Ltd v Barclays Woollen Co Ltd* [1954] 1 QB 428.

24 *Greenwood v Bennett* [1973] 1 QB 195.

25 *Gebhardt v Saunders* [1892] 2 QB 452.

26 In *County of Carleton v City of Ottawa* [1965] 52 DLR 2d 220 the appellant local authority mistakenly discharged the respondents' statutory duty to provide lodging for a homeless person. The appellant local authority succeeded before the Supreme Court of Canada in its claim in restitution for the value of the services rendered, on the basis that it had discharged the respondents' statutory duty. In *Peel (Municipality of) v Canada* [1992] 3 SCR 762, the Supreme Court emphasised that, in a restitutionary claim based on incontrovertible benefits of this nature, the plaintiff had to show that, had he not paid, on the balance of probabilities, the defendant would have done.

courts in Canada, Australia and South Africa was done on a basis that makes it difficult to distinguish the grounds upon which restitution is granted for payments from the grounds for which it is granted in respect of other benefits. Secondly, the New Zealand statute has been criticised for being confined to payments and the other law reform proposals are not so confined.[27] Thirdly, we now believe that it is illogical to deal with payments made under a mistake of law, and not to deal with services and benefits.[28] We therefore sought an amendment to our terms of reference and the Lord Chancellor has widened them to include non-pecuniary benefits. Consultees who expressed views on this issue included the Law Society and Bar Council, and they supported the extension of the reform to services and non-pecuniary benefits. **We recommend:**

(4) that the legislation should:

(a) encompass services rendered and non-pecuniary benefits conferred under a mistake of law; and

(b) abrogate the mistake of law rule for those things in the same manner as for mistaken payments (Draft Bill, clause 1).

This would mean in particular that in the case of 'services', where the law is less developed than cases on mistaken payment, it will be possible for many difficult issues to be resolved on a case-by-case basis.[29] The Draft Bill consequently does not attempt to prescribe the acts which may found a claim for restitution, which remains a matter for the common law. Draft Bill, clause 1(2) merely describes in very general terms the categories of act which the common law treats as founding a claim. These categories need not be mutually exclusive.

27 NSWLRC 53 (1987); LRCSA (84th Report, 1984); LRCBC 51 (1981); also NZLC 25 (1993) paras 4.59-4.63 recommends that the New Zealand legislation be extended to include services.

28 The Scottish Law Commission took the view that it was wrong to exclude non-pecuniary benefits: Scottish Law Commission Discussion Paper No 95 *Recovery of Benefits Conferred under Error of Law* paras 3.54 and 3.74-3.84.

29 For instance, the quality of the mistake required, or the value of improvement to property: *Greenwood v Bennett* [1973] 1 QB 195; the defence under the Torts (Interference with Goods) Act 1977, s 6, which appears to apply to mistakes of law as well as to mistakes of fact, and which gives a mistaken improver of goods who acts in the mistaken but honest belief that he has a good title to them, and is sued by the owner, an allowance for the extent to which, at the time as at which the goods fall to be valued in assessing damages, the value of the goods is attributable to the improvement; or the circumstances in which, at common law, the mistaken renderer of services or improver has a positive claim as well as a defence.

PART V
SPECIFIC ASPECTS OF THE LAW

Introduction

5.1 The view taken in the Consultation Paper was that the detailed rules on recovery for mistake of law could generally be left to be developed by the common law; consequently, it was not thought necessary to consider exactly what the scope of the rule should be and what defences and limitations should apply. However, three specific issues were dealt with. These are changes in the law or in the understanding of the law, compromises or submissions to an honest claim and the defence of change of position. Although we have concluded that reform should not be by a comprehensive statutory right of recovery these three issues require further consideration in order to determine whether the proposed legislation must or should, as a matter of prudence, deal with them.

Change in the Law or Understanding of the Law

5.2 Where the law is changed by *legislation* a payment made or service rendered in accordance with the previous law cannot be recovered since there was clearly no mistake when it was made. Where the law is changed by a *judicial decision*, however, the position is less clear. Such change may occur in one of two ways; either by the overruling of an earlier decision[1] or by changing what had previously been generally regarded as the law.[2] Where a judicial decision either overrules an earlier decision or leads to a change in the perception of what the law is, by clarifying the position,[3] it can be argued that there is a mistake, and hence a ground for recovery. This is

1 Eg *Anns v Merton LBC* [1978] AC 728 by *Murphy v Brentwood DC* [1991] 1 AC 398 and *Duncan v Cammell Laird & Co Ltd* [1942] AC 624 by *Conway v Rimmer* [1968] AC 910.

2 Two examples of this are the decision of the House of Lords in *Hazell v Hammersmith LBC* [1992] 2 AC 1 that local authorities cannot enter into "swaps" transactions and (more classically) the decision in the *Central London Property Trust Ltd v High Trees House* [1947] KB 130 case qualifying (albeit strictly only in *dicta*) the operation of the rule in *Pinnel's Case* (1602) 5 Co Rep 117a; 77 ER 237 by the use of promissory estoppel.

3 Eg *Brisbane v Dacres* (1813) 5 Taunt 143; 128 ER 641 (clarified by *Montagu v Janverin* (1811) 3 Taunt 442; 128 ER 175); *National Pari-Mutuel v R* (1930) 47 TLR 110 (clarified by *AG v Lunch and Sports Club* [1929] AC 400); *Home and Colonial Insurance Co Ltd v London Guarantee and Accident Co Ltd* (1928) 45 TLR 134 (clarified by *AG v Lunch and Sports Club* [1929] AC 400). See also *Akt Dampskibbs Steinstad v William Pearson & Co* (1927) 137 LT 533. In that case, a shipowner, believing that by the custom of a port he was obliged to pay stevedores for stowing a cargo in wagons, did so. Subsequently it was held in two other cases that the receiver was liable. Although the shipowners' claim to recover the overpayment was unsuccessful, this was not because they were not mistaken (MacKinnon J considered they were) but because they had shown no legal ground upon which they could recover it in an action for money had and received; it was therefore a purely "voluntary" payment. The recognition of a right to the restitution of payments made under a mistake of law would, accordingly provide the legal ground on the facts of that case if MacKinnon J's approach was taken by a modern court.

because the traditional working assumption upon which the common law proceeds is that judges declare law but do not make it. Thus, where the common law changes, a legal fiction (the declaratory theory) means that the law is regarded as having always been what the judicial decision stated it to be. There is a third situation, addressed only obliquely in the Consultation Paper. This concerns the case where what was previously commonly held to be the law ceases to be so held although this has not been the result of a specific decision.[4] It has been argued that there has been a clear mistake by the payer in such cases,[5] the real objection to recovery being that to allow it might open the door to a large number of claims.[6]

5.3 The Commission's provisional view was that it should not matter whether a change occurs through legislation or judicial decision: the payment should not be recoverable because in substance there has been no mistake. We cited *Henderson v Folkestone Waterworks Co*[7] which suggests that in such cases there is no mistake of law: "at the time the money was paid ... the law was in favour of the [payee]". Consultees generally agreed with that provisional view. We consider that our provisional conclusion was correct.

5.4 The Commission did not express a view as to whether the problem should be left to the common law or dealt with by statute. Of the consultees who commented on judicial change in the law, most thought that it should be dealt with in any legislation. The main reason was the need to avoid any possibility that the desired

4 An example of this is that it is commonly believed in the City that classic statements of the law concerning attribution of knowledge within a company or partnership require modification in the light of modern trading conditions and in particular the abolition of the requirement of single capacity in financial markets (this view gained some support from Millett J's judgment in *El Ajou v Dollar Land plc* [1993] 3 All ER 717, but see the Court of Appeal [1994] 2 All ER 685).

5 See Law Reform Commission of British Columbia Report No 51, p 70-72; Consultation Paper No 120 para 2.60.

6 In *Woolwich Equitable Building Society v IRC* [1993] AC 70 (CA) Ralph Gibson LJ dissented partly because he was concerned that introducing a general right to restitution would open the "floodgates" to claims as the declaratory theory of the common law would apply.

7 (1885) 1 TLR 329, applied in *Julian v Mayor of Auckland* [1927] NZLR 453. To this may be added the strong support of *Derrick v Williams* [1939] 2 All ER 559, 565 per Sir Wilfrid Greene MR: The plaintiff, "having acted upon the basis of a mistaken view of the law, now that the law has been enunciated by the highest tribunal, [claims to be] entitled to make another attempt. That is a thing which, it seems to me, cannot be permitted on principle. It appears to me to be completely indefensible. No shadow of authority was cited to us which would justify the proposition that, where, pursuant to the rules of court, a claim has been satisfied by money paid into court by a defendant, the plaintiff can afterwards come and say: "I was wrongly advised as to the law when I did this, because the law was not as then laid down by the Court of Appeal, but as subsequently enunciated by the House of Lords." It would be an intolerable hardship on successful litigants if, in circumstances such as these, their opponents were entitled to harass them with further litigation because their view of the law had turned out to be wrong, and unless I am constrained by binding authority, I should be quite unable, on principle, to accept any such proposition." See also *Akt Dampskibbs Steinstad v William Pearson & Co* (1927) 137 LT 533 (no mention of the mistake of law rule).

outcome might not be achieved, in particular, because *Henderson v Folkestone Waterworks*[8] was not strong authority. Also, the continuing influence of the declaratory theory of the common law meant that there was a real risk that the courts might allow recovery. However, there was some support on consultation for leaving the question to the common law, because of the complexity of the issues and the difficulties of drafting a suitable statutory provision.

5.5 There are four arguments in favour of statutory provision. The first is the possible effect of the declaratory theory of law.[9] Secondly, even if the declaratory theory did not apply in this context statutory provision would "avoid doubts...and...prevent any argument based on the fiction that the law has always been what the latest and most authoritative decision has decided that it is".[10] Thirdly, statutory provision would allay the concerns of some who doubt the desirability of abrogating the rule against recovery for mistake of law because of the risk of "too much restitution" and a consequent threat to security of transactions. While the principles relating to compromises and submissions to an honest claim will generally prevent a person who consciously takes a chance as to the true state of the law or the facts from recovering, where the payer has no doubts or no positive belief one way or the other about his liability to pay, we have seen[11] that the position is not entirely certain. Lastly, the New Zealand and Western Australian provisions do not appear to have given rise to difficulties. We are aware of only one reported case on the matter.[12]

5.6 Likewise, there are four arguments against statutory provision. First, there may be no real risk that a court will order recovery of a payment made on the basis of a decision subsequently overruled or other judicial change in the law. Judicial lawmaking has been more widely acknowledged in recent years, particularly since 1966 when the House of Lords stated that, while continuing to treat former decisions as normally binding, it would depart from a previous decision when it appeared right to do so.[13] Apart from *Henderson v Folkestone Waterworks Co*[14] and

8 (1885) 1 TLR 329, applied in *Julian v Mayor of Auckland* [1927] NZLR 453.

9 See para 5.2 above.

10 Cameron (1959) 35 NZLJ 4, 5 (Mr Cameron was a member of the New Zealand Law Revision Committee whose recommendations led to the New Zealand provision). See also New South Wales Law Reform Commission Paper No 53 (1987) para 5.25; Lange (1980) 18 Osgoode Hall LJ 472; Birks, [1992] PL 580, 587 (criticising the majority of their Lordships in *Woolwich* for following "the modern path of openly innovative correction").

11 See paras 2.25-2.38 above.

12 *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* [1969] WAR 104 (Negus J), 155 (Full Court). An appeal to the High Court of Australia succeeded on another ground and it was not necessary to consider this point: (1969) 121 CLR 137. The New Zealand Law Commission has considered the criticisms of section 94A(2) but did not recommend any changes: *Contract Statutes Review* NZLC No 25 (1993) paras 4.73-4.79.

13 See *R v National Insurance Commissioner, ex p Hudson* [1972] AC 944, 1026 (per Lord Simon of Glaisdale) and Paterson, *The Law Lords* (1982), esp Chs 7 and 8.

Derrick v Williams,[15] there may be set the fact that most cases in jurisdictions where the rule has been abrogated have denied restitution.[16] Secondly, the concerns of those who fear that restitution will be too widely available are addressed by the defences of compromise and submission to an honest claim, since many claims now barred by the mistake of law rule will continue to be barred because the payment will have been made to close the transaction. Thirdly, the New Zealand and Western Australian provisions have been widely criticised and many doubts remain about the position in those jurisdictions. Fourthly, in view of the criticism of the New Zealand and Western Australian provisions, the lack of litigation should not be taken as an indication that all the provisions are satisfactory.

5.7 In view of the doubts and the response on consultation we have concluded that, although it seems unlikely that the declaratory theory of the common law would lead the courts to permit recovery where there has been an obvious judicial change in the law, we cannot safely leave this matter to the common law.

5.8 Statutory provision for a defence of change in the law or change in the understanding of the law has been made in other Commonwealth jurisdictions. The New Zealand Judicature Amendment Act 1958, section 94A(2) provides:

> Nothing in this section shall enable relief to be given in respect of any payment made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of the payment.

The Western Australian provision is identical.[17] For the reasons set out below, we are, however, recommending that the legislation in this jurisdiction be formulated differently.

5.9 In devising a statutory provision we had to consider a number of issues. First, from what sources could the understanding or view of the law on which the payer relied

14 (1885) 1 TLR 329.

15 [1939] 2 All ER 559.

16 Eg *Mercury Machine Importing Corp v City of New York* 144 NE 2d 400 (1957) (a decision which proceeded on the basis that restitution on the ground of mistake of law is not precisely the same as restitution on the ground of mistake of fact). See further Palmer *Law of Restitution*, vol III, § 14.27.

17 The Law Reform (Property, Perpetuities and Sucession) Act 1962, s 23(1). In the United Kingdom the Taxes Management Act 1970, s 33 which makes provision for the recovery of overpaid tax where there is an excessive assessment by reason of "error or mistake" in a return, precludes relief "in respect of an error or mistake as to the basis on which the liability ... ought to have been computed where the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when the return was made" (see Section C paras 9.21-9.25 and 10.10-10.30 below).

be derived? Secondly, how "settled" does this view or understanding of the law have to be before a payment based upon it becomes irrecoverable? Thirdly, how can this understanding or view be changed? Fourthly, must the payer actually advert to the state of the law before making the payment, or is it sufficient that, had he so adverted, he would have found the law to support his payment? These issues will be discussed in turn.

5.10 First, it seemed to us that the sources from which "the law" for the purposes of this provision could be derived should not be limited by any statutory provision we might recommend. It is not realistic to restrict "settled law" to propositions which arise only from statute or from judicial decisions - it is often only in the light of the actual operation of the law in practice and criticism or discussion of it in legal literature that these acquire the flavour of immutability. We believe that this is a common-sense question, and that it is one which the courts are particularly well-qualified to answer. Courts will be free, under our proposed formulation of the bar, to recognise a proposition as settled irrespective of the source from which it is derived. Equally, courts will be able to recognise that different sources of law carry different weight in establishing whether a particular proposition is settled.

5.11 The second question raised was the most difficult for us to answer. The New Zealand provision seeks to define settlement by reference to the "common understanding" of the law. However, from the New Zealand model it is difficult to know whom the class of persons who have "commonly understood" the law will consist of. In *Bell Bros Pty Ltd v Shire of Serpentine - Jarrahdale*[18] the trial judge stated that "commonly understood" meant "that which would appear to the ordinary individual". However, on appeal the court accepted that the class in which the understanding must be looked for is of necessity limited to persons who have at least to some extent adverted to the subject and it can be very narrow. In that case, the class consisted solely of those who had legislative or administrative responsibility for the making of the ultra vires by-law requiring payment to the defendant-municipality.[19] We have therefore not focussed on the "common understanding" of persons or classes of persons, but have sought to identify the particular situation in which we felt that recovery by a claimant where the law had changed would be unfair. We have in mind the situation where, had the payer taken advice from a qualified legal practitioner who was reasonably experienced in the field of law in question at the time of payment, and that practitioner had obtained access to all of the ordinarily available legal materials on the point of law in issue, he would have had no doubt in advising the payer that the law supported the payment. We believe that this test would be satisfied even though legal commentaries might contain

18 [1969] WAR 104 (Negus J); 155 (Full Court).

19 In the context of section 33 of the Taxes Management Act 1970, it appears that a "general practice" is one which the revenue authorities have adopted in the past: *Murray's Trustees v Lord Advocate* 1959 SC 400, 415; Stopforth, "Error or Mistake Relief" [1989] BTR 151, 161-165. But see Section C paras 10.10-10.20 below.

strands of dissent from the settled propositions which a practitioner would derive, provided that the practitioner would not have regarded those dissenting views as giving rise to serious doubts. In that situation, it seemed to us that a payer could not seek to rely on a mistake as a ground for restitution. He and his legal advisers could not have come to any conclusion, at the time of payment, other than that to which they came (or, perhaps, would have come if they had addressed their minds to the issue). The subsequent change in the law was therefore one which could not have been foreseen and recovery should not be permitted.

5.12 The third question, relating to the change in the law, can be answered in two ways. First, focussing on the concept of "settlement", a settled proposition of law could cease to be "settled", and therefore could be held to have changed, simply because a sufficient number of people have come to doubt it. A further variant of this is the "common understanding" test (see paragraph 5.11 above) which would hold the law to have changed where the subjective understanding of (possibly unknown) individuals other than the parties has changed.[20] Secondly, change could be restricted to judicial changes (by a court or tribunal). We prefer this latter option; in principle a claimant should be allowed to recover where the law has changed unless the change could be viewed as equivalent to a statutory change, rather than merely a change in perception.

5.13 Finally, should the bar operate when the payer was in a state of ignorance as to the law? This is not a point which the common law has yet had to address. We believe that if the payer would have found that the law supported his payment at the time it was made, had he addressed the issue, he did not act under an operative mistake, and should not be allowed to recover. Similarly, the payer-challenger who suceeds in challenging the previous understanding of the law should not be able to recover. This is because the payment was made under a settled view of the law which is subsequently held to be incorrect, and there has, in fact, been no error or mistake entitling the claimant to relief. This also applies to those who commence actions before the payer-challenger's action comes to judgment for the same reason.[21] However, as the courts have not yet had to decide whether or not the mistake ground for restitution includes cases of ignorance, Draft Bill, clause 3 makes it clear that it seeks to prevent a payer relying on a judicial change in a proposition of settled law as a ground for restitution. The question of the extent to which the payer actually had to advert to that view seems to us properly to be for the courts to

[20] Law Reform Commission of New South Wales Paper No 53 (1987) para 5.28. See also *Bell Bros Pty Ltd v Shire of Serpentine - Jarrahdale* [1969] WAR 155.

[21] In this respect we differ from the provisional recommendations of the Scottish Law Commission to the effect that special provision should be made by the legislation which introduces the change in understanding defence for the payer-challenger to be permitted to recover and for payer-challengers who commence action prior to the date of judgment in the successful payer-challenger's action to recover: see Scottish Law Commission Discussion Paper No 95 "Recovery of Benefits Conferred Under Error of Law", para 2.125.

decide. **Accordingly, we recommend:**

(5) that a restitutionary claim in respect of any payment, service or benefit that has been made, rendered or conferred under a mistake of law should not be permitted merely because it was done in accordance with a settled view of the law at the time, which was later departed from by a subsequent judicial decision. (Draft Bill, clause 3).

Change of Position

5.14 In the Consultation Paper we provisionally concluded that change of position should be a defence, but that its development should be left to the common law, as a statutory formulation might have the effect of freezing appropriate developments. Consultees overwhelmingly supported the recommendation that the change of position defence should apply and did not perceive a need for legislation on this.

5.15 There seems no reason to depart from the provisional conclusion that there should not be legislation on the defence of change of position. Apart from the result of the consultation, we do not believe that it would be desirable to consider the defence solely in relation to recovery for mistake of law, or even mistake. As shown by the facts of *Lipkin Gorman v Karpnale Ltd*[22] and the statements of their Lordships in that case, it is a general defence to restitutionary claims based on unjust enrichment and it would be wrong to deal with only one part of it in legislation. **Accordingly, we recommend that:**

(6) there should not be legislation on the defence of change of position.

5.16 However, some of those who favoured common law development suggested that the defence should be dealt with more fully in our report, with a view to assisting the courts in developing it in the future, and so the defence has been discussed at paragraphs 2.17-2.23 above.

Estoppel

5.17 The majority of consultees favoured retaining this as a defence, as well as the defence of change of position. The Consultation Paper did not address the relationship of change of position with other defences, such as the requirement, in the context of rescission, that *restitutio in integrum* must be possible and the defence of bona fide purchase for value. There is, in our view, no need to address these complicated questions[23] as the precise relationship should be worked out by the common law. We believe that the importance of estoppel will diminish as a result of the introduction of a broad defence of change of position, but it is premature to

[22] [1991] 2 AC 548, 558-9 per Lord Bridge; 562-563 per Lord Templeman; 567-568 per Lord Griffiths and Lord Ackner; 577-583 per Lord Goff.

[23] See P Birks, "The English Recognition of Unjust Enrichment" [1991] LCMLQ 473; A Burrows, *The Law of Restitution*, p 429, 431; Watts, "Judicature Amendment Act 1958 - Mistaken Payments" in *Contract Statutes Review* NZLC 25, 189, p 202-204.

regard it as redundant.[24]

Submissions to an Honest Claim and Compromises

5.18 We have recommended that the proposed legislation should not create a comprehensive statutory right of recovery but should result in the same rules applying in principle to all kinds of mistake. This approach to reform also suggests that further development of the defences of submission to an honest claim and compromise should be left to the common law on a case by case basis. Although, as we have indicated the precise boundaries of the defences[25] have not been as yet determined and the several doctrinal explanations are not always kept separate, we believe there is sufficient certainty about the scope of the defences to justify this solution. Much of it turns on the application of well understood principles of common law and equity concerning compromise, waiver and finality of litigation which do not only apply in the context of mistake but are of general application. In paragraph 4.2 above we state that a comprehensive statutory right to restitution in respect of payments, services and other benefits rendered under a mistake of law would balkanise the law of mistake unnecessarily. The statutory treatment of submission and compromise would, we believe also balkanise the law of compromise, waiver and *res judicata*. The importance of these defences in this context is such that we have set out our understanding of their current scope in some detail in paragraphs 2.25-2.38 above. **Accordingly, we recommend:**

(7) that the legislation should not deal with the position of compromises and submissions to honest claims.

Limits to the Recommended Reforms

5.19 The aim of the recommendations in this section is only to remove the mistake of law bar to restitutionary claims. We have discussed the principles of waiver, compromise and submission to an honest claim which would be carried over undisturbed into the mistake of law field if the rule is abrogated. Another rule that we do not intend to disturb is the *in pari delicto* rule that generally denies recovery if there is an added element of illegality involved in the transaction. This rule, which lets the loss lie where it falls, is subject to common law and statutory exceptions,[26] and it is not intended to disturb these. Although, in *Tinsley v Milligan*[27] it was suggested by Lord Goff that the *in pari delicto* rule might usefully be reformed, it would be entirely inappropriate to expand this project to include issues of such complexity, particularly as we did not consult on them.

5.20 We do not wish restrospectively to disturb claims already in progress or existing

[24] Cf Burrows, *op cit*, pp 431-432, 436, 438.

[25] See paras 2.25-2.38 above.

[26] See *Chitty on Contracts*, §§ 1257 - 1280; GH Treitel, *The Law of Contract*, (8th ed 1991) p 427; para 2.5-2.16 above.

[27] [1994] AC 340, 364 per Lord Goff.

causes of action. Neither do we wish the legislation to constitute a definitive statement that a mistake of law bar did form part of English law, which some may regard as a matter of dispute. **We therefore recommend:**

(8) **that the proposed legislation should have prospective effect only (Draft Bill, clause 4(1)); and**

(9) **that the proposed legislation should not affect the balance of argument as to the existence of the bar to recovery of a payment made under a mistake of law, prior to the legislation coming into force (Draft Bill, clause 4(2)).**

Existing legislation may have been drafted on the assumption that no restitutionary claim may be founded on a mistake of law, and may either have given a right of recovery for such mistakes, or qualified or restricted the common law right of recovery for mistakes of fact. In the absence of a more general review of such provisions of the statute book, which should properly be carried out by the responsible government departments, we do not intend that our proposals should affect existing legislative provisions. We further wish to preserve the policy of existing legislative provisions insofar as these seek to qualify or restrict common law rights in particular circumstances. **We therefore recommend:**

(10) **that the proposed legislation should ensure that any enactment which restricts or excludes the possibility of a mistake claim in circumstances where such a claim would otherwise be possible should have the same effect on mistake claims brought by virtue of Draft Bill, clause 2 (Draft Bill, clause 4(3),(4)).**

SECTION C
CLAIMS IN RESPECT OF ULTRA VIRES PAYMENTS MADE TO PUBLIC AUTHORITIES

PART VI
INTRODUCTION AND PRESENT LAW

Introduction

6.1 Where a government or other public authority, purporting to act under statutory authority, imposes a charge or other levy on the citizen which it has no power to impose the payments may be recoverable either at common law or, in the case of the majority of central and local government taxes, under statute. Since the publication of our Consultation Paper, the common law rules governing recovery have altered radically with the decision of the House of Lords in *Woolwich Equitable Building Society v Inland Revenue Commissioners*.[1]

6.2 In this Section, we first set out the present common and statute law governing the recovery of such charges, together with references to the pre-existing law where necessary. We then state the case for reform of that law and the arguments addressed to us in favour of, and against, reform; both on consultation, and (where applicable) otherwise. Finally, we set out our recommendations for reform.

Recovery at common law

6.3 The traditional approach of the common law was that any payments of taxes or other charges levied ultra vires could be recovered on the same basis as any payments made to another but not lawfully due. The payer would therefore be able to recover if he could show that a ground for restitution, such as mistake of fact[2] or duress,[3] existed. The law also allowed recovery where a public official demanded a payment to which he was not entitled or in excess of that to which he was entitled for the performance of a public duty.[4] A payer would also be able to recover if he

[1] [1993] AC 70, 148 (HL) Lords Goff, Browne-Wilkinson and Slynn of Hadley, Lords Keith of Kinkel and Jauncey of Tullichettle dissenting; 76 (CA) Glidewell and Butler-Sloss LJJ, Ralph Gibson LJ dissenting; [1989] 1 WLR 137 (HC) Nolan J. The associated judicial review proceedings are reported as *R v IRC, ex p Woolwich Equitable Building Society* [1990] 1 WLR 1400 (HL).

[2] *Meadows v Grand Junction Waterworks Co* (1905) 21 TLR 538.

[3] *Maskell v Horner* [1915] 3 KB 106; *Mason v New South Wales* (1959) 102 CLR 108 (HCA).

[4] *Mason v New South Wales* (1959) 102 CLR 108 (HCA), *Steele v Williams* (1853) 8 Ex 624, 155 ER 1502; *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045; *Dew v Parsons* (1819) 2 B & Ald 562, 106 ER 471; *Hooper v Mayor of Corporation of Exeter* (1887) 56 LJQB 457; *South of Scotland Electricity Board v British Oxygen Co Ltd (No 2)* [1959] 1 WLR 587. Some have considered these public duty cases simply as a species of duress. See *Woolwich Equitable Building Society v IRC* per Nolan J, Glidewell and Ralph Gibson

could show that the payment was made pursuant to an agreement that the sum would be repaid if it were found not in fact to be due.[5] These grounds for recovery have not been affected by the *Woolwich* decision[6], and continue to be available to payers of taxes or other charges levied ultra vires. However, the decision of the majority of the House of Lords in *Woolwich Equitable Building Society v IRC*,[7] recognises a general right to restitution in cases (at least) of payments in response to ultra vires demands by government or public authorities.[8]

6.4 A brief account of the traditional approach prior to the *Woolwich* decision will be given, since it will assist in the analysis of the principle laid down in that case. Although the traditional approach can no longer be viewed as the common law of England and Wales, it has been suggested[9] that aspects of the traditional approach may continue to apply, and accordingly it cannot be disregarded completely.

The Traditional Formulation

6.5 Payments of taxes or charges levied ultra vires could not be recovered at common law simply because of the ultra vires nature of the payment. This traditional approach was established in a series of first instance decisions,[10] and subsequently confirmed by the Court of Appeal in *National Pari-Mutuel Association Ltd v R.*[11] In that case, the Court of Appeal held that payments made as a result of a mistaken

LJJ and Lords Keith, Jauncey and Slynn (para 6.8 and n 18 below) and Goff and Jones *Law of Restitution* (4th ed 1993), p 245-250.

5 *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] 1 Ch 409; *Woolwich Equitable Building Society v IRC* [1989] 1 WLR 137 (Nolan J); [1993] AC 70 (CA, per Ralph Gibson and Butler-Sloss LJJ; (HL) per Lords Goff and Keith of Kinkel). See also para 6.10-6.12 below.

6 Although questions have been raised as to the extent to which the *colore officii* line of cases (cited at n 4 above) survives the decision, and questions have been raised about the substantive rules governing the implication of contracts to repay: see para 6.10-6.12 below.

7 [1993] AC 70.

8 The scope of the rule established by the House of Lords in the *Woolwich* case is discussed at paras 6.32-6.42 below.

9 Burrows "Restitution of Payments made under Swap Transactions" (1993) 143 NLJ 480; Goff and Jones (4th ed, 1993) p 553; Birks "When Money is Paid in Pursuance of a Void Authority: A Duty to Repay?" [1992] PL 580.

10 *Slater v Burnley Corporation* (1888) 59 LT 636; *William Whiteley Ltd v R* (1909) 101 LT 741.

11 (1930) 47 TLR 110. Prior to the line of cases establishing the non-recoverability rule, to which reference is made here, case law had established the proposition that payments in response to demands by a public official for moneys to which he was not entitled or in excess of that to which he was entitled for the performance of his public duty could be recovered. The inconsistency between the two lines of case law led to exhaustive analysis in *Woolwich*: see especially Glidewell and Ralph Gibson LJJ ([1993] AC 70, 81-95, 124-135) and Lords Keith, Goff and Jauncey ([1993] AC 70, 154-161, 165-169, 178-193).

construction of a statute, and thus under a mistake of law, were irrecoverable.[12] The same approach has been followed in Scotland.[13] Thus, payments of taxes or charges levied ultra vires could not prior to *Woolwich* be recovered simply by virtue of their ultra vires nature. The general non-recoverability rule was, however, subject to a number of exceptions and qualifications.

Qualifications and Exceptions

(a) MISTAKE OF FACT AND DURESS

6.6 The recovery of payments made to public authorities under mistake of fact does not appear to have created any difficulty in the English case law. Recovery on the basis of duress has been a little more problematic. It is clear that a threat to the person or property of the plaintiff if the invalid demand is not met constitutes duress.[14] A threat to act in an ultra vires manner - for example, by withholding a benefit which there is a duty to provide - may also be treated as illegitimate duress.[15] On the other hand a mere threat to sue if payment is not made is not normally an illegitimate threat.[16]

6.7 These principles are clear enough but it may be difficult to decide whether there is duress where the authority does not explicitly make a threat. Often sanctions for non-payment may be provided for by statute, for example a licence may be refused or goods seized. The mere existence of these sanctions is not necessarily sufficient to establish a threat but the courts may be willing to imply a threat in such circumstances.

6.8 In *Twyford v Manchester Corporation*[17] stonemasons sought to recover a fee which had been unlawfully demanded from them for admission to a cemetery to carry out their work. It was held that there had been no implied threat to exclude them for

[12] Although subject to much criticism, this approach was confirmed by the Court of Appeal in 1989 in *R v Richmond upon Thames LBC ex p Stubbs* (1989) 87 LGR 637; see also *Woodcock v Commissioners of Customs and Excise* [1989] STC 237 and Nolan J, Ralph Gibson LJ and Lords Keith and Jauncey in *Woolwich Equitable Building Society v IRC* [1993] AC 70, 160-161, 192-194. Birks argued that the weight of the authorities actually supported a right to recovery, see Birks *Introduction to the Law of Restitution* (rev'd ed, 1989) p 294-299; "Restitution from Public Authorities" [1980] CLP 191; "Restitution from the Executive: a Tercentenary Footnote to the Bill of Rights" in *Essays on Restitution* (ed Finn, 1990), p 177-183 relying primarily on (a) cases concerned with the performance of a public duty, discussed at paras 6.13-6.15 below and (b) *Hooper v Mayor of Corporation of Exeter* (1887) 56 LJQB 457.

[13] *Glasgow Corporation v Lord Advocate* 1959 SC 203.

[14] Eg *Mason v New South Wales* (1959) 102 CLR 108.

[15] *Quaere* whether the cases concerned with payments for the performance of a public duty, discussed below, could or should be explained on this basis: see para 6.9 below.

[16] As was illustrated by both *William Whiteley Ltd v R* (1909) 101 LT 741 and *Woolwich Equitable Building Society v IRC* [1993] AC 70. See paras 2.25-2.38 above.

[17] [1946] Ch 236. For criticism see Marsh (1946) 62 LQR 333, Birks, *op cit* p 294-9; Birks "Restitution from Public Authorities" [1980] CLP 191, Goff and Jones, *op cit* p 242-3.

non-payment. Again, in *Woolwich Equitable Building Society v IRC*, it was held that there was no evidence of conduct by the Revenue sufficient to amount to duress. Specifically, the fact that interest would be payable on any sum withheld if the challenge to the regulations failed, which could not be deducted from future profits, did not constitute duress. Neither did the fact that the building society could have anticipated the raising of an assessment or the issue of a writ, both involving highly undesirable and commercially unacceptable adverse publicity.[18]

6.9 On the other hand, in *Mason v New South Wales*[19] the High Court of Australia was prepared to find duress when the plaintiffs paid a fee for a licence to carry goods, under a scheme which was later held to be unconstitutional. The fact that the state *might* have seized the plaintiffs' vehicles had they operated without a licence was said to constitute duress, although it seemed that such seizure had been rare in the past and certainly had not been explicitly threatened. Although "the ability of the Crown or a public authority to apply duress to the subject may be very much greater than that of another subject",[20] the availability of the duress ground to recover an unlawful levy depends on the court's interpretation of the facts. It is possible that, particularly in the light of the observations in *Woolwich Equitable Building Society v IRC*,[21] a broader view may be taken in future of "compulsion" or "duress" as a basis for recovering payments made to public authorities. If so, payments not due made in response to demands from public authorities and others, such as regulated utilities,[22] with their superior power to coerce the citizen, could be regarded as made under duress.

(b) Implied Contracts to Repay

6.10 The courts may be more willing to imply a contract to repay funds paid over where the defendant is a public authority than in other cases. In *Woolwich Equitable Building Society v IRC*,[23] Nolan J, following Vaisey J's approach in *Sebel Products Ltd v Commissioners of Customs & Excise* stated that -

> whenever money is paid to the revenue pending the outcome of a dispute which,

[18] Nor did the case fall within the *colore officii* principles, considered by some of the judges involved to constitute a form of duress: [1989] 1 WLR 137,143 and 146 (Nolan J); [1993] AC 70, 95 & 96 (Glidewell LJ); 119 (Ralph Gibson LJ); 139 (Butler-Sloss LJ); 161 (Lord Keith); 194 (Lord Jauncey); and 201 (Lord Slynn). Lord Slynn, however, indicated that he was of the view that the notion of duress or coercion should not be strictly confined (201) and continued "Although as I see it the facts do not fit easily into the existing category of duress or of claims *colore officii*, they shade into them. There is a common element of pressure which by analogy can be said to justify a claim for repayment" (204).

[19] (1959) 102 CLR 108.

[20] *Woolwich Equitable Building Society v IRC* [1989] 1 WLR 137, 144 (Nolan J).

[21] [1993] AC 70, 165, 173, 198, 201.

[22] Such as those supplying water, gas and electricity.

[23] [1989] 1 WLR 137.

to the knowledge of both parties, will determine whether or not the revenue are entitled to the money, an agreement for the repayment of the money if and when the dispute is resolved in the taxpayer's favour must inevitably be implied unless the statute itself produces that result.[24]

6.11 In the Court of Appeal, Glidewell LJ did not address this issue. Butler-Sloss LJ indicated that she would have been prepared to imply an agreement to repay had this been necessary.[25] Ralph Gibson LJ considered that the broad statement of law by Vaisey J, cited by Nolan J, could not without qualification be correct.[26] He then said that Vaisey J had based his finding that an implied contract existed on the inferences which a reasonable person would draw from the communications passing between the respective parties. The communications between Woolwich and the Revenue led to the implication that the Revenue must have agreed that the funds paid over by Woolwich would be repaid if the litigation was resolved in Woolwich's favour. He found no need to approve or disapprove the broad statement of law by Nolan J, that in similar circumstances contracts for repayment would inevitably be implied, but held that in any event, terms for the payment of interest would not be so implied as a matter of course.

6.12 In the House of Lords, Lord Keith[27] also doubted Vaisey J's approach in *Sebel Products*,[28] and stated that on the facts of the *Woolwich* case, no implied agreement to repay the tax or to pay interest could in his view arise. Lord Goff[29] considered that it was unnecessary to decide whether an implied agreement would exist. The status of Nolan J's statement of the law as to implied contracts to repay is thus uncertain.

(c) PAYMENTS DEMANDED FOR THE PERFORMANCE OF A PUBLIC DUTY

6.13 Payments which are demanded without entitlement, or in excess of entitlement, as renumeration by a public official for the performance of a public duty ("*colore officii*")[30] are recoverable.[31] The cases deal with the situation where a public officer

[24] *Ibid*, 147, following *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] Ch 409.

[25] [1993] AC 70, 142.

[26] *Ibid*, 113-117.

[27] *Ibid*, 150-151.

[28] [1949] 1 Ch 409.

[29] [1993] AC 70, 170.

[30] Glidewell LJ in *Woolwich* described this phrase as "archaic...at best vague and at worst meaningless at the present day. Certainly of itself I find it unhelpful": [1993] AC 70, 80.

[31] See eg *Morgan v Palmer* (1824) 2 B & C 729, 107 ER 554 (illegal fee paid to a mayor for the renewal of a publican's licence); *Steele v Williams* (1853) 8 Ex 625, 155 ER 1502 (illegal charge by parish clerk for taking copies of parish register); *Hooper v Mayor of Corporation of Exeter* (1887) 56 LJQB 457 (illegal landing fee paid for the unloading of particular classes of limestone); *Queen of the River Steamship Co v The Conservators of the*

or authority receives money to perform a duty which he or it is bound to carry out for nothing or for less than the sum paid. In such circumstances, the payment may be recovered as money had and received to the payer's use. The effect of the cases is summarised by Windeyer J in the High Court of Australia in *Mason v New South Wales* as follows[32] -

> Extortion by colour of office occurs when a public officer demands and is paid money he is not entitled to, or more than he is entitled to, for the performance of his public duty...The parties were not on an equal footing; and generally the payer paid the sum demanded in ignorance that it was not due.[33]

6.14 *Woolwich Equitable Building Society v IRC*[34] established that money paid under a demand for tax, which demand subsequently proved to be ultra vires, could be recovered on that ground alone. These *colore officii* cases were discussed and analysed in the *Woolwich* case.[35] It is not clear whether the *colore officii* principle is now subsumed within the *Woolwich* principle, or whether it still has an independent existence.[36] Some of the *colore officii* cases permit recovery in situations which do not

River Thames (1889) 15 TLR 474 (illegal tolls on ship recovered). For a modern example, see *South of Scotland Electricity Board v British Oxygen Co Ltd (No 2)* [1959] 1 WLR 587; 1959 SC 17 (HL) (unlawfully discriminatory electricity charges), although this is seen by some as a case of duress arising out of the implied threat of disconnection. Under the Water (Domestic Disconnections) Bill 1994 the potential threat of disconnection for non payment of charges in respect of domestic water consumers would be removed. See generally Goff and Jones (4th ed, 1993) p 243-250, and in particular n 30. For Commonwealth examples, see *Eadie v Township of Brantford* (1967) 63 DLR (2d) 561 and *Mason v New South Wales* (1959) 102 CLR 108.

[32] (1959) 102 CLR 108, 140.

[33] Adopted by Lord Jauncey in *Woolwich Equitable Building Society v IRC* [1993] AC 70, 184 as a correct formulation, and cited by Lord Slynn (201), referred to as "illuminating" by Lord Goff (164), and cited by Lord Keith (155). The leading decisions are also dealt with comprehensively in Goff and Jones *op cit.* p 245-250.

[34] [1993] AC 70.

[35] See para 6.9 n 18 above. In particular, Lord Goff seemed to see the cases as affording a basis for the subsequent declaration of an express recovery right for charges levied ultra vires ([1993] AC 70, 168)) while Lords Keith and Jauncey focussed on the situations where recovery had been denied to reject Woolwich's argument that such a right existed.

[36] This question was not resolved authoritatively by the *Woolwich* case itself. Glidewell LJ in the Court of Appeal did not offer an opinion on this specific point when establishing the general restitutionary principle ([1993] AC 70, 80-95). Ralph Gibson LJ, dissenting, did not need to consider the point. Butler-Sloss LJ did not base her finding that there was a general right to restitution of taxes invalidly demanded on the *colore officii* cases, and this may suggest that she saw them as independent of the *Woolwich* right. In the House of Lords, Lord Keith saw the *colore officii* cases simply as a species of duress. Lord Goff also seemed to consider the *colore officii* cases as a species of compulsion (173). Lord Goff went on to say that "[W]e may expect that in any event the common law principles of compulsion, and indeed of mistake, will continue to develop in the future", suggesting that he saw the *colore officii* line of cases as still being capable of independent development. Lord Browne-Wilkinson (198) saw the *colore officii* cases as examples of a wider principle, that where the parties are on an unequal footing so that money is paid by way of tax in pursuance of a demand by some public officer, it is recoverable. Lord Slynn held (204) that although the facts of the *Woolwich* case did not fit easily into the existing categories of

clearly fall within the principle established by the *Woolwich* decision.[37] Until the courts pronounce on the correct future treatment of the *colore officii* cases, it is prudent to regard the cases as still affording a separate ground for restitution to that established by the House of Lords in the *Woolwich* case.

6.15 The abrogation of the mistake of law rule, either by legislation based on our recommendations or by a decision of the House of Lords, will however make this question largely irrelevant. We cannot foresee a situation where payment in the circumstances of the *colore officii* cases would be made other than under a mistake of law. Our recommendation to abrogate the mistake of law rule which is set out in Section B of this Report[38] makes it unnecessary to embark on a detailed examination of the *colore officii* case law.

(d) "RECOVERY" THROUGH A SET-OFF AGAINST MONEY OWED

6.16 In *Blackpool and Fleetwood Tramroad Co v Bispham with Norbreck UDC*[39] it was stated that sums paid to a public authority pursuant to an unlawful rating demand could be set off against sums owed by the payer to the same authority, although they might be irrecoverable if an action were brought for repayment. In *R v Tower Hamlets LBC, ex p Chetnik Developments Ltd*[40] Lord Bridge commented that this alleged rule "seems to produce an anomaly"[41] in allowing a set-off but not a direct action for recovery. The tenor of his speech, including the reference to the anomaly, suggests that he doubted the correctness of the *Blackpool* decision.[42]

(e) PAYMENTS MADE TO AN OFFICER OF COURT

6.17 It was explained in Section B[43] that the mistake of law rule does not apply where a payment is made to an officer of the court. The exception does not specifically concern invalid levies, but in principle it should cover the case of an officer of the court who demands a payment which is outside his statutory authority.

duress or of claims *colore officii*, they shaded into them. Burrows (see para 6.4 n 9 above), suggests that the *colore officii* line of cases survives, while Goff and Jones *op cit* suggest that "it may be premature to write the obituary of the *colore officii* line of cases" and that the *colore officii* case law may go further than the *Woolwich* principle (p 553).

37 For example, as Goff and Jones point out, some of the payees compelled to make restitution (eg parish clerks and stewards of the manor) can only with generosity be described as public officers (*op cit.* p 245).

38 Paras 3.7-3.12 above.

39 [1910] 1 KB 592.

40 [1988] AC 858.

41 [1988] AC 858, 877.

42 It may be noted, however, that a similar "anomaly" exists in relation to overpayments by trustees and personal representatives (para 2.9 above) and another has been created by legislation in relation to overpayment of certain welfare benefits: see para 17.4 below.

43 Para 2.10 above.

(f) APPLICATION FOR JUDICIAL REVIEW

6.18 Prior to the decision in the *Woolwich* case, although there was no right to recover an invalidly demanded payment made to a public authority, in many cases a discretion to make a repayment existed. For example, prior to the introduction of a legislative right to recover, we understand that it was the practice to repay excess payments of VAT made under an error of law, unless the payee would have gained a windfall because he had passed on all or part of the tax to his customers. In some cases express statutory discretions exist;[44] in others the authority's right to repay depended on the general law concerning the making of ex gratia payments.[45] Where there is discretion to repay, whether conferred specifically by statute or not, it is subject to public law principles. Thus, in exercising it, the authority must take into account only relevant considerations, and must not act for improper purposes or in bad faith.

6.19 In *R v Tower Hamlets LBC, ex p Chetnik Developments Ltd*[46] a local authority's exercise of an express statutory discretion to refund overpayments of rates was considered.[47] Lord Bridge stated that, under the General Rate Act 1967, the fact that the payment was made under a mistake of law was not a consideration which would justify refusing recovery.[48] Nor could recovery be refused because of the special financial difficulties which would otherwise be faced by the authority. He seemed to envisage that recovery could be refused only in those types of case where recovery would be denied in a common law action based on mistake of fact, such as where there was a compromise of a disputed claim, although this general principle was not specifically stated by him. Lord Goff, however, stated that the General Rate Act 1967, section 9 effectively created a "statutory remedy of restitution"[49] to prevent the authority's unjust enrichment at the expense of the ratepayer and the courts should have regard to general restitutionary principles (including change of position) in deciding whether the authority could lawfully refuse recovery.

6.20 In *Woolwich* it was stated that the *Chetnik* principles were limited in their application to express statutory discretions to repay, where the discretion had to be exercised

[44] See Customs and Excise Management Act 1979, s 127.

[45] The Crown has a general power under the common law to make *ex gratia* payments. On the question of whether a power to make provision in subordinate legislation for payment of fees and charges can be construed as conferring a power to make regulations giving a *right* to recover, see para 7.2 below.

[46] [1988] AC 858.

[47] General Rate Act 1967, s 9 (l)(e).

[48] [1988] AC 858, 877.

[49] [1988] AC 858, 882.

in accordance with the statutory intention.[50] It should also be noted that, although *Chetnik* was an application for judicial review, the General Rate Act 1967 provided a right of appeal to the courts,[51] thus specifically indicating that, in that context, the courts were to have the final word on the merits. Where the courts' role is exclusively supervisory and there is no express statutory discretion to repay, they will undoubtedly be more cautious in granting judicial review.[52]

Overturning the Traditional Formulation: The General Restitutionary Principle

6.21 The claim in *Woolwich Equitable Building Society v IRC*[53] was for payment of interest on a sum paid over by the Woolwich Equitable Building Society ("the Building Society") to the Inland Revenue. The Building Society disputed the validity of the Income Tax (Building Societies) Regulations 1986[54] ("the Regulations") by which a building society was obliged, under the composite rate system, to pay sums representing income tax on interest and dividends due to depositors and investors to the Revenue. The Regulations changed the system to quarterly assessment dates and the transitional provisions subjected the Building Society to tax on 29 months of income in a 24 month period, in effect obliging it to pay tax twice on the same income for certain overlapping periods. Despite its belief in the ultra vires nature of the transitional provisions, the Building Society paid the sums requested as it was concerned about the adverse publicity it might receive if the Revenue commenced collection proceedings, and it was thought that it could not meet its financial obligations.

6.22 The Building Society paid £56,998,221 to the Inland Revenue in three instalments, each accompanied by a "without prejudice" letter reserving its legal right to recover the payments. In judicial review proceedings Nolan J, in a decision ultimately confirmed by the House of Lords, held the Regulations ultra vires and void.[55] In anticipation of that decision the Building Society had issued a writ to reclaim the

[50] *Woolwich Equitable Building Society v IRC* [1993] AC 70, 171 per Lord Goff with whom Lord Browne-Wilkinson and Lord Slynn agreed. Cf the broader view in the Court of Appeal.

[51] The question of whether review ought to have been refused because of the alternative remedy by way of appeal was not taken.

[52] *Woolwich Equitable Building Society v IRC* [1993] AC 70, 171. Lord Goff said "If..the revenue was under no contractual obligation to repay the money, and had refused to exercise such residuary discretion as it had to repay, it is difficult to see on what ground its refusal to repay could have been challenged, except on very narrow grounds such as bad faith".

[53] [1989] 1 WLR 137 (Nolan J); [1993] AC 70 (CA & HL).

[54] SI 1986/482.

[55] *R v Inland Revenue Commissioners, ex parte Woolwich Equitable Building Society* [1987] STC 654; [1990] 1 WLR 1400 (HL).

money paid over to the Inland Revenue together with interest.[56] Following the judicial review proceedings, the Inland Revenue repaid the overpaid tax with interest from the date of the decision in the application for judicial review. That payment was made without prejudice to any rights and liabilities of the parties to be established in the action to reclaim the money. The Building Society continued to claim about £7.8m interest from the date of payment to the date of the decision in the judicial review proceedings. In order to show an entitlement to interest it needed to establish that there was a right to restitution in this type of situation.[57]

6.23 Nolan J dismissed the action for interest, because he held the Building Society was not entitled to immediate repayment of the sum paid over to the Inland Revenue from the time of payment until the date of judgment in the judicial review proceedings. He found no support in the decided cases for the submission that the payments were immediately recoverable by virtue of a general restitutionary principle which may be invoked whenever a payment is made in response to a demand for tax made by the Crown without lawful authority. There was no duress in the present case as the Building Society had paid the money for purely commercial reasons. Although he held that there was an implied agreement that the money would be repaid to the Building Society if the dispute was settled in its favour,[58] he accepted the Inland Revenue's submission that the sum and thus interest was repayable only from the date of judgment in the judicial review proceedings.

6.24 The Building Society successfully appealed. Glidewell and Butler-Sloss LJJ held that there is a general right to restitution when a subject makes a payment in response to an unlawful demand for tax from the Crown.[59] However, they identified three limitations to the general right to restitution. These were payments made to close a transaction, payments made as a result of a mistake of law, and, possibly, payments made where an alternative remedy is available.[60] As indicated above, the House of Lords upheld the judgment of the Court of Appeal. The leading speech in the House of Lords was delivered by Lord Goff, with whom Lord Browne-Wilkinson and Lord Slynn agreed although they also gave separate speeches. Lord Keith and Lord Jauncey dissented.

[56] Under the Supreme Court Act 1981, s 35A.

[57] See para 16.11 below.

[58] Following *Sebel Products Ltd v Commissioners of Customs and Excise* [1949] 1 Ch 409. See also para 6.10-6.12 above.

[59] [1993] AC 70, 97-8, 141 (CA) Glidewell and Butler-Sloss LJJ, Ralph Gibson LJ dissenting. On the scope of the new general restitutionary right, see paras 6.32-6.42 below.

[60] Further discussion of the individual judgments in the Court of Appeal can be found in Consultation Paper No 120, paras 3.13-3.16, and the commentaries listed in para 1.5 above.

Foundations of the general restitutionary right

6.25 Lord Goff summarised the effect of the authorities,[61] and referred to the academic literature,[62] which suggested that the authorities should be reinterpreted in order to allow a right of recovery in such circumstances, and to our Consultation Paper, which provisionally recommended the legislative introduction of a right of recovery.[63] He stated that the cases clearly supported the traditional view of the law,[64] and did not allow automatic recovery of sums paid in response to ultra vires demands. The question was whether the House could and should reformulate the law in accordance with the principle of justice to the taxpayer.[65] Lord Goff was satisfied that it was open to the House to do so,[66] and the question to be answered was whether it should.

6.26 If a restitutionary right did not exist, the Building Society could not, in Lord Goff's view, obtain a refund of the tax paid save by an *ex gratia* repayment.[67] He said that the justice underlying the Building Society's claim was apparent although the Revenue raised two principal objections against it.[68] First, it was said that it was too late to turn back the clock, and allow restitution in situations where it had been denied for a century. Lord Goff, however, identified two principles to defeat this objection. The Bill of Rights 1688, article 4 establishes the principle that taxes should not be levied without the authority of Parliament. Moreover, the coercive power of the state implicitly backs any demand for taxation. The law as it stood thus penalised the good citizen who assumed that any demand for tax was lawful, and paid what was asked for.[69]

6.27 A focus on the coercive power of the state as a reason for accepting the Building

[61] [1993] AC 70, 164-166.

[62] Birks "Restitution from the Executive: a Tercentenary Footnote to the Bill of Rights" in Finn (ed) *Essays on Restitution* (1990) p 164; Cornish "Colour of Office: Restitutionary Redress Against Public Authority" (1987) J Mal & Comp L 41. Lord Goff's remarks are at [1993] AC 70, 166.

[63] Consultation Paper No 120 "Restitution for payments made under a mistake of law".

[64] [1993] AC 70, 168.

[65] Which Lord Goff believed was apparent from the judgment of Martin B in *Hooper v Mayor of Corporation of Exeter* (1887) 56 LJQB 457.

[66] [1993] AC 70, 168.

[67] The Taxes Management Act 1970, s 33 being inapplicable, and the principles of recovery established by *R v London Borough of Tower Hamlets ex p Chetnik Developments Ltd* [1988] AC 858 being inapplicable to non-statutory discretions to repay: see paras 6.19-6.20 above.

[68] Lord Goff stated that the Inland Revenue's position was "...as a matter of common justice...unsustainable" and involved the Revenue having the benefit of "a massive interest-free loan" as a result of its unlawful actions: see [1993] AC 70, 172.

[69] [1993] AC 70, 172 C-G. On the Bill of Rights, see also [1993] AC 70, 97-98, 142, 196 and cf *ibid* 125, 161-162, 196.

Society's argument that a restitutionary right should be recognised might at first sight suggest that the situation should be dealt with by expanding the common law concept of compulsion. However, Lord Goff said that since the possibility of distraint by the Revenue against the Building Society was slim, the concept of compulsion would have to be stretched to its utmost in order to accommodate the case.[70]

6.28 The Revenue's second objection was that for the courts to change the basis for recovery in a case such as that before the House would overstep the bounds of proper judicial development of the law, and would amount to judicial lawmaking.[71] Lord Goff countered this with the following arguments. First, he said that the opportunity to change the law might not come again speedily,[72] and secondly, that Parliament was unlikely to be asked by any government to recognise a restitutionary right by statute, because of its implications for government finances.[73] Thirdly, the immediate impact of the decision would be limited because most cases would continue to be ruled by the statutory schemes in place.[74] Fourthly, in view of this Commission's review of this area, it was the ideal moment for the recognition of a general restitutionary principle.[75] Fifthly,[76] the position of a citizen who could not obtain repayment compared unfavourably with the position where the Crown pays money out of the consolidated fund without lawful authority, which is ipso facto recoverable if it can be traced.[77] Finally, there is a right to repayment of sums levied by a public body contrary to the rules of European Community law.[78] It would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under European law.[79] Accordingly, he was prepared to hold 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...as of right".[80]

[70] *Ibid*, 173 B-F.

[71] *Ibid*, 173 F-H.

[72] *Ibid*, 176 F.

[73] *Ibid*, 176 G.

[74] *Ibid*, 176 G-H.

[75] *Ibid*, 176 H.

[76] *Ibid*, 177 B-C.

[77] *Auckland Harbour Board v R* [1924] AC 318.

[78] Case 199/82 *Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595.

[79] [1993] AC 70, 177 C-E.

[80] He thought that this principle should extend to cases where the unlawfulness did not result from the ultra vires nature of the demand but from some other cause: [1993] AC 70, 177 F-G.

6.29 Lord Goff's speech was most directly based on creative principle. He was concerned with enunciating the general restitutionary rules, and he based his decision on external factors and the timing of the case as well as "the fading flame of principle" to be found in some of the *colore officii* cases.[81] The other two majority speeches, while agreeing with him, also sought to locate the new rule within the parameters of existing categories of the law. Lord Browne-Wilkinson developed the *Woolwich* rule by way of analogy with pre-existing law and held that the court should "reinterpret the principles lying behind the authorities so as to give a right of recovery in such circumstances".[82] He found two different bases for recovery - lack of consideration,[83] and compulsion. Lord Slynn approached the case in a similar way, and in particular was attracted to the notion of duress: "the facts do not fit easily into the existing category of duress or of claims colore officii, they shade into them. There is a common element of pressure which by analogy can be said to justify a claim for repayment."[84]

6.30 At the core of the dissent in the House of Lords, from Lord Keith and Lord Jauncey (and in the Court of Appeal from Ralph Gibson LJ) was the perception of a need for legislation in this area, and of the inappropriateness of judicial intervention. Indeed, this is reflected even in the speech of Lord Goff who praised this Commission's Consultation Paper and hoped that -

> [the] consultation may acquire a greater urgency and sense of purpose if set against the background of a recognised right of recovery at common law...there is an immediate opportunity for the authorities concerned to reformulate, in collaboration with the Law Commission, the appropriate limits to recovery, on a coherent system of principles suitable for modern society.[85]

We have sought to accept this invitation, to our knowledge unique on the part of a senior Judge, and to give full effect to the opportunity identified by Lord Goff.

6.31 Lord Keith and Lord Jauncey rejected a general restitutionary right to recovery, and consequently denied that the Building Society was entitled to interest on the sums paid to the Revenue from the date of payment. Both considered that the authorities stood clearly against such a general right, and that any change in the law should be introduced by the legislature and not the courts. Lord Jauncey in particular was concerned about the effects of judicial lawmaking:

[81] [1993] AC 70, 168.

[82] *Ibid*, 196

[83] For criticism see Birks "When tax is paid under a void authority: a duty to repay?" [1990] PL 580. But see *Westdeutsche Landesbank Girozentrale v Islington LBC* (1993) 91 LGR 332; [1994] 1 WLR 938 (CA).

[84] [1993] AC 70, 204.

[85] *Ibid*, 176-177.

> To apply the Woolwich principle as initially enunciated without limitation could cause very serious practical difficulties of administration and specifying appropriate limitations presents equal difficulties....These are all matters which would arise in any reform of the law to encompass some such principle as Woolwich contend for and are matters with which the legislature is best equipped to deal.[86]

In addition, Lord Keith rejected the argument based on constitutional principles. He said the Bill of Rights 1688, article 4 had no bearing on the present case because it was concerned with the denial of the right of the Executive to levy taxes under the Royal Prerogative without the consent of Parliament, and not with the restitution of moneys paid pursuant to an ultra vires demand.

The scope of the Woolwich rule

6.32 There seem to us to be two issues which need to be addressed to determine the scope of the principle enunciated in *Woolwich.* First, the ratio of the decision must be identified. Secondly, as the ratio of *Woolwich* is likely to be redefined by continuing judicial development, it is desirable to know the direction that is likely to take.

6.33 The ratio of *Woolwich* (strictly confined to its particular facts) is that a citizen who makes a payment in response to an unlawful demand for tax that was unlawful because of the invalidity of the relevant subordinate legislation has a prima facie right in restitution to the repayment of the money, irrespective of whether the payment is mistaken or made under duress.[87]

6.34 The principle in *Woolwich* seems to us to be unlikely to be confined by the courts to the ratio: there appear to be several possibilities for the future scope of the principle. First, the rule may only extend to taxation and other similar exactions made on behalf of Governmental authorities; secondly, it may apply to any levy in breach of public law or European Community law. Thirdly, the principle may exclude cases where the charge was made for the provision of goods and services by the public authority.

6.35 We believe that the further boundaries of the principle can be predicted using three indicators: the formulation of the principle, the authorities from which it is derived, and the reasons which persuaded the majority to reinterpret the existing law.

(a) THE FORMULATION OF THE PRINCIPLE

6.36 Lord Goff enunciated the principle in *Woolwich* as follows -

[86] *Ibid*, 196.

[87] Although this appears to be quite limited, it does, in fact, represent a considerable legal step as it effectively abolishes the mistake of law rule in this area.

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.[88]

Lord Goff's formulation of the rule illustrates three criteria ("*demands*" for "*tax*" made under "*ultra vires subordinate legislation*") that may determine the future scope of the *Woolwich* principle.

6.37 First, is the rule confined to payments made under a demand? There are inherent difficulties with the requirement for a demand in that there may be an implied demand or general expectation that the payment would be made. This is further complicated by the fact that if, as suggested by Lord Goff and Lord Slynn, the ultra vires nature stems from error of law, the requirement for a "demand" would be questionable. In addition, the move to self-assessment for income tax[89] would mean that if a demand was necessary the scope of the right would in practice be significantly narrowed.

6.38 Secondly, is the principle confined to tax? Lord Goff's formulation would seem to exclude licence and other fees. However, the phraseology of other judges in this case may help to decide what types of payments could be recoverable under this principle, and whether the rule is confined to tax. The majority in the Court of Appeal held that the key was in the "public law" nature of the demand. Glidewell LJ included licence fees and similar imposts as well as tax and customs duties,[90] while Butler-Sloss LJ, agreeing with Glidewell LJ, referred to "tax, duty, licence fee or other payment on behalf of central or local government".[91] The House of Lords appeared to suggest a narrower application for the principle. Lord Slynn only referred to tax, while Lord Browne-Wilkinson talked of "money paid by way of tax or other impost."[92] But there is no positive indication that they intended a narrower scope for the principle: nothing turned on this in the case itself and Lord Browne-Wilkinson agreed with Lord Goff's reasoning.[93]

6.39 Finally, is the principle confined to demands made under the authority of ultra vires subordinate legislation? There is doubt as to whether that ultra vires quality must stem from the invalidity of subordinate legislation, or may also be due to error of

[88] [1993] AC 70, 177F.

[89] Finance Act 1994.

[90] [1993] AC 70, 79 B-E. Glidewell LJ drew a distinction between "private law" cases and cases "in which the defendant is an instrument or officer of central or local government, exercising a power to require payment of a tax, customs duty, licence fee or other similar impost", which he regarded as "public law" cases.

[91] [1993] AC 70, 138 F-H.

[92] *Ibid*, 198 B-C.

[93] *Ibid*, 196.

law, abuse of discretion, or possibly procedural unfairness. This doubt arises because Lord Goff and Lord Slynn expressly reserved judgment on this question. However, the misconstruction of a relevant statute or regulation is an error of law and any administrative decision based on such a misconstruction is likely to be ultra vires and may therefore, fit into the basic formulation.[94]

(b) THE AUTHORITIES UNDERLYING THE PRINCIPLE

6.40 An examination of the authorities from which their Lordships derived their principle is helpful to an examination of the likely potential scope of any rule derived from the *Woolwich* case. They relied on cases of charges for export duty,[95] fees for taking extracts from the parish register,[96] harbour dues and pier charges,[97] electricity charges,[98] and licence fees.[99] This suggests that they did not consider that the rule should be confined to tax. Also, while the cases on payments *colore officii* have been traditionally explained as turning on duress or compulsion, the House of Lords identified the real key as the demand for more money than the officer is entitled to for the performance of his duty. This reformulation of the cases in *Woolwich* suggests that the principle of recovery should now be want of lawful authority for the payment.

(c) THE REASONS UNDERLYING THE DECISION

6.41 Lord Goff's reasons for the new restitutionary right, described above,[100] also sustain these inferences, as they are all based on the special position of the state and other public bodies.[101] They do not focus on the particular requirements of a "*demand*" or a "*tax*"; but on the manifest injustice of allowing moneys unlawfully extracted from the subject by a public authority to be retained by it.

6.42 Therefore, we believe that the principle may well be held to apply to all taxes, levies, assessments, tolls or charges, whether for the provision of services or not, collected by any person or body under a statutory provision which is the sole source of the

[94] See *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Pearlman v Governors of Harrow School* [1979] QB 56; *Re Racal Communications Ltd* [1981] AC 374. But cf *R v Hull University Visitor ex p Page* [1993] AC 682, 694, 702; *Bugg v DPP* [1993] QB 473; *Neill v North Antrim Magistrates' Court* [1992] 1 WLR 1220, 1223. See generally Lewis *Judicial Remedies in Public Law* (1992) p 130.

[95] *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045.

[96] *Steele v Williams* (1853) 8 Exch 625; 155 ER 1502.

[97] *Hooper v Mayor of Corporation of Exeter* (1887) 56 LJQB 457; *Queens of the River SS Co Ltd v Conservators of the River Thames* (1899) 15 TLR 474.

[98] *South of Scotland Electricity Bd v British Oxygen Co Ltd* [1959] 1 WLR 587, [1959] SC 17 (HL); *Hydro Electric Commission of Nepean v Ontario Hydro* [1982] 1 SCR 347.

[99] *Attorney-General v Wilts United Dairies* (1922) 127 LT 822; *Brocklebank Ltd v R* [1925] 1 KB 52; *Mason v New South Wales* (1959) 102 CLR 108.

[100] See paras 6.25-6.29 above.

[101] See paras. 6.26-6.27, 6.29 above.

authority to charge.[102] We do not think that the *Woolwich* right is limited to payments of tax or to Governmental or quasi-Governmental exactions, or to payments made in accordance with a demand. We believe the crucial element is that the payment is collected by any person or body which is operating outside its statutory authority, that is, it is acting ultra vires. The requirement of ultra vires is not in our view confined to the excess of statutory power but also extends to procedural abuses, abuse of power and error of law on the part of the charging authority. Others[103] have, however, questioned whether the *Woolwich* right would extend to non-Governmental *colore officii* cases, such as the *South of Scotland*[104] case in respect of electricity charges which were based on tariffs claimed to discriminate unlawfully against industrial consumers. The future scope of *Woolwich* is therefore in dispute, but we believe that it may be much wider than the strict ratio suggests.

Charges made by Public Utilities

6.43 The primary control, both legal and economic, of the levels of charges levied by privatised utility companies in the gas, electricity, telecommunications and water industries is by the regulator responsible for the control of the respective industry. However, other controls on the levels and structure of charges do exist,[105] sometimes statutory and sometimes set out in the terms of the utility's licence.[106] In addition, the utilities sometimes have a statutory duty to supply the service in question to those who wish to be supplied.[107] No general provision is made by the statutes governing the privatised industries[108] for the recovery of amounts demanded in

[102] This means that if it were not for primary or secondary legislation having granted a power to charge the body would have no right to do so, even under private law.

[103] See A Burrows, "Restitution of Payments made under Swap Transactions" (1993) 143 NLJ 480; Scottish Law Commission Team Position Paper "*Recovery of ultra vires public authority receipts*" (presented to Scottish Law Commission/Strathclyde University Seminar on 23 October 1993) p 44. See para 6.14 above.

[104] *South of Scotland Electricity Board v British Oxygen Corporation* [1959] 1 WLR 587; 1959 SC 17 (HL). See para 6.13 n 31 above.

[105] For example, the legislation may require tariffs showing the methods and principles of charges to be published (Gas Act 1986, s 12), and may prohibit undue discrimination or preference on the part of the utilities between different customers (Gas Act 1986, s 12(1), Electricity Act 1989, s 3(2), 18(4)).

[106] Telecommunications Act 1984, ss 3, 8(1)(d); Electricity Act 1989, s 3(2); Water Industry Act 1991, ss 2(3)(a)(ii), 2(5). See also Water Industry Act 1991, Part E and generally Bailey and Tudway *Electricity Law and Practice* (1992) and Bates *Water and Drainage Law* (1990).

[107] Gas Act 1986, s 10; Electricity Act 1989, s 16.

[108] Telecommunications Act 1984, Gas Act 1986, Electricity Act 1989, Water Industry Act 1991. The Water Industry Act 1991, sections 150 (1)-(5), contains a power on the part of the Director General of Water Services to fix maximum prices by order for water supplied by persons or companies which are not undertakers under the Act. Any amounts overcharged under such an order "shall be recoverable by [the payer] from the person to whom he paid the charge".

breach of these restrictions, so it seems to us that the common law[109] will normally apply.[110]

6.44 In our Consultation Paper,[111] we indicated that, in the absence of specific recovery provisions, we believed that the common law on recovery would apply to the repayment of most such charges. We have stated that we regard the *Woolwich* rule as being capable of applying in principle to all taxes, levies, assessments, tolls or charges collected by any person or body under a statutory provision which is the sole source of the authority to charge.[112] Whether or not specific utilities fall within this formulation will depend largely on the terms of the statutes under which, after privatisation, they operate.[113] Much may then turn on whether the provisions of the governing statutes are construed on the one hand as creating powers to charge; or on the other simply as limiting pre-existing powers to charge and granting powers to recover charges by denying supply in certain circumstances.[114]

6.45 The formulation of the *Woolwich* principle in paragraph 6.42 above may appear excessively restrictive. It seems narrower than that adopted by Glidewell and Butler-

[109] Of which the principles of mistake, and the rule in the *Woolwich* case, will be relevant.

[110] Although some might well dispute our belief (paras 6.13-6.14 above) that charges levied by the privatised utility companies would fall within the scope of the *Woolwich* rule: see para 6.42 above.

[111] Consultation Paper No 120 "Restitution for Payments made under a Mistake of Law", paras 3.35 and 3.88.

[112] See paras 6.42-6.43 above. If the Court of Appeal's formulation of the rule, which focused on the public law nature of the power to charge which was unlawfully exercised, is adopted then this would include payments demanded under prerogative, as opposed to statutory, powers: see [1993] AC 70, 79 B-G (per Glidewell LJ). We should also note that in the course of consultation, we held meetings with representatives of the Office of Electricity Regulation ("OFFER"), the Office of Water Regulation ("OFWAT"), and the Office of Gas Regulation ("OFGAS"). There were no indications during these meetings that these regulatory bodies disagreed with our provisional conclusion that the *Woolwich* principle was capable of applying to them.

[113] In the case of the electricity industry, for example, the Electricity Act 1989 provides (in section 18(1)) that "the prices to be charged by a public electricity supplier for the supply of electricity by him...shall be in accordance with such tariffs..as may be fixed...by him". Section 18(2) goes on to restrict the manner in which these tariffs may be calculated. The Act therefore restricts the manner in which tariffs may be set by the utility, thus clearly importing the notion of limited power (*vires*). However, it might be argued that the section does not create a statutory *authority* to charge, but merely limits a pre-existing common law authority to charge for a service rendered. Section 24 of the Act enacts Schedule 6, which contains the Public Electricity Supply Code, and this provides (in paragraph 1(1)) that "...a public electricity supplier may recover from a tariff customer any charges due to him in respect of the supply of electricity...". This may constitute a statutory power to recover charges, rather than a power to charge.

[114] It seems to us that the doubt which may exist about the inclusion of unlawful charges levied under prerogative powers within the scope of the *Woolwich* rule cannot affect the question of whether or not charges levied by public utilities fall within its scope. After privatisation, any powers which they enjoy must have a statutory foundation, subject to the construction of the particular statutory provision in question.

Sloss LJJ in the Court of Appeal,[115] although there were no positive indications in the House of Lords that their Lordships intended to adopt a rule with a narrower scope. If so, the courts may not focus on the statutory origin of the power to charge, but may look instead at the nature of the body subject to the operation of the principle. The question then would be whether the charging body is subject to the supervisory judicial review jurisdiction. It may be argued that the *Woolwich* rule was clearly intended to apply only to bodies with a "public" character, and that after privatisation, utilities are clearly "private" commercial organisations. However, against this can be set the fact that non-governmental organisations have been held to be subject to control by way of judicial review,[116] and that some provisions of European Community law are directed at bodies not traditionally thought to be within the public sphere.[117]

Summary

6.46 We believe that at common law the position of payments made by way of taxes or charges which turn out not to be lawfully due is as follows:-

(A) They will generally be recoverable after the *Woolwich* decision by virtue of their very ultra vires nature, and thus the *Woolwich* decision will have a field of application wider than that of its own particular facts.

(B) As an alternative, recovery might be possible where the payment could be shown to have been made under duress, or where there was an implied agreement to repay the sum paid over if it proved not to have been due.

(C) At common law prior to the *Woolwich* decision, the refusal of a public authority to exercise a statutory or common law discretion to repay in favour of the payer could be reviewed by way of judicial review, but the grounds for such review would be considerably narrower in the case of a non-statutory discretion.

(D) The case law prior to the *Woolwich* decision makes it clear that payments made to a public authority in response to demands for moneys to which the

[115] [1993] AC 70, 78 B-G and 138 F-H.

[116] For example, University Visitors (*R v Hull University Visitor ex p Page* [1993] AC 682); Inns of Court (*R v Visitors to the Inns of Court ex p Calder* [1994] QB 1); Advertising Standards Authority (*R v Advertising Standards Authority Ltd ex p the Insurance Service plc* [1990] 2 Admin LR 77); Self-Regulating Organisations (*R v LAUTRO ex p Ross* [1993] QB 17). Recent case law, however, suggests that the courts may be in the process of narrowing the scope of judicial review: see *R v Disciplinary Committee of the Jockey Club ex p The Aga Khan* [1993] 1 WLR 909.

[117] For example, *Foster v British Gas plc* [1991] 1 QB 405 (ECJ), [1991] 2 AC 306 (HL). Thus EC law directed at "public" entities may sometimes impact upon bodies which are privately owned but subject to some state control. Cf (1994) 91/32 Law Soc Gazette 8. EC law, as we make clear later, requires the repayment of charges levied in breach of its directly applicable provisions. See paras 14.1-14.6 below.

public authority was not entitled or in excess of that to which the public authority was entitled for the performance of a public duty are recoverable.

(E) Similarly, we believe that payments to an officer of the Court for the performance of his duty would be recoverable.

PART VII
STATUTORY PROVISIONS FOR RECOVERY

Introduction

7.1 For the principal central and local government taxes, however, the common law principles described above have generally been abrogated or modified by the enactment of statutory rights[1] to recover payments made to public authorities.[2] For example, in the case of income tax, such a right is given by section 33 of the Taxes Management Act 1970 (hereafter "TMA 1970"), which was considered in the *Woolwich* case. It is not proposed as part of our survey of the existing law in this Part of our Report to set out the detail of the various statutory recovery provisions. The scope of these provisions varies substantially, and each of them is discussed in Parts VIII to XVI of this Report, where we also make our recommendations for reform in each case. After the *Woolwich* case, the most important question to be resolved regarding these specific statutory rights of recovery is their exact interrelationship with the *Woolwich* common law recovery right, and with the pre-existing common law in the light of our recommendation that the mistake of law rule be abolished. The relatively brief treatment of such statutory rights of recovery in the *Woolwich* case is discussed at paragraphs 7.6-7.8 below.

Repayment Provisions in Subordinate Legislation

7.2 The practice of treating a power to make provision in subordinate legislation for payment of fees and charges as also conferring a power to make provisions for repayments was criticised by the Joint Committee on Statutory Instruments[3] but was regularised for enactments then existing by the Finance Act 1990, section 128. The effect of this is that where further enabling powers to make provision for the payment of fees and charges are taken, express provision in the primary legislation will now have to be made for repayments. The statutory provisions do not appear to affect the power to make a refund by way of an ex gratia payment.

[1] Taxes Management Act 1970, s 33 (Income Tax, Corporation Profits Tax, Capital Gains Tax and Petroleum Revenue Tax); Inheritance Tax Act 1984, ss 241, 255 (Inheritance Tax); Stamp Duties Management Act 1891, s 9, 10; Stamp Act 1891, s 59 (Stamp Duty); VAT Act 1994, s 80 (Value Added Tax); Finance Act 1989, s 29 (Excise Duties); Social Security (Contributions) Regulations 1979, SI 1979/591, reg 32 (Social Security Contributions). These provisions are considered at paras 9.22-9.25, 13.7-13.11, 13.17-13.21, 14.14-14.16, 14.22, 15.4-15.6 below. See also paras 15.13-15.26 below for council tax recovery provisions. Customs and Excise Management Act 1979, s 127 (see para 6.18 n 44) provides a method of challenge for the recovery of import duties unlawfully demanded. The section is now of no practical application, as import duties are collected on behalf of the EC: see para 14.5 below. There may be other statutory provisions permitting the recovery of overpayments due to mistake which apply to more esoteric situations, for example compulsory purchase legislation, dock and harbour dues (on which see para 16.7 below).

[2] The displacement of the common law cannot be assumed in every case, but depends on the wording of the statutory provision under consideration: see paras 7.3-7.8 below.

[3] 1988/89 HC 47-i, pp 7 and 23.

The Relationship between the Legislative Structure and the General Restitutionary Principle

7.3 Two questions arise under this heading. First, to what extent, if at all, specific statutory recovery provisions exclude the new general common law right to restitution? Secondly, do the existing statutory provisions extend to the recovery of amounts demanded ultra vires the capacity of the public authority, or are they confined to amounts demanded and paid *intra vires*? We addressed both questions in our consultation paper.[4]

7.4 The first question was not directly addressed in the *Woolwich* case itself, although this could be because it was regarded as axiomatic that a statutory recovery right applying to the same payments as a common law right would displace the common law unless the contrary could be shown to have been the intention of Parliament. Glidewell LJ did not address the relationship between the statutory provisions for recovery and the restitutionary claim which Woolwich were seeking to advance. Butler-Sloss LJ's judgment[5] suggests that she considered that a statutory provision which applied to the case in issue would be exhaustive of the taxpayer's recovery rights.[6] Ralph Gibson LJ considered this issue briefly.[7]

7.5 In the House of Lords, Lord Goff concluded that the statutory recovery provisions found in TMA 1970, section 33 did not apply to Woolwich's case, since the section presupposed a valid assessment. Lord Goff appeared to accept that where the statutory recovery rights applied, they would be exhaustive of the taxpayer's rights.[8] Lord Slynn stated that the fact that Parliament had legislated extensively in this area did not mean that a common law recovery right could not be held to exist,[9] and seemed to recognise that the existence of legislative recovery rights would render it unnecessary to rely on the common law, thus arguably supporting the theory that express legislation displaced the common law.[10] Lord Browne-Wilkinson did not address the issue, and Lords Keith and Jauncey (like Ralph Gibson LJ) drew

[4] Consultation Paper No 120, para 3.38. These questions have also been addressed by Beatson "Restitution of Taxes, Levies and Other Imposts" (1993) 109 LQR 401, 419-421. The second question arises as a result of remarks by Butler-Sloss LJ in *Woolwich* [1993] AC 70, 141 G-H.

[5] [1993] AC 70, 141; quoted at para 7.6 below.

[6] This was approved by Lord Goff: [1993] AC 70, 169.

[7] [1993] AC 70, 132 B.

[8] [1993] AC 70, 169-170. See also 177 (referring to cases where public authorities demand moneys as a result of misconstruction of a statute or regulation): "...cases of this kind are generally the subject of statutory regimes which legislate for the circumstances in which money so paid either must or may be repaid".

[9] [1993] AC 70, 200 B-C.

[10] [1993] AC 70, 200. Lord Slynn said "Because of the other legislative provisions dealing with repayment of various taxes it seems in any event that the number of cases where any principle of common law would need to be relied on is likely to be small".

support for their rejection of a common law right of recovery from the fact that the existing statutory recovery rights had been framed against an assumption that no such right existed.[11]

7.6 The second question was set out in our consultation paper, which discussed whether the legislative rights of recovery could be said to extend only to sums paid under regulations which were *intra vires* or whether they extended to sums paid directly under the statute itself. In the Court of Appeal in the *Woolwich* case, Butler-Sloss LJ considered the recovery provisions in TMA 1970 and stated that the legislative structure which governed taxation only provided for repayment of overpayments under intra vires regulations. She said that:

> No structure is in place to deal with the demand for and payment of tax which has been unlawfully demanded under legislation found to be ultra vires. To deal with that eventuality the courts are thrown back upon the common law and precedent.[12]

Butler-Sloss LJ clearly believed that none of the existing statutory recovery rights to which she had been referred dealt with the repayment of amounts demanded ultra vires.

7.7 As far as TMA 1970, section 33, was concerned, Lord Goff considered that sums paid to the Revenue in response to ultra vires demands were not recoverable under the section, since it presupposed a valid "assessment" to tax.[13] Lord Goff preferred the view of Butler-Sloss LJ on this point to that of Ralph Gibson LJ.[14] His Lordship's remarks were confined to the statutory provision under consideration[15] but generalising from them, he may have intended to lay down a rule that where a statutory provision either expressly or impliedly limits its application to, or is only capable on its proper construction of being applied to, overpayments of taxes otherwise lawfully demanded, it cannot then be argued that the provision permits the recovery of sums demanded ultra vires.

7.8 Where a statutory provision allows for the recovery of amounts paid by way of tax

[11] [1993] AC 70, 161 and 193.

[12] *Ibid*, 141.

[13] [1993] AC 70, 169. This is one of our principal criticisms of TMA 1970, s 33: it does not apply when no "assessment" has been made: see para 9.24(1) below.

[14] Cf Consultation Paper No 120, para 3.38. We said "It is surely arguable that the statutory remedy applies whenever there has been payment of a sum which, under the statute, is not due, although such payment in a sense is *ultra vires*". This was however qualified in relation to TMA 1970, s 33, because the reference there to an "assessment" could presuppose a valid, final and conclusive assessment.

[15] TMA 1970, s 33.

which were not "due",[16] in our view different considerations will apply. We can see no reason why such a provision should not apply to overpayments of tax demanded ultra vires the revenue authorities, and there seem to us to be policy reasons why it should do so.[17] There may be several reasons why an amount is not "due": the revenue authorities or the taxpayer may have made errors in their calculations, there may have been errors on the part of either the authority or the taxpayer in claims to reliefs and allowances. Similarly, if the revenue authorities had no lawful basis on which to claim an amount from the taxpayer, it can properly and ordinarily be said that that amount was not "due" from the taxpayer.

[16] Eg Value Added Tax Act 1994 ("VATA 1994"), s 80 (previously Finance Act 1989, s 24).

[17] If the provision does not apply, claims for the recovery of overpaid tax must be brought at common law, so that the specialist experience of the tax tribunals will be unavailable, the cost of the claim to both the taxpayer and the revenue authorities will be greater, and the statutory provisions regarding payment of interest on disputed tax claims will not apply.

PART VIII
THE CASE FOR REFORM

Proposals in our Consultation Paper

8.1 In our consultation paper we provisionally proposed the enactment of a right to restitutionary relief against payments made pursuant to an invalid demand by a public authority or where payment was not otherwise due because of a breach of public law. We consulted on three groups of issues. First, we asked for views on the range of bodies and types of payments to which such a right should apply; secondly, we asked whether public authorities should have power to enter into binding compromises or settlements of disputed liability under such demands; and finally, we asked whether a general restitutionary right should be limited by defences intended to deal with any perceived problem of disruption to public finance. We suggested when we addressed this final group of issues that the defences of change of position, short limitation periods or "passing on" might be appropriate for this purpose.[1]

Responses to Consultation

8.2 Our consultation paper predated the decision of the House of Lords in the *Woolwich* case.[2] The circumstances against which our provisional recommendations were made have altered dramatically as a result of that decision, and this has obviously affected the consultation. For example, one of the reasons given in our consultation paper for considering the enactment of a statutory recovery right for all taxes or charges levied ultra vires by public authorities was the possibility that the House of Lords would reverse the Court of Appeal's decision that a restitutionary right existed.[3] Having said this, however, the responses we received on consultation have been enormously helpful. We referred above to our meetings with representatives of bodies who were particularly likely to be affected, whether directly or in their representative capacities, by any proposed reforms to the law governing the recovery of charges levied ultra vires. Our purpose was to discuss in more detail the concerns which some of these bodies had expressed to us on consultation.

8.3 There was almost unanimous support from consultees for our provisional proposal that there should be a wide general right to recover ultra vires levies from public bodies. Most consultees agreed with our provisional proposal that recovery rights should be embodied in a special public law rule allowing recovery of all overpayments (though possibly subject to defences) rather than being dependent on the private law grounds for restitution - even if the private law were reformed to allow recovery for mistake of law. It should also be said that there was support for

[1] Consultation Paper No 120, paras 5.6, 3.87-3.90, 3.65-3.86.

[2] Judgment was given on 20 July 1992.

[3] Consultation Paper No 120, para 3.53.

our proposals for rationalisation of the existing statutory recovery provisions.

8.4 Most of those consultees who addressed the issue of defences to the proposed general restitutionary right agreed with our provisional proposal that public authorities should continue to be permitted to make contractual compromises of disputed claims.[4] Similarly, most of those responding agreed that the defence of change of position[5] should not apply to public authorities. Finally, there was a division of opinion on whether short limitation periods or other defences should be enacted in order to deal with any perceived problem of disruption to public finances.

Factors Affecting our Provisional Approach

8.5 Since the close of our consultation the law has continued to develop. By far the most important development was, of course, the *Woolwich* case itself. The other developments in the common law are discussed at paragraphs 1.10 and 2.39-2.41 above. These developments, together with the comments made by consultees have led us to reconsider our provisional proposals for reform.

8.6 The actual and likely potential scope of the *Woolwich* principle had to be considered.[6] Faced with this newly-established right at common law permitting the recovery of taxes and other charges unlawfully exacted, we were obliged to consider afresh the available options for an exercise of clarification and definition, which we began, in the wake of the *Woolwich* decision, to see as our principal responsibility.[7]

8.7 There seem to us to be three possible approaches to the further development of the *Woolwich* rule. The first is simply to permit the rule to be developed by the courts, without any statutory intervention, whether in the field of central and local government taxation, or generally. The second is to seek to codify the *Woolwich* principle together with defences to it. The third is to set out the rule, together with defences to it, within a limited sphere, while leaving its precise scope to be established by the courts at common law. We call these three approaches the "common law development", "statutory codification" and "specific statutory provisions" approaches respectively.

Common Law Development Approach

8.8 In our Consultation Paper we identified the simple abrogation of the mistake of law rule and the application of the resulting private law to ultra vires public authority

[4] See Section B, paras 2.25-2.38 above and see paras 10.31-10.35 below.

[5] See Section B, paras 2.17-2.23 above and see paras 11.10-11.18 below.

[6] See paras 6.32-6.42 above.

[7] See *Woolwich Equitable Building Society v IRC* [1993] AC 70, 176-177, per Lord Goff.

receipts as one possible option for the reform of the law.[8] This option met with little approval on consultation. The majority of consultees who addressed the issue favoured our alternative of a statutory right to recover taxes or other charges paid ultra vires. Consultees were, of course, considering the option of common law development in the absence of an established right to restitution at common law.

8.9 The *Woolwich* right remains undefined in scope, and free of any particular safeguards[9] against its operation. Now that the existence of the right has been declared, it is these areas which common law development would need to address. Although we will later recommend common law development to establish the limits of the scope of the *Woolwich* right at its margins, we cannot recommend that the entire development of the rule be left to the courts.

(a) COMMON LAW DEVELOPMENT APPROACH: SCOPE OF THE RULE

8.10 We believe that the *Woolwich* right is capable of providing for the recovery of all amounts demanded by way of taxes, imposts, charges or other levies by any body acting under a statutory authority to charge in excess of that authority.[10] It is also possible that it may extend to all taxes, imposts, charges or other levies demanded by any body in breach of public law.[11] Since the practical difference between these two approaches to the definition of the scope of the *Woolwich* right is likely to be small, we consider that this task can safely be left to the common law. We take this view for two reasons. First, a statutory definition of the rule's scope could be productive of greater uncertainty than any litigation at common law to establish the margins of the principle.[12] Secondly, the rule in *South of Scotland Electricity Board v British Oxygen Co Ltd (No 2)*[13] means that most unlawful charges levied by public utilities will be capable of being recovered as paid under compulsion. It is charges levied by the newly privatised but regulated utilities which are most clearly at the margins of the *Woolwich* right.

(b) COMMON LAW DEVELOPMENT APPROACH: SAFEGUARDS

8.11 It has always seemed to us to be clear that the *Woolwich* right, as part of the law of restitution, will be subject to the operation of standard restitutionary defences. As

[8] Consultation Paper No 120 para 3.59. See also Burrows "Public Authorities, Ultra Vires and Restitution" in Burrows ed, *Essays on the Law of Restitution* (1991) 39, 60-63.

[9] Apart from the standard restitutionary defences: see generally Goff and Jones Chapters 39-43.

[10] See paras 6.32-6.42 above.

[11] See para 6.42 and 6.44-6.45 above.

[12] We discuss below the difficulties of framing any definition of the rule, based on the "public" nature of the charging body, the "statutory" origin of the power to charge, or generic references to the types of bodies falling within the scope of the rule: see paras 8.16-8.19 below.

[13] [1959] 1 WLR 587; 1959 SC 17 (HL).

the law stands at present, these defences are change of position,[14] submission and compromise,[15] and estoppel.[16] We considered whether further safeguards against the operation of the principle were necessary, and if so, in what context these should be applied. We found it difficult to justify the application of further safeguards to the right without any reference to the need of the particular payee for protection against it. In certain areas, genuine concern existed on the part of particular payees or groups of payees that the operation of the *Woolwich* right should be restricted. We considered these areas carefully, and as will be seen later, we recommend the adoption by statute of safeguards against the unrestricted operation of the right in some of them.

(c) COMMON LAW DEVELOPMENT: CONCLUSIONS

8.12 In conclusion therefore, we do not believe that leaving the further development of the *Woolwich* rule entirely to the courts is either desirable or that it reflects the intentions of the House of Lords in the *Woolwich* decision itself, at least in the field of central and local government taxation.[17] It would lack the certainty which is essential in the field of revenue law for the protection of the interests of both the citizen and the state. Further, it would leave inconsistent statutory and common law recovery rights in place, and leave the scope of defences to the *Woolwich* recovery right entirely unclear.

Statutory Codification Approach

8.13 The second approach is to codify the *Woolwich* right, and the defences to it. This would involve the enactment by statute of a comprehensive right of recovery, together with defences to that right. These defences could be of general application, or could address specific categories of payee bodies separately. We considered this option very carefully. First, it seemed most consistent with our provisional proposals for the reform of the law in this area[18] which were supported by consultees. We said that our preferred option was to have a special public law rule which would entitle payers of charges demanded ultra vires by public authorities to recover them, possibly subject to a number of defences.[19] Secondly, it may appear to be the approach which is least likely to result in litigation, either to establish the scope of the right or of the defences to it.

[14] See Section B para 2.17ff above and paras 11.10-11.17, 11.31 below.

[15] Including such allied principles as "voluntary payment" and "payment to close a transaction": see Section B, para 2.25ff above.

[16] See Section B, para 2.24 above.

[17] Particularly in the light of Lord Goff's invitation to us to reformulate the law in cooperation with the relevant authorities, and Lord Keith's and Lord Jauncey's insistence that this problem was one for legislation, and not for the common law: see [1993] AC 70, 161, 177 and 196.

[18] Consultation Paper No 120, para 5.2, provisional conclusion (c).

[19] *Ibid.* paras 3.61-3.64.

8.14 Notwithstanding this, however, we do not now recommend the enactment of a wide ranging statutory provision governing the recovery of all taxes, charges or levies raised by all public or quasi-governmental authorities. We are concerned that clashes between such a right and the existing statutory framework for the collection of most central and local government revenue might occur. The introduction of a wide ranging statutory right of recovery would require a thorough review of the entire statute book, and detailed consideration of the relationship between any such statute and the existing statutory provisions for recovery. Although avoiding comprehensive statutory treatment of the recovery right may seem at first to be more likely to produce litigation, we believe the contrary to be the case. This is because of the difficulties of definition of the scope of any codified right in legislation.

8.15 First, the scope of a wide ranging recovery right would have to be defined by reference to some touchstone, whether the nature of the charging body ("public" or "private"); or the origin of the power to charge ("statutory" or "common law"). Secondly, such a wide ranging right would make it difficult for us when determining the defences to be recommended to distinguish between different categories of charging bodies requiring different levels of protection from disruption of their finances.

(a) DIFFICULTIES OF DEFINITION: "PUBLIC" AND "PRIVATE" BODIES

8.16 We gave detailed consideration to the possibility of a special statutory restitutionary right based on the "public" nature of the charging body. We were assisted in this by the commentary,[20] and by our continuing close cooperation with the Scottish Law Commission.[21] It is, of course, arguable that the range of bodies falling within what might be termed "public" law is now sufficiently precise as a result of a number of indicators to render this term capable of inclusion in an English taxation statute.[22] However, we took account of the difficulties experienced by the English courts in determining the precise delimitation between "public" and "private" bodies for the purposes of the procedural exclusivity established in judicial review by *O'Reilly v Mackman.*[23] It was also clear that difficulties would be experienced at the margins of a wide ranging statutory recovery right based on the "public" nature of the charging body. Certain types of charging body, such as privatised utilities, are

[20] See J Beatson "Restitution of Taxes, Levies and Other Imposts" (1993) 109 LQR 401. See also Burrows in Burrows (ed) *Essays on the Law of Restitution* (1991) 39, 60-63; Birks "Restitution from the Executive" in Finn (ed) *Essays on the Law of Restitution* (1990) 164; Birks "When tax is paid under a void authority: a duty to repay?" [1992] PL 580.

[21] For the only published statement of the Scottish Law Commission's position, see SLC Discussion Paper No 95 *Recovery of Benefits Conferred under Error of Law* (Vol I) paras 1.6-1.9. We have of course maintained a continuing correspondence with the SLC on this point, among others, and thus have received from them some further indications of their grounds for disapproving of the "public/private" dichotomy.

[22] See Beatson "Restitution of Taxes, Levies and Other Imposts" (1993) 109 LQR 401, 413-415.

[23] [1983] 2 AC 237.

regarded by the law as private for certain purposes and as public for others.[24] Finally, the views of the Scottish Law Commission, which did not regard it as an acceptable development in the law of Scotland, influenced us against such a solution.[25]

(b) DIFFICULTIES OF DEFINITION: ORIGIN OF CHARGING POWERS

8.17 We also considered a recovery right based on the statutory origin of the particular power to charge. This would have had the advantage that it would have been unnecessary to consider the "public" character of the particular body levying the charge. Instead, the courts would focus on the origin of the charging power, which at first sight appears a more certain criterion. Whether a particular power is conferred by statute or not would appear initially to be a matter which is reasonably capable of a precise and certain answer. However, after a thorough review, including a detailed examination of local legislation with the assistance of our Statute Law Revision Team,[26] we decided that we could not recommend such a provision.We discuss these difficulties further in paragraphs 16.4-16.8 below, where we consider the possibility of a residual recovery right for charges not covered by specific taxation legislation.

8.18 The second difficulty which caused us to decide against this approach was that of determining when a particular charge was purely statutory in origin. Powers to charge may originate at common law,[27] but be limited by statute. This mixture of statutory and common law provisions would, in our view, pose severe problems in defining the scope of a recovery provision based on the origin of the power to charge.[28] We considered refining the principle, so that recovery would be available for charges *made and under no other circumstances exigible* except under the provisions of a statute or subordinate legislation. This would omit situations where individuals

[24] Privatised utilities for example may be regarded as sufficiently under governmental control to be subject to the provisions of "public" EC law - see *Foster v British Gas plc* [1991] 2 AC 306; cf the Public Procurement Directives, para 16.6 below.

[25] Scottish Law Commission No 146 28th Annual Report 1992/93 para 2.23. Any solution which did not result in a uniform approach across the United Kingdom to taxation law would be unlikely to command support.

[26] In relation to the local and private Acts of Parliament passed between 1900 and 1939. The results of this review are detailed at para 16.7 below.

[27] For example, for work done or services rendered at the request of another, where the common law will normally imply a contract for repayment: see Goff and Jones p 18-19, *Ellis v Hamlen* (1810) 3 Taunt 52,53, 128 ER 21.

[28] For example, charges imposed on individual underwriting members of Lloyd's of London by regulations made by the Council of Lloyd's under Lloyd's Act 1982. Although underwriting members *contract* to obey the provisions of the Act and regulations made thereunder, it could be argued that the source of the authority to make the charge is statutory, and if the levy in question is ultra vires the statutory powers of the Council, it would seem to fall within the scope of such a right. There are countless examples of provisions within local or private Acts of Parliament which affect the powers of a wide variety of bodies to charge for the services they provide or administer.

contract to abide by the provisions of private statutes and regulations constituting statutory corporations, and where their obligations to pay the charges set by those corporations result from these contractual agreements. It would not omit charges demanded under powers conferred directly by Acts of Parliament or regulations made thereunder, which are demanded from the individual pursuant to the statutory authority alone.

8.19 It seemed to us, however, that the distinction might still be difficult to administer in many realistic situations. For example, certain bodies with statutory power to provide certain services and to levy charges for these might nonetheless enter into what purported to be contractual arrangements with those using the services in question. Where the sources of the power to charge overlapped, it seemed to us that it would be difficult to determine whether the charge was exigible solely because of the statutory rights of the charging body, or because of a combination of that body's contractual and statutory rights. Similar doubts were expressed to us by the Scottish Law Commission, and in some of its published material.[29]

Specific Statutory Provisions Approach

8.20 The third possible approach is to incorporate the rule to the fullest extent possible into the specific statutory provisions dealing with the recovery of overpaid central and local government taxes, while at the same time establishing limitations ("prudential safeguards" or defences) to its exercise. This would be done for those taxes and charges which clearly fall within the scope of the *Woolwich* principle, leaving for consideration separately those taxes and charges on which disputes as to the applicability of the general restitutionary right exist. This would enshrine the right (within its most likely area of operation), together with the applicable defences, in statute, thus substantially removing the uncertainties inherent in the first and second approaches. It seems to us that any defences to the exercise of the right must result either from fundamental principle, or from a perceived need to protect the finances of public bodies from disruption.[30] It is this final, third, approach which we favour. Our recommendations for reform will, therefore, take the form of a series of specific amendments to and replacements of existing statutory recovery provisions

[29] Scottish Law Commission Discussion Paper No 95 "Recovery of Benefits conferred under Error of Law", paras 1.7-1.9, Scottish Law Commission Team Position Paper presented to SLC/Strathclyde University seminar, Edinburgh, 23 October 1993, pp 94-95.

[30] It must be borne in mind that the need to protect the public revenue from disruption does not command universal support. In *Air Canada v British Columbia* [1989] 1 SCR 1161, the Supreme Court of Canada was divided on the issue. The Irish Supreme Court in *Murphy v Attorney General* [1982] IR 241 seems to have accepted its pressing importance without much substantive discussion or argument. United States authorities cited in both those cases indicate a widely differing approach in different US jurisdictions. Lord Goff, in *Woolwich* thought that the introduction and formulation of any safeguards was preeminently a matter for the legislature, while Lords Jauncey and Keith in *Woolwich* and Lord President Clyde in *Glasgow Corporation v Lord Advocate* (1959) SC 203 used the absence of safeguards as a reason for justifying their failure to introduce a right of recovery.

in the case of the principal central and local government charges. These will seek to take account of the machinery for collection of these charges and, wherever practical, achieve uniformity of recovery rights in respect of the taxes concerned.

8.21 In view of our belief that the scope of the *Woolwich* principle extends beyond central and local government charges to all charges levied in excess of statutory authority, we considered a statutory right of recovery, following a similar pattern, for the remaining charges thought to lie within its scope. We have concluded for the reasons set out at paragraphs 16.1 to 16.10 below, that any attempt to introduce such a residual statutory recovery right would not be desirable. We considered the possibility that such a provision, which would endeavour to set out the categories of bodies to which it would be intended to apply, could be modelled on the "list" approach adopted by the statutory instruments enacting the European Community public procurement directives into UK law.[31] Such a provision could contain a power to add to the list of categories of bodies by statutory instrument. It would not then be proposed that the common law *Woolwich* principle should be abolished, but that it should remain in existence for cases not covered by the specific statutory regimes in place, subject to general restitutionary defences.

8.22 However, when considering the application of the *Woolwich* principle outside the field of central and local government taxation, we felt that the practical importance of the recovery provision in such areas would be marginal.[32] We also considered that failure to define the scope of the recovery provision in relation to such bodies was unlikely to leave any significant potential for dispute, and that the matter could be left to common law development.[33]

Factors Influencing the Shape of Reform

8.23 A number of factors have determined the precise shape of our recommendations. These are outlined in the following paragraphs.

(a) EXISTING FRAMEWORK OF REVENUE LAW

8.24 First, a complex body of revenue law already exists. This body of law inevitably interacts with the operation of the *Woolwich* principle. Statute provides a mechanism for the calculation of a taxpayer's potential liability to tax; for the assessment of, and appeal against, that liability; and for repayment and recovery of overpayments. In most cases, the statutory principles have developed over many years in successive

[31] SI 1991/2680, SI 1991/2679 and SI 1992/3279. The idea grew from a consideration of other possible lists: of types of charges, or charging authorities. See Beatson "Restitution of Taxes, Levies and Other Imposts" (1993) 109 LQR 401, 426-427.

[32] The principal example of widely levied non governmental charges are charges levied by utilities. Most will be recoverable if paid and not due because of the wide concept of compulsion adopted by *South of Scotland Electricity Board v British Oxygen Co Ltd (No 2)* [1959] 1 WLR 587; 1959 SC 17 (HL).

[33] See para 6.15 above and paras 16.9-16.10 below.

Finance Acts, and have been the subject of several consolidation exercises. It would be undesirable, in the absence of a more general review, for us to recommend any substantive changes to these mechanisms, which have resulted from the work of governments and Parliaments across many years. Thus, the guiding principle for our work in the field of taxation has been to work within the existing statutory framework for the collection of the tax in question and to seek to make recommendations within that framework to take account of the newly established *Woolwich* right.

8.25 One consequence of this is that claims for recovery of overpaid tax, whether for tax paid as a result of mistake or as a result of ultra vires demands, should in our view generally be brought before the specialised tax tribunals already provided by Parliament for the determination of issues of liability to most taxes. This seems to us to be logical, and in the interests of both taxpayers and public bodies alike. Taxpayers will benefit from the simplicity of procedure in statutory tribunals and from their relative accessibility when compared with the High Court. All parties will benefit from the lower costs involved in defending actions before statutory tribunals and from the specialised experience of the tribunals in question. We discuss this point in more detail below.[34]

8.26 A further consequence of our reluctance to disturb existing machinery for the assessment of liability to the principal central government taxes results from our belief that the finality of these procedures should generally be upheld. Statutory provisions exist in the case of a number of taxes and charges giving rights of appeal against assessments of liability to the tax or charge in question. In principle, it seems to us that where a taxpayer is capable of relying on a mistake, or the invalidity of a charging instrument, at the appeal stage as a defence to such an assessment, he should be obliged to raise this defence; rather than seeking to rely later on a claim for recovery, which may involve a liability on the Revenue for interest. Most taxpayers, given the opportunity, would choose to contest an assessment prior to payment of a tax liability, rather than to pay and then to seek repayment later. However, we recognise that in many cases taxpayers will be obliged to make payment unless an application for postponement of their liability under TMA 1970, s 55 is successful. The situations where a taxpayer does not raise all available grounds on an appeal against an assessment will be those where he is not aware either of (i) the facts giving rise to the defence, or (ii) the significance of those facts, or (iii) the existence of the right of appeal, prior to the expiry of the time limit for appeal. Unless there is some such reason for not exercising a statutory remedy we consider that it should be a defence to a claim for the recovery of an overpayment that there has been a failure to exhaust statutory remedies. It is instructive to discuss the proposed defence in some detail.

[34] See paras 9.15-9.20 below.

8.27 There is an analogy between the proposed defence of "failure to exhaust statutory remedies" and the existing principles of *res judicata*. The principle of *res judicata* means that "[a] judicial decision is conclusive as between the parties".[35] The principle also has a wider meaning - the process of the court cannot be abused.[36] This proposition has been judicially considered on several occasions, and has two rather disparate aspects. The classic statement of the law is in the judgment of Wigram VC in *Henderson v Henderson*:[37]

> [t]he plea of res judicata applies, except in special cases, *not only to points of law upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time* (emphasis added).[38]

8.28 Sir Nicolas Browne-Wilkinson V-C considered the doctrine of *res judicata* in *Arnold v National Westminster Bank*,[39] and distinguished clearly between its aspects of "cause of action estoppel" and "issue estoppel". Cause of action estoppel seeks to prevent a litigant from raising the same action a second time. He said this aspect of the *res judicata* rule is absolute, and is based on the public interest in seeing an end to litigation. He defined issue estoppel as that aspect of the doctrine of *res judicata* which prevents the same matter from being tried in two different actions.

8.29 In *Commissioners of Inland Revenue v Adams*[40] the Inland Revenue raised assessments to income tax and claimed penalties. The defendant did not appeal against the assessments and he presented no defence to the High Court in recovery proceedings for the tax due under those assessments. However, before the Court of Appeal the defendant contended that the penalty proceedings were invalid for a number of reasons. The Court held that the defendant was estopped from raising a defence as he had failed to raise the matter before the earlier proceedings for recovery of taxes.

[35] L Rutherford and S Bone *Osborn's Concise Law Dictionary* (8th Ed, 1993), p 289.

[36] Supreme Court Practice 1993 Ord 18, r 19.

[37] (1843) 3 Hare 100, 115; 67 ER 313, 319.

[38] See also, *Hoystead v Commissioner of Taxation* [1926] AC 155; *Greenhalgh v Mallard* [1947] 2 All ER 255; *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581; *Mills v Cooper* [1967] 2 QB 459, 468 per Diplock LJ "a party to civil proceedings is not entitled to make, as against the other party, an assertion whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties...and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him".

[39] [1989] Ch 63, affirmed [1990] Ch 573 (CA) [1991] 3 All ER 41 (HL).

[40] (1973) 48 TC 67.

As this case illustrates, this broad principle of *res judicata* has already been held to be applicable in the field of tax law.

8.30 The analogy between the application of the principle of *res judicata* in this field (which is an issue estoppel) and the proposed defence of non exhaustion of statutory remedies is not quite exact, as an issue estoppel properly so called will only apply as between one set of court or tribunal proceedings and another subsequent set of court or tribunal proceedings. It may not apply to prevent a person who had an opportunity to raise a particular point by way of appeal proceedings and did not, from raising that point in subsequent proceedings.[41]

8.31 Where the *vires* of a demand for a tax or charge is in issue between the parties to a claim for repayment of that tax or charge, the ultra vires nature of the demand will probably not have been known to them when the tax was paid. Thus, an issue estoppel strictly so called seems to us to be unlikely to apply as between appeal proceedings against an assessment to that tax or charge and the claim for repayment of it. Although the defence of issue estoppel might not strictly apply where a taxpayer had been given an opportunity to raise a particular defence by way of appeal proceedings against an assessment to tax and had unreasonably failed to do so, we were fortified in our view that it should, in general, apply by a number of factors.

8.32 First, we drew comparisons with the courts' discretion in judicial review proceedings to refuse relief for failure to pursue available statutory remedies.[42] Secondly, we took account of the fact that some commentators clearly regarded the defence as being one which might properly be applied to a statutory recovery right.[43] Thirdly, we gave due weight to the fact that administrative convenience favours the determination of all matters arising between a particular administrative body and the citizen in one set of proceedings before a competent tribunal, so far as this can reasonably be achieved without injustice to the citizen. We have addressed the defence separately for each statutory provision we recommend, but the foregoing principles remained prominent in our minds.

[41] In addition, the doctrine of issue estoppel is qualified by exceptions. The Vice Chancellor in *Arnold v National Westminster Bank plc* [1989] Ch 63 said that there were circumstances in which the injustice of not allowing the matter to be relitigated outweighed the hardship of relitigation. In summary, these were where fraud or collusion could be established in relation to the first proceedings, where the first judgment was a judgment in default, and where new material (whether issues of fact or of law) became available. This last head would permit a plaintiff to relitigate where there had been a judicial change in the law, but only where to refuse to do so would cause grave injustice to the plaintiff.

[42] See *R v Chief Constable of Merseyside Police ex p Calveley* [1986] QB 424; *R v Secretary of State for Home Dept, ex p Swati* [1986] 1 WLR 477; *R v Birmingham City Council ex p Ferrero* [1993] 1 All ER 530; see generally Lewis *Judicial Remedies in Public Law* (1992) p 297-309; also para 9.15 n 33 below.

[43] Goff and Jones, p 551-552.

(b) COMMONALITY OF APPROACH

8.33 A further consequence of the complexity of existing revenue law is that the legislative amendments which we recommend may differ slightly from one another. They are, however, guided by a similar philosophy. Differences will reflect the differing schemes for the assessment and collection of the taxes in question and characteristics peculiar to that tax.[44]

(c) DEALING WITH POINTS RAISED BY THE SCOTTISH LAW COMMISSION AND THE INLAND REVENUE

8.34 We were concerned to ensure that any reforms to taxation law which we proposed would be capable of being uniformly applied across the United Kingdom, even though our statutory duty is confined to recommending reforms to the law of England and Wales. For this purpose, we have endeavoured to ensure that any reforms we proposed would be broadly capable of application in Scotland. Thus, our continuing correspondence with the Scottish Law Commission led us away, for example, from recommending that the legislation define the scope of the *Woolwich* right by reference to the "public" nature of the payee or the sum levied.

8.35 Similarly, the Inland Revenue's first Response to our consultation paper suggested that we had failed to attach sufficient importance to the mechanism for assessment of and appeal against liability provided by Parliament for the benefit of taxpayers. The Inland Revenue also emphasised the importance of adequate protection being available for the public finances against any disruption which might result from the repayment of taxes unlawfully demanded. Taking careful account of these points, we believed that a legislative recovery scheme which was specifically formulated to work within the current legislative framework would be more likely to command approval from bodies concerned with the day to day administration of the taxation system, as not involving fundamental changes to the existing machinery of assessment to liability.

8.36 Further, we considered the need for defences to the right to recovery of overpaid income taxes carefully in the light of the Inland Revenue's representations to us on consultation. As a result, we have formulated a range of defences with great care, in what became a difficult exercise of balancing the rights of the citizen taxpayer against those of the state. The proposed defence of non exhaustion of statutory remedies in particular is aimed at achieving a balance between the administrative need to ensure finality of the assessment procedure, and the moral and legal need to ensure that the citizen has an adequate and full opportunity to appeal against a disputed liability to tax, and obtain repayment of tax paid unlawfully in appropriate circumstances. These defences, and the reasoning by which we selected and formulated them, are set out in the next section.

[44] In the case of VAT, for example, the substantial involvement of EC law alters the presumptions underlying a recovery right, and makes its boundaries difficult to define because of the evolving nature of EC law; see paras 14.1-14.5 below.

8.37 Some may consider that we have leant heavily on the side of the state in formulating defences to the recovery right. We believe, however, that a number of powerful policy considerations militate in some circumstances against widespread restitution of otherwise unlawful taxes. Most commentators have accepted the need for prudential safeguards to the right of recovery over and above the general restitutionary defences. Any such limitations to that right will appear to some to be unjustifiable in principle, and to others to be insufficiently protective of the national revenues. However, we would point out in this connection that the House of Lords clearly seemed to regard limitations on the recovery right they declared in the *Woolwich* case to be necessary.

8.38 We now turn to consider the legal basis of, and the statutory mechanism for collection of, the main taxes raised by central and local government, and will recommend changes to those mechanisms where thought appropriate to accord with the emergence of *Woolwich*, the removal of the mistake of law bar and the considerations in paragraphs 8.23 to 8.35 above. It will be seen that we draw a clear distinction between those principles which should apply to direct taxes (generally administered by the Commissioners of Inland Revenue), and those which should apply to indirect taxes (generally administered by the Commissioners of Customs and Excise).

8.39 In order to establish the principles which should apply to direct taxes we undertook detailed consideration of the principal direct tax (income tax). We have not set out in this Report the detailed account of the collection and assessment machinery for income tax which we found it necessary to prepare in forming our policy, but an abbreviated version, comprising only those principles which we believe it is essential to understand in order to comprehend the detail of our proposed reforms, is given. Income Tax (the principles for recovery of which also apply to Corporation Tax, Capital Gains Tax and Petroleum Revenue Tax) caused us most difficulties due to the narrow scope of the existing provisions.

PART IX
THE MODEL SCHEME IN RELATION TO INCOME TAX

Introduction

9.1 We have explained our general approach to reform in paragraphs 8.20 to 8.36 above. Our purpose is to recommend specific amendments to taxation legislation to provide for the recovery of taxes or charges overpaid due to a mistake (whether of law or of fact) or due to ultra vires demands on the part of the taxation authorities. Although the decision in *Woolwich Equitable Building Society v IRC*[1] dealt only with the recovery of amounts overpaid due to ultra vires demands on the part of the taxation authorities, we do not believe it to be practical for amendments to the taxation legislation to avoid dealing with overpayments resulting from mistakes of law or of fact.

9.2 First, the existing statutory provisions were framed against a common law background which denied recovery for payments made under a mistake of law save in exceptional circumstances. Secondly, it is difficult to say when an ultra vires act on the part of a taxation authority may give rise to a mistake of law on the part of the payer. To provide different statutory regimes for the recovery of payments of taxes or charges made under a mistake, and made due to ultra vires demands means that the relationship between the two would have to be carefully defined. Thirdly, for reasons which we will later develop,[2] we believe the considerations which should motivate the defences to mistake recovery claims, and ultra vires recovery claims are similar.

9.3 Fourthly, to apply the common law on recovery of payments made under a mistake, whether of law or fact, to taxation would be to disturb the existing statutory scheme and to permit actions to be brought at common law against the Commissioners of Inland Revenue.[3] This would expose the public revenues to protracted and uncertain litigation in what remains a difficult area of law. Finally, Parliament has at all times seen fit to limit recovery rights for taxes paid by mistake, whether of law or of fact. If limitations on a *Woolwich*-type claim are justified in the interests of avoiding disruption to public finances, we cannot see that limitations are not equally justifiable in cases of payments by mistake.[4]

[1] [1993] AC 70.

[2] See paras 10.1-10.8 below.

[3] It would also lead to differences between England and Wales, on the one hand, and Scotland on the other, since the underlying common law differs.

[4] Indeed many payments in response to ultra vires demands may be caused by a mistake of law on the part of the taxpayer.

9.4 In the case of income tax, we have based our recommendations on the law governing the assessment of liability to income tax as it stands prior to the introduction of the self-assessment system. This system, although part of the Finance Act 1994, will not be brought into full operation until the taxation year 1996/1997.[5] It is understood that the self-assessment system is to be developed further in legislation prior to its formal introduction.[6] Therefore, we found our work in this area especially difficult. We were faced with a statutory framework which we knew was shifting, and aspects of which had yet to be brought into operation. Accordingly, we cannot be sure that the scheme which we recommend will accord in every detail with the new system of self-assessment to income tax as it will ultimately be brought into operation. However, our recommendations reflect the principles which should in our opinion guide those responsible for implementing reforms to the legislation governing recovery of income tax, and indeed other taxes.

9.5 In relation to inheritance tax, the statutory framework is not, as is the case with income tax, in the process of substantial amendment. For the reasons given in paragraph 9.4, and because implementation would be in a Finance Act, we append draft clauses rather than a Draft Bill to reflect our recommendations for the reform of the recovery provisions for overpaid direct and indirect taxes. We have chosen not to present a draft clause implementing our recommendations in relation to stamp duties, which we set out at paragraphs 13.12 to 13.23 below. References in the next parts of this Report are to the law in force as at 31 July 1994. We deal with the changes which will result from the introduction of self-assessment separately.

The Legislative Scheme

9.6 There are at present two methods by which income tax is collected from the subject by the Board of Inland Revenue - the first is by means of direct assessment (which is currently in a state of flux[7]) and the second is under the PAYE (Pay As You Earn) system.

9.7 The system of direct assessment to tax commences with the production of a return by the taxpayer. The law prescribes the situations where returns must be produced.[8] It also prescribes certain situations where a return must be produced by one person

[5] The self-assessment system was introduced first for corporation tax from 1 October 1993 - (where it is known as "Pay and File") - and will be introduced for Income Tax and Capital Gains Tax ("CGT") from the taxation year 1996/1997.

[6] See Butterworth's Finance Bill 1994 Handbook, p 483, and Inland Revenue Press Release issued with the Finance Bill 1994.

[7] A system of self-assessment of all non-PAYE taxpayers, instead of the current system whereby assessments are made by Inspectors of Taxes either on the basis of information supplied in returns or otherwise obtained (see post) or on the basis of estimates of income will be introduced from the taxation year 1996/1997: see paras 12.8-12.14 below.

[8] TMA 1970, ss 7, 8, 13, 14 and 72(1), (2).

on behalf of another,[9] or where information included in one taxpayer's return is to be used as the basis of an assessment which will then be made on another.[10]

9.8 The information which is provided will be used as the basis of an assessment to tax, whether of the taxpayer making the return or of some other taxpayer. The Inland Revenue also has further statutory powers permitting it to gather information which can be used as the basis of an assessment.[11]

Assessments

9.9 The next stage following the collection of information is the making of an assessment of liability to income tax. The Inland Revenue may make assessments of a taxpayer's liability under each Schedule,[12] but tax due from a company in respect of interest or annual payments[13] requires no assessment. Assessments are required to be based on the information provided in the return, if the person making the assessment (normally the Inspector) is satisfied as to its truth. If not, he may make an estimated assessment, and the onus is then on the taxpayer to establish on an appeal that this is wrong.[14] Special provisions exist in relation to assessments under Schedule A (rents and income from land).[15]

Time Limits for Assessment

9.10 There are complex rules governing the time limits within which assessments must be made, but essentially in all cases, save those of personal representatives assessed to tax in respect of the deceased or cases of loss of tax through the fault or neglect of the taxpayer, assessments must be made for any year of assessment ending within six years of the date of assessment. Provisions covering tax lost through fault or neglect permit the reopening of years of assessment up to 18 years before the date of assessment.

9.11 The assessment must then be served on the taxpayer in the manner authorised by the Taxes Acts.[16] The notice will state the time limit within which the taxpayer must

[9] For example, trustees or guardians; TMA 1970, s 72(1), (2).

[10] TMA 1970, s 8, 13, 14.

[11] TMA 1970, s 20A-C.

[12] Income Tax is still charged under a schedular machinery of assessment. The charges to tax are set out in the Income and Corporation Taxes Act 1988 ("ICTA 1988"), ss 1, 15-20.

[13] ICTA 1988, schedule 16, para 4 - this provision is worth bearing in mind, as the absence of an assessment has consequences later.

[14] *Norman v Golder* (1944) 26 TC 293.

[15] See *Whiteman on Income Tax* (3rd ed, 1988), para 29-03, p 1349. See ICTA 1988, s 15(1)(2), s 22 and s 32(2) & (3).

[16] For meaning, see TMA 1970, s 118(1). For provisions relating to service, see TMA 1970, ss 115(1) & (2).

appeal, and appeals are available in every case *where assessments are made.*[17] If the assessment is appealed, and the appeal is finally determined in favour of the Inland Revenue, or no appeal is taken within the time limited, the assessment becomes final and conclusive, subject to the right to claim repayment under TMA 1970, section 33 for "error or mistake".[18] If a taxpayer appeals successfully against the Inland Revenue's assessment, the Commissioners hearing the appeal have power, where they are satisfied that the taxpayer has been overcharged to tax, to reduce the assessment accordingly.[19] The taxpayer may apply under TMA 1970, section 55 for a postponement of his liability to pay the tax under the assessment pending the appeal.[20]

Appeals against Assessments

9.12 The Revenue system provides its own appeals mechanism, which is entirely statutory. The General and Special Commissioners of Income Tax exercise jurisdiction when, and only when, jurisdiction is given to them by the Taxes Acts; or statute generally. An appeal will lie to one or other body from any assessment to income tax under Schedules A, D or E[21] or under the Income and Corporation Taxes Act 1988 (hereinafter "ICTA 1988"), section 349 (tax charged on annuities

[17] It is not entirely clear whether an appeal is available against an assessment under Schedule C, should one be made. TMA 1970 s 31 provides that appeals are available in every case where an assessment is made, while ss 31(3), (4) assign jurisdiction to the Special and General Commissioners as appropriate. ICTA 1988 sch 3 (which contains the administrative provisions governing the making and collection of the Schedule C charge to tax) provides (at paragraph 6A(3)) that tax is payable fourteen days after a "Schedule C transaction" *"without the making of any assessment"*. However, at paras 6D(1)-(3) it is made clear that an assessment may be made even if tax has already been paid without an assessment and that the Board of Inland Revenue may make additional assessments where the chargeable person has paid less tax than he should. The assessment would be on the chargeable person - the paying or collecting Bank - and it is unclear how the individual taxpayer would seek to appeal against an assessment or to recover tax overpaid, other than through action at common law. It may be that as a matter of practicality, such situations do not arise. Paragraph 6F of Schedule 3 of ICTA 1988 permits repayment or adjustment of payments by the Board where a person has made a payment purporting to represent a liability when in fact the person in question was not so liable. This point arises as a result of a statement in *Whiteman on Income Tax, op cit*, para 30.03 that appeals against assessments under Schedule C are not possible and that a taxpayer's only remedy is to claim at common law.

[18] See TMA 1970 s 46(2), also the cases listed in Whiteman on Income Tax, op cit, p 1351 n 1.

[19] TMA 1970, ss 50(6), (8). Although there is no specific statutory provision to that effect, where tax has been paid on an assessment which is later reduced or discharged, such overpayments will be repaid as a matter of course. It may be that TMA 1970, s 50(6) can be construed as giving rise to an implied duty on the part of the Inland Revenue to repay, since the statutory authority to exact income tax generally presupposes a valid assessment.

[20] See TMA 1970, s 55. Section 55(9) provides that "on the determination of an appeal...the date on which...tax [is] payable in accordance with that determination...shall, so far as it is tax the payment of which had been postponed...be determined as if the tax were charged by an assessment [made on the date of the determination]..and...any tax overpaid shall be repaid".

[21] And possibly Schedule C (see para 9.11 n 17 above).

(and other payments subject to Schedule D Case III)). The provisions governing appeals against assessments and the respective time limits applicable are complex, but can be summarised for our purposes as follows:[22]

(1) Appeals can be brought against any assessment made under Schedules A, B, D and E within 30 days of the making of the assessment, to the General Commissioners unless the appellant opts for the Special Commissioners.

(2) Appeals can be brought against any assessment under ICTA 1988, section 350 (which covers the charge to tax under section 349 as above) within 30 days of the relevant assessment, to the Special Commissioners. It is important to note that tax under this provision does not require an assessment in order to be payable (ICTA 1988, schedule 16, para 4).

(3) Appeals may not be brought against a charge to tax under Schedule C.[23] The taxpayer's remedy is to bring action against the Board under some provision enabling repayment, or to proceed at common law.

(4) Appeals may be brought against notices of coding for PAYE on objection to the General Commissioners at any relevant time.[24]

(5) Appeal lies either to the General or Special Commissioners against all "assessments" to income tax and "decisions" on claims (TMA 1970, section 31). However, apart from the statutory provisions, no appeal will lie. It is because no assessment was required for its collection that the taxpayer building society in *Woolwich* was unable to appeal against the charge to composite rate tax which was imposed on it.

Reopening of Assessments

9.13 Either the Inspector or the Board of Inland Revenue may raise additional assessments in certain circumstances. The principal of these is the power found in TMA 1970, sections 29(3) and (4) to raise a further assessment on discovery of the failure to assess any income previously, or on discovery that an earlier assessment has been insufficient. It was held in *Cenlon Finance Co v Ellwood*[25] that this enables the Inland Revenue to make further assessments to tax, even where the taxpayer has provided all the information required to the Inland Revenue, and the Inspector simply discovers some mistaken proposition of law, or error on the part of his

[22] See *Whiteman on Income Tax, op cit*, Table 30.1 p 1369.

[23] *Whiteman on Income Tax, op cit*, para 30.03. But cf para 9.11 n 17 above.

[24] See below in relation to PAYE, but see SI 1993/744, regs 11(1)-(7).

[25] (1962) 40 TC 176.

predecessor, which establishes that the assessment was wrong.[26] However, the Inland Revenue cannot re-open matters which have been decided by a previous appeal against an assessment or which are treated under TMA 1970, section 54 as compromised on such an appeal. This limit to the power to reopen matters applies whether or not the Inspector's agreement to the compromise was caused by an error on his part.[27]

9.14 We understand that, by administrative discretion, the Inland Revenue also refrains from making additional assessments where all matters had been fully placed before the Inspector originally and the original view taken was at least a tenable one. However, in strict law, the taxpayer's rights are better protected where an appeal has been taken, since a compromise then reached is legally protected against the *Cenlon* principle. It seems clear that the Inland Revenue is bound by the ordinary law of contract where it reaches compromises and settlements with taxpayers in the usual way.[28] However, unless such an agreement qualifies as a compromise falling under TMA 1970, section 54 it gives no legal guarantee against an additional assessment being raised in appropriate circumstances.[29] The development of the law of judicial review in the field of protection of "legitimate expectation" might afford a taxpayer protection against an additional assessment, in circumstances where a binding contract had been made, but was subject to reopening under the *Cenlon* principle, or where a binding contract would but for the fact that the Inland Revenue is a public body have been made.[30]

[26] See *Cenlon Finance Co Ltd v Ellwood* (1962) 40 TC 176 and *Parkin v Cattell* (1971) 48 TC 462.

[27] *Scorer v Olin Energy Systems Ltd* (1985) 58 TC 592 and [1985] STC 218.

[28] It is suggested in Whitehouse & Stuart-Buttle *Revenue Law - Principles and Practice* (11th ed, 1993) p 14 citing *R v Inland Revenue Commissioners ex p Preston* [1985] AC 835 (CA) that "apart from s 54, the Revenue are not legally bound by an agreement (eg compromise) made with the taxpayer and nor can estoppel be raised against them (for an illustration see [the Preston case cited above]...". However Lawton LJ in *Preston* stated: "[C]ounsel for the taxpayer accepted that what had happened in 1978 did not amount either to the making of a contract which bound the Inland Revenue or to a promissory estoppel". Lord Templeman (862) stated that Woolf J at first instance had "rightly decided that the taxpayer had no remedy against the Commissioners for breach of contract or breach of representation made..in 1978, because the Commissioners could not in 1978 bind themselves not to perform in 1982 the statutory duty of counteracting a tax advantage imposed on the Commissioners by [Income and Corporation Taxes Act 1970, section 460]". It is established that estoppel cannot lie against the Crown (see *Western Fish Products v Penwith District Council* [1981] 2 All ER 204). But the Crown has capacity to contract and contracts may be made by it directly or through the normal rules of agency (see generally: Wade, Bradley & Ewing *Constitutional and Administrative Law* (11th ed, 1993) p 744-753). Obviously, however, servants of the Crown, such as the Inland Revenue, could not contract not to perform their statutory duty, but *quaere* to what extent the power to raise additional assessments is a statutory duty or a statutory power.

[29] Because of *Cenlon Finance Co Ltd v Ellwood* (1962) 40 TC 176.

[30] On legitimate expectation generally, see *R v Secretary of State for Transport, ex p Richmond-upon-Thames LBC* [1994] 1 WLR 74, 93-4 per Laws J. On its application to Revenue law see *R v Inland Revenue Commissioners ex p MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545; *R v Inland Revenue Commissioners ex p Kaye & Kaye* [1993] Admin LR 369; *R v*

Relationship between Statutory Recovery Rights and Rights of Appeal

9.15 TMA 1970, section 33 currently permits recovery of overpayments of income and other taxes in certain circumstances.[31] At present taxpayers are given a short time limit within which to appeal against assessments of liability to tax. This time limit, though short, is, we understand, not strictly enforced. However, taxpayers can apply for repayment of overpayments of tax under TMA 1970, section 33 even where they have challenged their assessment of liability by way of appeal, provided that they can bring themselves within the rather limited grounds which that section affords.

9.16 It seems to us that, as at present, a taxpayer's first avenue of recourse against an assessment of liability to tax which is excessive should be an appeal against that assessment. Appeals should be capable of being brought on any grounds before the specialised tax tribunals, and a taxpayer should be encouraged to raise any matters which are believed to afford grounds for avoiding the assessment under attack at the earliest possible opportunity.[32] We are fortified in this view by the rule of administrative law which generally requires an applicant for judicial review to have exhausted any statutory rights of appeal which may be open to him before invoking the discretionary judicial review jurisdiction.[33]

9.17 In general, it seems to us that a claim for repayment should be a second line of defence for the taxpayer against an excessive, erroneous or unlawful assessment. This is particularly the case since a claim for repayment may be brought some years after the end of the taxation year in question,[34] and involve far greater administrative inconvenience, costs and possibly a liability for interest on the part of the Crown. We believe that the right to repayment of overpaid tax should reflect the common law grounds for recovery of such amounts, as amended to deal with problems specific to the character and circumstances of either payer or payee. It seems to us therefore that a wide right to repayment, which is not subject to extensive provisos or the exercise of administrative discretion on the part of the Inland Revenue, is more consistent with legal principle, and fairer to the taxpayer.

Inland Revenue Commissioners ex p Matrix Securities Ltd [1994] 1 WLR 334; *R v A-G ex p ICI plc* (1990) 60 TC 1; *Re Preston* [1985] AC 835.

[31] See paras 9.22-9.25 and 10.10-10.19 below for a full discussion of the provisions of section 33.

[32] See the discussion of the principles of *res judicata* above at paras 8.27-8.32.

[33] An administrative appeal on the merits of a case is sometimes regarded as an entirely different process from a review of the legality of the determination process. Therefore, some administrative lawyers do not regard it as fundamental that an applicant for judicial review should exhaust appeal rights before seeking leave to apply for judicial review: See Wade and Forsyth *Administrative Law* (1994) p 721 et seq. See however, *R v Chief Constable of Merseyside Police ex p Calverley* [1986] QB 424 per May LJ; *Re Preston* [1985] AC 835; *R v Blackpool BC ex p Red Cab Taxis The Times* 13 May 1994 (Judge J).

[34] See para 9.15 above.

9.18 It is, however, not our task in this Report to recommend reforms to taxation appeals.[35] It has certainly been suggested that the law governing taxation appeals is in need of reform.[36] Indeed, increasing dissatisfaction is being expressed by taxation practitioners and writers with the law governing the administration of taxation. This is particularly the case at the intersection of administrative law and revenue law, where the actions of the Inland Revenue and other taxation authorities are subject to control by way of judicial review.[37] Our task is to address the related, but different area of claims for repayment of tax which has been overpaid and not recovered as a result of a successful appeal, and to suggest reforms to the legal machinery governing this area.

Defence of Non Exhaustion of Statutory Rights of Appeal

9.19 A wide right to repayment has the consequence that the resolution by way of appeal of issues arising on excessive, erroneous or unlawful assessments must be encouraged. If there is no sanction against unreasonable failure to submit disputed assessments to an appeal at the earliest possible stage, taxation authorities face the prospect of many claims for repayment, coming several years after the taxation years in question. We have sought to meet the concerns which taxation authorities expressed after the introduction of a wide ultimate right to recovery in the *Woolwich* case by our proposed defence of "non-exhaustion of statutory remedies".

9.20 We recognise that there may be situations where the principle that the taxpayer should be obliged to raise all matters on an appeal against an assessment may (without more) seem to be harsh. For example, if a taxpayer discovers his error, whether of fact or of law, after his time limit for appealing against his assessment has elapsed, it may be unfair to prevent him from claiming relief. Similarly, it must be borne in mind that any limitation on the taxpayer's right to reopen previous taxation affairs by way of a claim for repayment of tax overpaid should be balanced against the Inland Revenue's need for protection against unjustified administrative disruption and its own power to reopen a taxpayer's previous affairs. The Inland Revenue may raise further assessments on the taxpayer on discovery of errors by

[35] One aspect of statutory appeals from the taxation tribunals is discussed in Law Com No 225 "Administrative Law: Judicial Review and Statutory Appeals" (1994) paras 12.28-12.29.

[36] See Avery-Jones "Tax Appeals: The Case For Reform" [1994] BTR 3 (Hardman Memorial Lecture).

[37] After the decision in *R v Inland Revenue Commissioners, ex p Matrix Securities Ltd* [1994] 1 WLR 334, it has been suggested that it is impossible to derive any consistent principles from the case law as to the circumstances in which action by the Inland Revenue which is inconsistent with prior assurances may constitute an abuse of power. See also *R v IRC, ex p S G Warburg & Co Ltd* (*The Times*, 25 April 1994). Calls have been made for a formal system of advance rulings. See Saunders "When are revenue assurances binding?" (1994) 138 SJ 446; Woolf "Too Clever by Half" 254 Tax J 6; Woodgate "Clearance procedures" 257 Tax J 6; Savory "What does Matrix mean?" 258 Tax J 6; Staveley "Matrix: Some further thoughts" 261 Tax J 16; Eden [1994] BTR 254; Sandler "The Revenue Giveth - The Revenue Taketh Away" [1994] CLJ 273.

their staff, and it therefore seems to us to be unfair that claims for repayment of overpaid amounts should not generally be permitted to taxpayers on later discovery of errors or unlawfulness which caused the overpayment. However, in tandem with this, we believe that nothing should be permitted adversely to affect the Inland Revenue's general ability to make determinations of a taxpayer's liability, and thus any derogation from the finality of assessment rule must be tightly circumscribed.

Importance of Recovery Rights

9.21 We have seen[38] that there are at present situations where no statutory right to appeal against an assessment exists (Schedule C[39]), and in such situations, the only remedy available to the taxpayer is to claim repayment of overpaid tax under TMA 1970, section 33 or other provisions permitting recovery.[40] In these situations, we believe it to be vital, pending reform of the taxation appeals machinery, that the statutory repayment right should be fair and sufficiently wide to benefit the taxpayer in appropriate circumstances, while protecting the Inland Revenue against unjustified disruption. Similarly, there are situations where the statutory right to an appeal against an assessment may not be automatically invoked, because the machinery requires some intervening act by the taxpayer before an appeal can be brought. One example is found in the case of a charge to tax under PAYE, where the taxpayer must call for an assessment in order to appeal against it. Again, in such a situation it is important to ensure that the taxpayer is not unreasonably deprived of the right to claim repayment of amounts overpaid, and that the right to claim repayment is sufficiently wide when invoked.

9.22 We have therefore asked ourselves whether the existing statutory recovery rights for income tax are sufficiently wide to satisfy two criteria. Do they afford the taxpayer a remedy in the situations where first, a remedy would be available at common law and secondly, where the taxpayer should not be denied statutory relief through failure to exhaust a right to appeal against an assessment?

Taxes Management Act 1970, section 33

(1) The provisions of TMA 1970, section 33 afford the taxpayer a right to apply to the Board for relief where the taxpayer alleges "that the assessment was excessive by reason of some error or mistake in a return".

(2) The right to apply to the Board is subject to a six year limitation period "after the end of the assessment period".

(3) The Board must give "such relief as is just and reasonable" after fulfilling its

[38] See para 9.11 above.

[39] But see para 9.11 n 18 above.

[40] For example, ICTA 1988, sch 3, para 6F inserted by Finance (No 2) Act 1992, sch 11, paras 2(1),(2) & 6 in relation to transactions effected after 30 September 1992.

statutory duty to inquire into the matter.

(4) Relief is predicated on the existence of an "assessment" which is excessive by reason of an error or mistake in a "return". "Return" for the purposes of the Taxes Acts includes statements and declarations made under the Taxes Acts.[41] "Assessment" is not defined.[42]

(5) Consequently, the section offers no remedy where the tax in question has been collected without an assessment. In the case of taxes subject to the section (which extends to corporation tax, capital gains tax and petroleum revenue tax) no assessment may be necessary for tax to become chargeable.[43] It was this dilemma which the Woolwich Building Society faced. Composite rate tax did not require an assessment to be made and consequently relief under section 33 could not have been claimed.[44]

(6) The statutory right to claim repayment is also subject to a number of defences, which would restrict the ability of a taxpayer to use the section even where he could bring himself within its terms:

(a) the proviso to section 33(2) prevents relief being granted where the Board is satisfied that the return was made in accordance with the practice as to computation of liability which was generally prevailing at the time the return was made. This proviso has been used on a number of occasions to deny relief. What is general practice is a question of fact to be determined by the General or Special Commissioners on a claim for repayment, and cannot be the subject of an appeal by way of case stated to the High Court.[45]

(b) under section 33(3) the Board may have regard to all relevant circumstances when deciding whether or not to admit a claim for repayment, in particular whether or not the granting of relief would result in the exclusion from charge of any part of the profits of the claimant. In its response to our Consultation Paper the Inland Revenue described this provision as giving "a useful measure of flexibility" entitling the Department to conduct "a review of a taxpayer's affairs before determining what amount of relief is just and

[41] TMA 1970, s 118.

[42] The previous statutory definition found in Finance Act 1960 s 63(1) was repealed by ICTA 1970, section 583(1) and sch 16.

[43] For example, the charge to income tax under ICTA 1988, s 348. See also ICTA 1988 Sch 16, para 4(1)(a).

[44] See speech of Lord Goff, [1993] AC 70, 168-169. This seems to have been the case even if, as is a question for interpretation, a tax paid under an ultra vires statutory instrument knowing or suspecting that it is ultra vires can be said to be paid under a mistake on the part of the taxpayer.

[45] The proviso is discussed and criticised at paras 10.25-10.32 below.

reasonable". We find it difficult to see how a taxpayer's right to repayment can or should be qualified by a broad discretion *on the part of the charging authority* to deny relief where it believes it to be reasonable to do so because of a taxpayer's conduct of his other tax affairs.[46]

(7) Cases stated to the High Court are permitted only on "a point of law arising in connection with the computation of profits".[47] The question of what is, or is not, a general practice within the proviso to section 33(2) has been held not to be such a point.[48]

(8) Section 33 is to be amended in order to accommodate the new system of self-assessment being introduced by the Inland Revenue. The amended provisions are found in the Finance Act 1994, and will be discussed so far as is necessary later in this Report.[49] However no changes of substance to the section are proposed.

9.23 Therefore, we believe that there are situations where a taxpayer would have a right under the *Woolwich* principle to repayment of tax demanded *ultra vires* which would be denied under section 33. It seems to us that these are for the most part likely to be cases which might currently fall within the "general practice" defence, insofar as such cases do not constitute cases of compromise or submission at common law,[50] and cases where the taxpayer would be denied a remedy because of the possible consequential avoidance of a charge to tax on other income. The common law background against which these limitations on the existing recovery rights were framed has changed, or may change again.[51] This will result in fundamental changes to the rights enjoyed by taxpayers at common law, and should logically result in similar changes to statutory recovery rights. The common law at the time of enactment of the statutory provisions did not recognise a right of restitution for payments made under a mistake of law: thus, limitations on recovery for mistake of law, where such a right had been conferred by statute, could more easily be justified. Now, however, the *Woolwich* litigation has established a right of restitution at common law for payments made in response to charges levied ultra vires by public bodies.

[46] In some circumstances, repayment to a taxpayer where he has underpaid tax in other areas might cause him to be "unjustly enriched". On a defence of "unjust enrichment" for the Revenue, see paras 10.44-10.48 below.

[47] TMA 1970, s 33(4).

[48] See paras 10.15, 10.18 below.

[49] See paras 12.8ff below.

[50] See above, Section B, paras 2.25-2.38 above.

[51] Whether by legislation or as a result of further common law development by the courts: see Section B, paras 2.40, 3.9-3.10 above.

Reform of the Recovery Rights

9.24 We believe it to be illogical for the Taxes Acts to contain a provision for recovery of overpaid tax which is significantly narrower than that allowed at common law. We believe this to be the case for a number of reasons -

(1) There are situations where a charge to tax is imposed where TMA 1970, section 33 does not apply due to the absence of a return or assessment.[52] There is no existing statutory definition of "assessment". A common law right would exist where no "assessment" has been made, but it is unclear what an "assessment" is. We believe that the law should be clearer, so that there should be little scope for lengthy argument on whether a statutory recovery right applies to a given set of facts, and if so, whether its application excludes common law or equitable principles. We believe that the law should also be more comprehensive, so that the right to repayment is not predicated on the need for error or unlawfulness to exist in any particular stage in an administrative process. It should be sufficient, in the case of relief for mistake, that the mistake was one which would ground relief at common law, and in the case of unlawfulness, was of such character as to afford relief under the *Woolwich* principles.

(2) There are situations where the section 33 right applies, but relief would be denied under the section whereas it would be permitted under the *Woolwich* principle. The House of Lords in *Woolwich* indicated that where a taxpayer had a statutory right of recovery, this should be pursued and was exhaustive of his rights. However, we believe it to be unfair to the taxpayer that he should have narrower rights where statute has addressed the issue than in those cases where it has not, unless there is a good reason for this difference. However, the failure of statute to address particular cases seems to us to arise from the fundamental shift in the common law provisions on recovery referred to in paragraphs 9.2 and 6.21 to 6.31 above, rather than from any clear justification on policy grounds. Further, the distinction and its consequent anomalies seem to us certain to give rise to litigation as taxpayers seek to exploit any gaps in the legislation to come within the wider *Woolwich* right.

(3) The House of Lords made it clear in the *Woolwich* case[53] that it wished a review of the entire field of recovery of taxes paid ultra vires to be carried out as part of our review of the law governing the recovery of taxes and other charges paid in response to ultra vires demands. Their Lordships therefore clearly indicated that the law was in an unsatisfactory state, and were apparently anxious to ensure that a public debate took place which would lead to the formulation of acceptable limitations to the *Woolwich* principle.

[52] As, for example, was the case in *Woolwich* itself.

[53] [1993] AC 70, 176-177 per Lord Goff, with whom Lord Browne-Wilkinson and Lord Slynn agreed.

9.25 We believe that the foregoing discussion establishes the need for reform of the existing legislation on recovery of taxes paid under mistake, or in response to an ultra vires demand. **We therefore recommend:**

(11) (a) a repeal of TMA 1970, section 33 and replacement by a right on the part of all taxpayers charged to tax, whether under an assessment or otherwise, to recover tax paid but not due irrespective of the presence or absence of any mistake on the part of the taxpayer;

(b) the right to repayment is to be exercised by application in writing to the Board of Inland Revenue in the first instance with an appeal to the Special Commissioners and with a further appeal on a point of law[54] to the High Court (Draft Clause A, new section 33(1)-(7)).

The right to repayment is to be subject to a number of defences, which are partly based on the principles which we have recommended should govern recovery in the case of payments made under mistakes of law,[55] and which are considered below. We also address procedural issues further below.[56]

[54] With no restrictions as to subject matter.

[55] See Section B of this Report, paras 2.17-2.23, 2.25-2.38, 5.3-5.18 above.

[56] See paras 16.15-16.17 below.

PART X
THE MODEL SCHEME - DEFENCES

Introduction

10.1 We have said that we believe that statutory recovery rights for the principal central and local government taxes must make provision for the recovery of overpayments resulting from both mistake and from ultra vires demands. In dealing with the defences to such rights, therefore, the first issue to address is whether the defences available to public authorities against claims for the recovery of overpayments due to mistake, and claims for the recovery of overpayments due to ultra vires demands should be identical.

10.2 There is a substantial overlap between claims for the recovery of sums paid to public authorities in response to ultra vires demands and claims for the recovery of sums mistakenly paid to public authorities. It can be argued that, in almost all cases where a tax or charge is paid in response to an ultra vires demand by a public authority, it is also paid under a mistake of law by the taxpayer.[1] Similarly, on every occasion where a public authority makes a mistake of law, it is likely that it will have acted ultra vires.[2] This substantial overlap at first sight seems to suggest that the defences to the two claims should be identical. Different defences are possible only if clear distinctions can be made between the two categories and described in legislation in mutually exclusive terms.

10.3 We were particularly concerned in our consultation paper,[3] and later because of comments made to us by some consultees, by suggestions that permitting recovery

[1] In *Woolwich Equitable Building Society v IRC*, Lord Goff said "...if there is to be a right to recovery in respect of taxes exacted unlawfully by the revenue, it is irrelevant to consider whether the old rule barring recovery of money paid under mistake of law should be abolished, for that rule can have no application where the remedy arises not from error on the part of the taxpayer, but from the unlawful nature of the demand by the revenue": [1993] AC 70, 176 D-E. It might be thought that this suggests that Lord Goff saw no overlap between the two rights, but saw the right to recovery of sums demanded ultra vires as trumping any right to recovery of sums paid under error or mistake of law. Lord Slynn said "I do not agree that this principle cannot apply where there is a mistake of law. That is the situation where the relief is most likely to be needed and if it [is] excluded not much is left": [1993] AC 70, 205 A. We believe that both comments actually mean that their Lordships did not believe that the bar on recovery of payments made under a mistake of law should also bar recovery of payments of unlawful taxes so made. They do not, in our view, mean that their Lordships saw a claim for recovery of unlawful taxes as displacing any other ground of recovery. Several grounds for restitution can coexist in one set of factual circumstances. For example, it was common ground in the *Woolwich* case that, had duress existed on the facts, that would have allowed the building society to recover. Lords Keith and Jauncey, dissenting, found the distinction between cases where the overpayment of tax resulted from a misconstruction or other wrongful exaction, and cases where the overpayment resulted from an ultra vires demand to be irrelevant.

[2] See para 6.39 n 94 above.

[3] Consultation Paper No 120, paras 3.70-3.80.

of ultra vires charges would unsettle public finances. We consequently considered the introduction of a number of defences to deal with this situation. It is arguable that widespread mistakes of law could easily occur in the field of taxation, be acted upon by a significant proportion of taxpayers, and thus result in a sufficient number of potential claims for recovery to unsettle public finances. For instance, a mistaken interpretation of a statutory provision might be generally adopted in practice and relied upon by tax advisers.[4]

10.4 On the other hand, some consultees argued that claims for the recovery of sums levied ultra vires by public authorities differ fundamentally from sums paid under mistake, and that this fundamental difference means that similar defences should not be imposed. In the *Woolwich* case the Court of Appeal and House of Lords relied heavily on the constitutional impropriety of permitting the Executive to retain funds exacted without express Parliamentary grant.[5] This might be taken to suggest that no limitations on the recovery of sums levied ultra vires (other than an appropriate limitation period) are permissible. This amounts to an argument that, if funds are exacted from a citizen unlawfully, they should simply be given back. This view is supported by the dissenting judgment of Wilson J in the Supreme Court of Canada in *Air Canada v British Columbia,* where she said "Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government's mistake?...If it is appropriate for the courts to adopt some kind of policy in order to protect government against itself (and I cannot say that the idea particularly appeals to me) it should be one that distributes the loss fairly across the public...".[6] Wilson J's remarks were cited with approval by Lord Goff in *Woolwich.*[7] We do not, however, believe that serious consideration can be given to a provision which would permit completely unrestricted recovery of sums paid in response to ultra vires demands.

10.5 First, such a provision seems to us to run counter to sound administrative policy. Sums which are raised by public authorities are raised and spent, not (in general) for their own benefit, but for the benefit of society as a whole. To permit citizens to bring claims for the recovery of sums unlawfully demanded may in certain circumstances run the risk of disrupting the finances of public bodies to such an extent as to be contrary to society's interests. This may particularly be the case, for example, where the public authority has entered into spending commitments in reliance on the revenue source in question, or where the public authority would

[4] We do not, however, necessarily mean to imply that this situation should be the subject of a defence, merely that it illustrates that fears of disruption of the public finances apply to cases of mistake of law.

[5] See paras 6.26, 6.31, 6.41 above, and *Woolwich Equitable Building Society v IRC* [1993] AC 70, 172 per Lord Goff.

[6] [1989] 1 SCR 1161, 1215, on which see para 11.1 n 5 below.

[7] [1993] AC 70, 176. The judgment was also referred to by Lord Slynn (203), and by Lord Jauncey (191) and Lord Keith (162-163), who found the majority view more persuasive.

simply be forced to reimpose an additional or alternative tax to make up the lost revenue. It seems to us that public bodies should be spared the administrative inconvenience and waste of repaying and then reimposing tax in circumstances where the resulting confusion might result in profound and lasting damage to the public body's activities.

10.6 Secondly, an unrestricted restitutionary right for payments of taxes in response to ultra vires demands seems to us to run counter to legal principle. Since the right declared by the House of Lords in *Woolwich* is a restitutionary right, it will at least be subject at common law to the standard restitutionary defences of change of position,[8] submission or compromise,[9] and estoppel,[10] as well as a limitation period of 6 years from the date of payment.[11] These standard restitutionary defences would in our opinion apply to claims for the recovery of tax overpaid due to ultra vires demands on the part of a public authority at common law. We have recommended that there should be no recovery for mistake of law merely because the payment was made on the basis of a settled view of the law from which a subsequent judicial decision has departed. The substantial overlap (referred to above[12]) between mistake cases and ultra vires cases might suggest that this limit to recovery for mistake of law may equally apply to actions for the recovery of taxes unlawfully demanded. We discuss this further below.

10.7 Thirdly, a statutory right to recover sums paid in response to ultra vires demands which is, apart from a limitation period, unrestricted, seems to us to be, at least in the field of central and local government, contrary to the decision in *Woolwich*. In the Court of Appeal, Glidewell LJ stated that sums paid in response to ultra vires demands could not be recovered where such sums had been paid to close a transaction or under a mistake of law.[13] He also suggested that the recovery right might be limited where a taxpayer had failed to pursue a statutory right of appeal.[14] In the House of Lords, although Lord Goff first doubted the advisability of the courts imposing special limits on recovery in the case of unconstitutional or ultra vires levies,[15] he then said that our project offered an opportunity for the limits to recovery to be reformulated in cooperation with the relevant authorities.[16]

[8] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548. See Section B, paras 2.17-2.23 above.

[9] See above, Section B, paras 2.25-2.38 above.

[10] See above, Section B, para 2.23 above.

[11] Limitation Act 1980, s 5, and see para 10.36 n 73 below.

[12] See para 10.2 above.

[13] [1993] AC 70, 101 B-C.

[14] Ibid, 101 C-E.

[15] Ibid, 176 D-E.

[16] Ibid, 176H-177B.

10.8 We cannot, therefore, recommend an unrestricted right to the restitution of sums demanded ultra vires by central and local government authorities by way of taxes or charges, or of sums paid under a mistake. We have said that we believe that the defences to claims for the recovery of sums paid through mistake and paid in response to ultra vires demands should be similar. However, we do not believe that it can be assumed that they are identical, so as to preclude a separate examination of the defences to each right. The different considerations of principle which underlie the two grounds of recovery, along with the difficulties which surround the defence of change in a settled view of the law, lead us to this conclusion.

10.9 Using income tax as a test case, and bearing in mind the reforms to the legislation governing the recovery of income tax which we have already recommended,[17] we now set out to examine the possible defences which may apply to claims for the recovery of taxes paid under mistake and in response to ultra vires demands, and to make recommendations accordingly.

Change in a Settled View of the Law: Payments in accordance with General Practice

(a) MISTAKE CLAIMS

10.10 The most important qualification to the existing right of recovery under TMA 1970, section 33 is the proviso to section 33(2) which states:

> ...no relief shall be given under this section in respect of an error or mistake as to the basis on which the liability of the claimant ought to have been computed where the return was in fact made on the basis of or in accordance with the practice generally prevailing at the time when the return was made.

When dealing earlier in this Report with the private law we recommended that sums paid should not be recoverable as paid under a mistake of law only because they were paid in accordance with a settled view of the law which is subsequently changed by a decision of a court or tribunal.[18] We are inclined to the view that this principle should equally apply to mistake claims for the recovery of overpaid tax.

10.11 In discussions with us, officials of the Inland Revenue emphasised the importance, in their view, of the present proviso to section 33. In its first response to our Consultation Paper, the Inland Revenue stated:

> In applying section 33 the Department would not seek to argue that *any* practice adopted by the Revenue at any particular time is "generally prevailing". The Revenue accept that in the circumstances where its view is not generally accepted by taxpayers, any Revenue practice resulting from that

[17] See para 9.25 above.

[18] See Section B, paras 5.3, 5.7 and 5.13 above.

view cannot be said to be "generally prevailing". And in any event the question whether any particular practice is or was "generally prevailing" is one for consideration on an appeal against a refusal to grant relief under the section.

In further meetings, the Inland Revenue stated that the defence was a reflection of the need for finality and that where both Revenue and taxpayers had conducted their affairs on the basis of a certain understanding of the law it did not seem unreasonable that there should be restrictions on the ability to reopen past returns made on that basis. In addition the Inland Revenue have emphasised that a general practice is not simply one which the Revenue have adopted in the past - the question of whether or not a practice exists is one for consideration, ultimately by the Special Commissioners. In considering our recommendations in connection with the general practice defence, we took into account the following considerations.

10.12 First, the proviso to section 33 does not appear to us to accord with the spirit of current Government policy towards taxation. In the "Taxpayer's Charter"[19] the taxpayer is informed that he may expect the Inland Revenue "to be fair...by expecting you to pay only what is due under the law..". By definition those cases where recovery is refused under the "general practice" proviso are cases where no legal liability to pay in fact existed at the time of payment.

10.13 Secondly, the Value Added Tax Act 1994, section 80 (previously the Finance Act 1989, section 24) and the Finance Act 1989, section 29 (which provide for the repayment of overpayments through mistake of levies collected by HM Customs & Excise) do not include such exceptions. We understand from HM Customs & Excise Solicitor's Office that the Commissioners are satisfied with the operation of these provisions.[20]

10.14 Thirdly, differences between the legal provisions governing the recovery of taxes administered by the Inland Revenue and HM Customs and Excise must in our view be justified by objective criteria. Such differences may be necessary, especially because of the involvement of European law in the field of internal indirect taxation, and because of differences in the systems which have developed for the administration of taxes under the care and management of each. HM Customs & Excise do not currently, and will not under our proposals benefit from the change in settled view bar against mistake of law recovery claims for taxes administered by them. This may well reflect the significant influence of EC law, which we discuss at Part XIV below, on indirect taxes in general. We are nonetheless reluctant to suggest that the Inland Revenue should not be permitted to resist mistake of law

[19] Inland Revenue Personal Taxpayer Leaflet IR 120 "You and the Inland Revenue".

[20] For their response on consultation and discussion of decisions of the VAT Tribunal on the Finance Act 1989, s 24, see paras 14.14-14.19 below.

claims on the basis of the change in settled view bar. However, there certainly appears to us to be nothing which justifies permitting the Inland Revenue to retain a defence against claims for repayment of taxes overpaid through mistake which is wider than that which we recommend should be available to private payees under the general law.

10.15 Fourthly, while a "general practice" is one which the Revenue has adopted in the past,[21] the present machinery for determining the practice of the Revenue on a claim for repayment under TMA 1970, section 33 is unsatisfactory. What is Revenue practice is a question of fact to be decided by leading evidence before the Special Commissioners. It is only the most well (and expensively) advised taxpayers who will be in a position to dispute the Inland Revenue's view as to what is accepted as practice and what is not.[22] This is compounded by the fact that most decisions of the Special Commissioners are not reported, and are at present only available for the Revenue's internal use.[23] If the Special Commissioners find against a taxpayer on an issue of practice, no appeal is possible by way of case stated or otherwise.[24]

[21] *Murray's Trustees v Lord Advocate* 1959 SC 400, 415; Stopforth, "Error or Mistake Relief" [1989] BTR 151, 161-165. There appear to be 3 reported cases where error or mistake relief was granted: *Heastie v Veitch* (1933) 18 TC 305; *Radio Pictures Ltd v IRC* (1937) 22 TC 106; *Barlow v IRC* (1937) 21 TC 354.

[22] The manner in which the general practice in the *Arranmore* case (n 24 below) was established in evidence before the Special Commissioners is instructive. Evidence was given by an official from the applicable branch of the Revenue Inspectorate to the effect that instructions to local branches based on the practice as understood by the taxpayer company had been followed and that taxpayers locally had followed these instructions and negotiated in accordance with them.

[23] We understand that decisions of the Special Commissioners will be reported and appeals to them will be heard in public from 1 September 1994.

[24] In *Rose Smith & Co Ltd v IRC* (1933) 17 TC 586 (Finlay J) it was held by the High Court on a case stated by the Special Commissioners of Income Tax that whether or not a practice was a general practice within the section was a question of fact for determination by the Special Commissioners and did not fall within those provisions of the Finance Act 1923, s 24 (the predecessor to TMA 1970, s 33) which permitted a taxpayer to require a case to be stated to the High Court, those provisions being confined to questions of law arising in connection with the computation of profits only. Again, in *Arranmore Investment Co Ltd v IRC* (1973) 48 TC 623 (Court of Appeal in Northern Ireland) the Court refused to inquire into a revenue practice in circumstances where a *prima facie* injustice to the taxpayer was disclosed. The company's accountants, after the company had entered into transactions apparently liable to tax, had prepared returns based on their understanding of the legislation. Assessments were raised, but after these became conclusive, the Special Commissioners held in another case (*Ferbro Estates Ltd v IRC*, Special Commissioners of Income Tax, unreported, July 1969 - see (1973) 48 TC 623, 625 per Lord Lowry LCJ) that no liability to tax attached to such transactions. The Revenue accepted this decision and the taxpayer company sought a refund of tax under s 33, but this was rejected on the basis of the "general practice" defence. In an appeal to the Special Commissioners the company argued that the proviso only applied where there was a liability under the section and not where its correct interpretation disclosed no liability. The Special Commissioners found that in law this was incorrect and held that there had as a matter of fact been a general practice to the effect understood by the taxpayer company. The Court of Appeal held that no point of law in connection with the computation of profits arose and accordingly it had no jurisdiction to entertain a case stated. The case appears to be one where, in the absence of a defence based on compromise or submission, relief would have been available under the *Woolwich* principle, since the Inland Revenue had no jurisdiction

10.16 Fifthly, it does not appear from the reports of the relevant Parliamentary debates to have been the intention of the legislature at the time of enactment of the Finance Act 1923, section 24 that it was to be the last word on the subject.[25] The clear intention of the MPs proposing the amendment was to introduce "reasonable fair play" for taxpayers,[26] and they pointed towards the period of 6 years for the reopening of assessments by the Inland Revenue which formed part of the same clause. The basic concepts of income tax as the fairest method of raising Government revenue were stressed, and it was felt that fairness towards the taxpayer was consequently essential.[27] The present clause, introduced at the Report stage of the Bill, was described as "somewhat experimental"[28] as at the time of introduction it did not extend to tax paid under Schedule E. The hope was expressed that "as time goes on, we may be able to get a good working system under which the taxpayer will have what one may describe as equal rights with the tax collector in regard to rectifying cases of over-assessment".[29]

10.17 Sixthly, the stimulus for the Finance Act 1989, sections 24 (now the Value Added Tax Act 1994, section 80) and 29 may have been the decision in *Customs & Excise Commissioners v Fine Arts Developments plc*[30] and the developing jurisprudence of the European Court of Justice in this area.[31] It is, of course, important to bear in mind that EC law underlies all provisions governing the collection and repayment of VAT, and EC law provides for wider rights to the recovery of taxes or charges levied ultra vires than did English law prior to the *Woolwich* decision.[32] There is, however, no reason why the *Woolwich* decision should not prove an equally appropriate moment to review the system for other taxes.

10.18 Seventhly, Revenue practice itself is far from being an exact science. It has been said

to demand tax under the legislation relied on in the circumstances applicable.

[25] The provision was first introduced as an amendment to clause 16 of the Finance Bill 1923 on 13 June 1923, at the Committee stage of that Bill. The original amendment read as follows "Provided that in cases where Income Tax has been paid upon the amount of income assessed and it has subsequently been ascertained that the amount paid was excessive power is hereby given to the General and Special Commissioners of Income Tax to review such cases if appeal is lodged within three years following the year of assessment". It is noteworthy that this first draft did not seem to make relief conditional upon an assessment nor did it contain an exemption for payments made based on the existing general practice. However, relief was to be discretionary.

[26] Committee Stage, Finance Bill, 1923. *Hansard (Commons, Fifth Series) Vol 165, Cols 560-563.*

[27] *Ibid, cols 563-564.*

[28] Speech of Sir H Buckingham MP, *Hansard (Commons, Fifth Series) Vol 166, Cols 224-225.*

[29] Speech of Mr D Herbert MP, *Hansard (Commons, Fifth Series) Vol 166, Col 225.*

[30] [1989] STC 85.

[31] See Consultation Paper No 120 paras 3.39-3.46.

[32] See paras 14.1-14.5 below.

that:

> It is not a subject upon which one can make confident assertions based upon a study of the legislation, the cases or other sources. There are likely to be as many views on the subject as there are tax practitioners.[33]

Many potential sources of Revenue practice are identified by this commentator.[34] It is important to bear in mind in this context that in general the UK tax system does not make provision for advance clearance of transactions by the Revenue before they are entered into by the taxpayer. The Revenue will generally express a view if requested to do so, but is under no obligation to do so.[35] The Revenue will certainly not assist in anything regarded as "tax planning" for individuals. Thus the diversity of sources of existing Revenue practice makes it difficult for all but specialist tax advisers to keep abreast of it. Proper regulation of Revenue practice has been called for, but to our knowledge no such regulatory system has yet been devised.[36]

10.19 Finally, we believe that the recommendation which we make in paragraph 10.21 below that relief should not be available for mistake where a payment is made in accordance with a settled view of the law[37] later changed by judicial decision will afford the Inland Revenue much of the protection currently available under the general practice defence, but in a more principled way. Many of the situations where a payment is made in accordance with a settled view of the law will be cases where payment might also have been made in accordance with Inland Revenue Statements of Practice ("SP's"). Although these cannot of course be regarded as in any way conclusive of the state of the law,[38] it is submitted that they would constitute a powerful indicator of the understanding of those actually concerned with the administration of the tax system and to the extent that this is shared by accountants, advisers and legal practitioners, of the fact that the law is regarded as

[33] Gammie "Revenue Practice: A suitable case for treatment?" [1980] BTR 304.

[34] These include Inland Revenue Press Releases (of which, for example, 227 were reported in *Simon's Tax Intelligence* for the two years from July 1978); Parliamentary Questions; Statements of Practice and Extra-Statutory Concessions and responses to queries by individual taxpayers in which Revenue practice in particular matters is expounded. Similarly, Consultative Documents issued by the Revenue stating the existing law would generally be regarded as its practice for the time being. There are also speeches or lectures by Revenue staff.

[35] The informality of this procedure was the basis of the difficulties addressed by the courts in *R v IRC ex p Matrix-Securities Ltd* [1994] 1 WLR 334.

[36] See Gammie, *op cit*, p 317-8. Doubts were expressed about the constitutionality of extra statutory concessions in *Vestey v IRC (No 2)* [1979] Ch 198, 204; [1980] AC 1148, 1173-1174, 1194-1197. Cf *R v Inspector of Taxes ex p Fulford-Dobson* [1987] QB 978.

[37] This will be affected by the level and quantity of legal debate at the time of payment. On the implications of the fact that at present the decisions of the General and Special Commissioners of Income Tax are not generally published; see para 10.15 above.

[38] See for example *Campbell Connelly & Co Ltd v Barnett* [1992] STC 316.

settled.

10.20 The degree of overlap between the operation of the present "general practice" defence and the proposed "change in a settled view of the law" defence becomes clear when it is recalled that the Inland Revenue stated in its response to our consultation paper that a view taken by it, which was not accepted by taxpayers generally, would not constitute a "general practice" for the purposes of the proviso to TMA 1970, section 33.[39] Similarly, where any substantial dissent existed, the law is unlikely to be regarded as "settled" for the purposes of the defence of "change in a settled view of the law" and thus the position under the present and the new proposed defences would approximate.[40] We intend that the concept of a "settled view of the law" should be the same in tax law as it will be in private law under our recommended reforms, and therefore we see the discussion of this concept in paragraphs 5.9ff above as equally applicable in construing our recommended reforms in relation to tax. **We recommend that:**

(12) overpayments of tax should not be regarded as paid under a mistake of law on the part of the taxpayer (and consequently not due and recoverable on that ground) merely because the taxpayer paid in accordance with a settled view of the law that the payment was due, and later judicial decisions have departed from that view (Clause A, section 33AA(6)).

10.21 In Section B of this Report we recommended that recovery should not be available in private law to a payer-challenger who succeeds in challenging the previous understanding of the law, or to later payers who commence action before his proceedings come to judgment.[41] We see no reason to depart from that recommendation in the context of payments to public authorities under a mistake. Where a payment is made in accordance with a settled view[42] of the law which is

[39] See para 10.11 above and particularly the quotation from the Inland Revenue's First Response to our Consultation Paper, there set out.

[40] See above, Section B, paras 5.9-5.13 above and the discussion of *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* [1969] WAR 104 (Negus J) and 155 (Supreme Court of Western Australia).

[41] See Section B, para 5.13 above.

[42] Which will obviously be affected by the level and quantity of legal debate at the time of payment. For example, it is only from 1 September 1994 that decisions of the Special Commissioners are to be published. Prior to that date, they were not generally published, but we understand that notes of Special Commissioners' decisions were available for the Inland Revenue's internal use. It may be that the widespread publication of Special Commissioners' decisions will alter the level of legal debate on certain tax issues and consequently the existence of settled views (if any) on points of taxation law. Publication of Special Commissioners' decisions has been called for by commentators on taxation law - see J Avery-Jones [1974] BTR 7 and the reference there to the decision in *Ferbro Estates* which changed the understanding of the law prior to the claim in *Arranmore Investment Co Ltd v IRC* (1973) 48 TC 623 (CA NIr). It appears that notwithstanding the decision in *Ferbro Estates Ltd v IRC* (Special Comms of IT, unreported, July 1969, see (1973) 48 TC 623, 625), no guidance was issued either to the public or to Inspectors of Taxes and

subsequently held to have been incorrect, there has by virtue of this in substance been no mistake of law which should entitle the claimant to relief. **Accordingly we recommend that:**

(13) there should be no special provision enabling a payer-challenger of a previously settled view of the law to recover, on that ground alone, overpayments of tax as made under a mistake of law, nor do we recommend any such provision for later payers who commence action before the decision in the case of the payer-challenger.

(b) ULTRA VIRES CLAIMS

10.22 As we have stated above, it is arguable that acts done in response to ultra vires acts or on the basis of ultra vires legislation are always done under a mistake of law on the part of the taxpayer. This consideration militates in favour of the application of the "change in a settled view of the law" defence to claims for the recovery of overpayments in response to ultra vires charging acts or instruments, because of the difficulty in distinguishing between the two grounds of recovery. In the United States, this difficulty has been avoided by the denial of restitution on grounds of mistake where payments of taxes are made under an invalid statute or ordinance which was believed by the payer to be valid.[43]

10.23 The question of *vires* of an administrative act or of primary or secondary legislation is always an issue of law. Where tax is levied by the Inland Revenue in reliance on a provision of primary or secondary legislation,[44] or other administrative act which is later held to have been ultra vires, the charge in question may be viewed by the Inland Revenue and the individual taxpayer concerned as valid at the time of payment, and the taxpayer may pay on this basis.[45] Such a view may arise from the practice of those concerned with the area of law in question, from legal literature, or from a first instance or appellate decision of the courts which is subsequently overruled. A settled view of validity may also arise as a result of the presumption of

taxpayers continued to pay on foot of an understanding of the law which had already been held to be wrong. On an application for relief, this was refused because of the general practice bar (see para 10.15 above). See also Avery-Jones "Tax Appeals: The Case for Reform", [1994] BTR 3.

[43] See *Restatement on Restitution* (American Law Institute, 1937) section 46(c), Palmer, *Law of Restitution*, Vol II, para 9.16 and Vol III, para 14.20. This is so even in States where the mistake of law bar no longer applies and has been abrogated by statute (for example, New York (*Mercury Machine Importing Corp v City of New York* (1957) 3 NY 2d 418, 144 NE 2d 400) and California (*Southern Services Co v Los Angeles* (1940) 15 Cal 2d 1, 97 P 2d 963).

[44] We have delegated legislation particularly in mind here, but we believe the same principles apply where primary legislation is held invalid under EC law in accordance with the principles in *R v Secretary of State for Transport, ex parte Factortame (No.2)* Case C-213/89 [1990] 2 AC 85; [1991] 1 AC 603. See paras 14.3-14.4 below.

[45] This is a different factual situation from that arising in *Woolwich* where the appellant building society did not believe in the validity of the charging regulations but nevertheless made the payment to preserve their commercial reputation.

validity which statutory instruments and administrative acts generally enjoy. This makes it arguable that all such acts should be viewed as valid. Consequently, if the change in a settled view of the law bar is applied to all claims for the recovery of taxes paid under a mistake of law and in response to ultra vires demands, any payment in response to an ultra vires act might fall within the bar. This would effectively reverse the result of the *Woolwich* litigation in such cases and negate the restitutionary right declared by the House of Lords.

10.24 The principles underlying the common law rights to restitution in cases of charges paid under a mistake of law, and charges paid in response to demands made ultra vires are different. The ground for restitution in the case of charges paid in response to ultra vires demands seems to be the very ultra vires nature of the charge itself.[46] If this is the case, it follows that the payer's (or anyone else's) belief as to the validity of the charging instrument is irrelevant to the existence of a ground for restitution, and that consequently, the "change in a settled view of the law" bar should not in principle apply to claims for the recovery of taxes levied ultra vires at all. In the *Woolwich* case itself, the House of Lords relied on the constitutional impropriety of the imposition of tax by the Executive in excess of Parliamentary authority as a basis for the general restitutionary right.[47] This suggests that the citizen's knowledge of the legitimacy or otherwise of the demand made in excess of Parliamentary authority is irrelevant.[48] It could further be argued that payment is actually motivated by the apparent legitimacy of the Inland Revenue's demand, and the desire on the part of the payer to be a good citizen[49] or to avoid tax penalties, rather than by any positive belief on the part of the payer.[50] All the arguments recited in paragraphs 10.23 and in this paragraph would therefore militate against the application of the "change in a settled view of the law" bar to claims for the recovery of sums paid in response to ultra vires demands.

10.25 However, the constitutional considerations favouring a very wide recovery of ultra vires receipts by public authorities have to be assessed in the light of the need for certainty in the law and the problem (addressed in paragraphs 11.1ff below) of

[46] Nowhere in the speeches in *Woolwich* does any focus on the state of mind of the payer appear. Lord Goff, in particular, stresses the lack of legitimacy of the demand as the ground for restitution.

[47] See 6.26, 6.31, 6.41, 10.4 above.

[48] Cf Burrows in Burrows ed *Essays on the Law of Restitution* (1991) p 55-57 who argued that recovery should be denied where a payer paid in a situation where he was not mistaken as to the law, or where he was mistaken, but his mistake was not causative.

[49] *Woolwich Equitable Building Society v IRC* [1993] AC 70, 172 per Lord Goff.

[50] However, it could be motivated by a desire to obtain an advantage ahead of others, to avoid a threat of being sued or even because the payer knows the money will go to a good cause and does not care about the legitimacy of the demand. See Burrows *op cit.* n 48 above p 55.

avoiding disruptions to public finance.[51] These factors are reflected in the present "general practice" bar and in our proposed "change in settled law" defence. The alternative of not applying the defence of change in a settled view of the law where payment was made in response to demands levied ultra vires, while applying it in cases of charges paid under a mistake of law is, however, only possible if a clear distinction can be made in legislation between situations in which the mistake of law ground of recovery applies, and in which the ultra vires ground of recovery applies. Without a satisfactory legislative formulation, the adoption of a distinction between mistake of law and ultra vires would be a recipe for litigation.[52] We considered alternative means of distinguishing mistake of law from ultra vires. First, we considered doing so by reference to the payer's state of mind.

10.26 The impact on recovery of the state of mind of the payer of a charge levied ultra vires under the present law is as follows:

(1) Where the payer adverts to the *vires* of the charging instrument, decides that it is invalid but nevertheless decides to pay for other reasons, recovery is presently permitted.[53]

(2) Where the payer completely fails to advert to the *vires* of the charging instrument, recovery may be available for mistake of law,[54] and should, it is submitted, in principle be available.[55]

(3) Where the payer adverts to the *vires* of the charging instrument, but decides to pay, believing the charge to be valid, the *Woolwich* rule should permit him to recover (subject to the rules on submission to claims and compromise), and he might also be able to recover on the basis that the sum was paid under a mistake of law.[56]

[51] In the United States, these difficulties have all been avoided by denying recovery at common law in virtually all claims for restitution of of illegal taxes, except where duress exists. Payment under protest is not there regarded as sufficient to give rise to a right of restitution, although it does go to indicate a lack of voluntariness on the part of the payer: see Palmer, *Law of Restitution* Vol II, para 9.17.

[52] Particularly if one takes the view that all errors of law go to jurisdiction; see para 6.39 above.

[53] This was the case in *Woolwich* itself. In many senses, this is the paradigm case where recovery should not be allowed, as it is closest to a settlement or compromise situation. It is the situation in which Burrows argues that recovery should not be permitted: see Burrows *op cit* n 48 above, p 55.

[54] But cf the different position in the United States, para 10.22 n 43 above.

[55] This is the paradigm case where the considerations enunciated by Lord Goff as the foundations of the rule in *Woolwich* come into play: the payer pays in reliance on the apparent legitimacy of the demand, he is a good citizen, he submits to the power of the State, and so forth.

[56] Under the present TMA 1970, s 33.

10.27 It might be thought that the third situation is one in which a "change in settled view" bar might be permitted to operate so as to deny recovery, since the position of a payer who positively adverts to the *vires* of a charging act or instrument, but decides on the basis of a settled view of the law at the time of payment that the act or instrument was valid, might be thought to be less meritorious than that of a payer who has either failed to consider the law at all, or considered it and decided that there was a lack of vires on the part of the revenue authorities, but that payment should be made for other reasons.

10.28 We are not convinced by these arguments. The principles which underlie the *Woolwich* right suggest that the right is based on the constitutional impropriety of revenue being extracted from the citizen in breach of Parliamentary authority. It seems to us to make no difference whether these sums are extracted from a citizen who believes them to be validly extracted or not, unless the citizen in question has paid as part of a binding compromise of his liability to tax. It would further seem to us to be unsound for recovery to be denied because of the change in settled view of the law defence, where the payer believes a charge to be validly imposed, if it is to be allowed where the payer does not.

10.29 To find another solution, we considered the application of the *Woolwich* rule in the income tax context. We believe it applies in the following situations:

(1) Where subordinate legislation which establishes or is fundamental to the charge to tax in question is held to be invalid.

(2) Where an assessment is void or voidable, other than where it is excessive as a result of an error on the part of the taxpayer (relief for which would be granted under TMA 1970, section 33), or where it is a double assessment (relief for which would be granted under TMA 1970, section 32).[57]

(3) Where no assessment was made, but the charge to tax was unlawful for breach of public law principles.

(4) (Subject to EC law) where primary legislation is held to be invalid by the European Court of Justice for breach of EC law under the *Factortame*[58] and

[57] *Woolwich* suggests that no appeal lies against assessments which are void or voidable under the provisions of TMA 1970 (see [1993] AC 70, 169 per Lord Goff). If this is correct, it suggests that the *Woolwich* rule would apply to those situations. However, because Parliament has given the Inland Revenue a power to assess taxpayers to tax and has provided an appeal against excessive exercises of that power to a tribunal, it may be arguable that excessive assessments, although technically void, are not within the scope of the *Woolwich* rule, which postulates a situation where the administrative appeal rights provided by Parliament cannot be exercised because of a complete absence of any legal basis for the charge to tax in question. Note also that the absence of certain formal requirements does not render assessments void or voidable (TMA 1970, s 114(1)).

[58] [1991] 1 AC 603.

Commerzbank[59] principles.

10.30 We asked ourselves therefore whether a satisfactory distinction could be founded on these subcategories of claim, or on a more general concept such as the lawfulness or validity of the charge to tax, with appropriate qualifications. We consider that "lawfulness" or "validity" are unsatisfactory because unlawfulness on the part of the Revenue or the invalidity of the charging act is in many if not most cases likely to provoke a mistake on the part of the taxpayer.[60] They are also unsatisfactory because virtually every mistake by the Revenue, except for mistakes of form, will cause assessments or charges to be invalid (unlawful). "Lawfulness" also fails adequately to distinguish other grounds for restitution, such as duress.[61] We were also concerned about invalidity of a technical nature, for instance a minor procedural error which could be cured so that the tax became due.[62] We have come to the conclusion that the only workable distinction is that based on the invalidity of the subordinate legislation. It is, therefore, only in those cases that the change in a settled view of the law defence can safely be disapplied. Save in such cases, we believe the defence should, as indicated in paragraph 10.20 above, apply to claims for the recovery of sums paid to the Revenue as a result of a mistake by the taxpayer. We note that this distinction in fact reflects the technical ratio of *Woolwich*, and therefore the existing law. **We therefore recommend that:**

(14) the change in a settled view of the law bar (recommendation (12)) should not apply to claims for the recovery of sums paid to the Revenue as a result of the invalidity of subordinate legislation which created or was fundamental to the collection of the charge to tax (Clause A, section 33AA(6)).

Submission to an Honest Claim

(a) MISTAKE CLAIMS

10.31 Under the general law, a payee may resist a claim for restitution of a payment made under a mistake if the payment was a submission to, or a compromise of, an honest

[59] Case C-330/91 *R v Inland Revenue Commissioners, ex parte Commerzbank AG* [1994] QB 219 (ECJ).

[60] This could only be overcome by founding the "mistake" claim on an error in a procedural step, such as an assessment or a return, an approach which we have criticised at para 9.24 above.

[61] Duress by the Revenue is undoubtedly an unlawful act, and may provoke overpayments, but is hardly intended to come within the scope of *Woolwich* as declared by the House of Lords. However, where the tax is (apart from the threat) due, although such an amount might be recoverable in theory, it will be subject to a counter claim in exactly the same amount. It might also be disputed whether the House of Lords intended to influence the law of duress by their rulings in the *Woolwich* case: Lord Slynn and Lord Browne-Wilkinson, for example, both held that the imposition of pressure on a citizen by the revenue authorities was close to duress. See *Woolwich Equitable Building Society v IRC* [1993] AC 70, 198, 204.

[62] Other than a purely formal error which would fall under TMA 1970, s. 114.

claim.[63] While this rule originally extended to payments made in response to actual litigation, it now seems to go further and to extend to payments made in response to threats to litigate.[64] In the context of public authorities with their superior power to impose pressure on the subject and also the apparent legality of their demands to the subject, we suggested in our Consultation Paper that the defence of submission should not continue to apply.[65] This would mean that only agreements qualifying as contractual compromises (or, possibly, voluntary payments) would constitute defences to claims for repayment. However, if a taxpayer pays after proceedings have in fact been commenced against him, it seems contrary to the principle of finality of litigation to permit that payment to be reopened.

10.32 The Taxes Management Act 1970, section 54 gives the Inland Revenue power to compromise appeals against assessments which are taken to the General and Special Commissioners. Such a statutory compromise prevents the Inland Revenue from levying an additional assessment and thus reopening the transaction under appeal,[66] but a contractual compromise falling outside the provisions of section 54 would not so operate. A compromise reached under TMA 1970, section 54 has the same effect as if the General or Special Commissioners had determined the appeal against the assessment in accordance with the compromise.[67] The findings of the General or Special Commissioners on an appeal against assessment are final,[68] subject to the right to require a case stated to the High Court,[69] or to other specific provisions of the Taxes Acts.

10.33 The provisions of TMA 1970, section 54 are particularly important in practice, but would not apply to a claim for a repayment under our proposed replacement of TMA 1970, section 33. Therefore, a compromise of a claim for repayment under TMA 1970, section 33 would not protect the taxpayer against the levying of an additional assessment arising out of affairs which formed the subject matter of the claim for repayment where the Inland Revenue discovers matters overlooked at the time of the original assessment. We consider this to be unjustified. A compromise of a claim for repayment should be subject to the usual contractual rules on finality, and thus conclusive of that particular aspect of a taxpayer's liability, in the absence

[63] See above Section B, paras 2.25-2.38, where these principles are discussed.

[64] See above Section B, para 2.35.

[65] Consultation Paper No 120, paras 3.65-3.69. See also *Woolwich Equitable Building Society v IRC* [1993] AC 70, 160-1, 204 per Lord Keith and Lord Slynn. Both believed that the dividing line between the imposition of legitimate and illegitimate pressure by the Crown on the subject was difficult to draw, and that almost any pressure to pay would shade into duress.

[66] See Consultation Paper No 120, paras 3.66-3.68.

[67] TMA 1970, section 54(1).

[68] TMA 1970, section 46(2).

[69] TMA 1970, section 56. See also *Petch v Gurney* [1994] 3 All ER 731.

of fraud, misrepresentation or other grounds sufficient to render the compromise void or voidable. We see no reason why a compromise of a claim for repayment under the new statutory recovery right should not be capable of having the same finality as if the claim for repayment had actually been heard and determined by the Commissioners.[70]

10.34 **Accordingly, we recommend:**

(15) it should be a defence to an action for recovery of an overpayment of tax paid as a result of a mistake that a claim for the tax in question was contractually compromised,[71] or that payment was in response to litigation commenced by the Inland Revenue against the taxpayer concerned. However, it should not be a defence that the payment was made in response to a mere threat to litigate, unless that payment would also qualify as a contractual compromise (Clause A, clause 33A(4)).

Although it is not within our terms of reference to make recommendations regarding the current operation of the "discovery" assessment rules in TMA 1970, and their relationship with the rules on submission and compromise, we consider that TMA 1970, section 54 should be amended to make it clear that in the course of a claim for repayment brought before the General or Special Commissioners (as the case may be) compromises or agreements may be reached with the same effect and finality as currently apply to compromises reached in the course of appeals against assessments.

(b) ULTRA VIRES CLAIMS

10.35 We believe that the principles which should govern the position here are identical to those which apply in the context of overpayments of tax to the Inland Revenue due to mistake of law, and **recommend that:**

(16) it should be a defence to an action for recovery of an overpayment of tax paid as a result of an ultra vires charging instrument that a claim for the tax in question was contractually compromised, or that payment was in response to litigation commenced by the Inland Revenue against the taxpayer concerned. (Clause A, clause 33A(4)).

[70] The Finance Act 1994, s 191 has altered the rules governing "discovery" assessments under TMA 1970, s 29. The new TMA 1970, s 29(2) provides that discovery assessments may not be made by the Inland Revenue where the loss of tax was caused by an error or mistake in the taxpayer's return, which return was made "on the basis [of]...the practice generally prevailing at the time when it was made". The subsection therefore accords with the limitation on recovery in TMA 1970, s 33. A taxpayer cannot recover tax paid through error or mistake if paid in accordance with the generally prevailing practice, nor can the Revenue recover tax lost as a result of returns which are mistakenly made in accordance with the generally prevailing practice. We have given our objections to the concept of generally prevailing practice at paras 10.12-10.19: however, although parity between the taxpayer's ability to reopen his own affairs for mistake on his part and the Revenue's ability to do so would be desirable, it is not in our view essential. Although not strictly within our terms of reference, nothing in our Report is intended to cast any doubt on the newly introduced limitation to the Revenue's powers under TMA 1970, s 29.

[71] Whether under TMA 1970, s 54 or in accordance with standard contractual principles.

Limitation Periods

(a) MISTAKE CLAIMS

10.36 At present, the time limit for commencing action for repayment of overpaid tax under TMA 1970, section 33 is -

> not later than six years after the end of the year of assessment (or, if the assessment is to corporation tax, the end of the accounting period) in which the assessment was made.[72]

For cases not falling within section 33, where action must be taken at common law, the period of limitation is six years.[73]

10.37 The Inland Revenue's Supplementary Response to our consultation paper favoured relatively short time limits from the date when the tax was paid for instituting proceedings under the *Woolwich* principle.[74] However, in later discussions with us, representatives of the Inland Revenue also pointed out the disadvantages of time limits in general. Time limits favour the well-advised and shorter time limits would be likely to cause particular problems in connection with the move to self-assessment to tax. Nowhere was it suggested in the Revenue's submissions that the existing six year limitation period for claims for relief under TMA 1970, section 33 operated to the Revenue's disadvantage.

10.38 Most consultees who considered the issue of short limitation periods (which, of course, was raised only in the context of *Woolwich*-type actions against public authorities) favoured these.[75] Short time limits have been adopted in other jurisdictions as a means of dealing with the potential problems caused to public finances by claims for restitution of taxes levied either illegally or unconstitutionally.[76] An example which was put forward in the *Woolwich* case itself

[72] TMA 1970, s 33(1).

[73] Limitation Act 1980, ss 2 & 5. See McLean "Limitation of Actions in Restitution" [1989] CLJ 472. The author, along with Goff and Jones, concludes that the courts are likely to decide that sections 2 & 5 of the 1980 Act, although not phrased so as to apply to restitutionary actions, do so, and that the six year period runs from the date of conferral of the benefit, being the date of accrual of the cause of action (cf McLean, *op cit*, p 475-476; *Maskell v Horner* [1915] 3 KB 106; Goff and Jones, p 765-770). However, in actions founded on mistake, section 32(1)(c) provides that the cause of action does not accrue so as to commence the limitation period until the plaintiff discovers the mistake or could with reasonable diligence have discovered it.

[74] Supplementary Response page 12.

[75] Five out of sixteen who addressed the issue opposed short time limits.

[76] For example, in the United States, sections 6532 and 7422 of the United States Internal Revenue Code provide that a claim for repayment must be made by written notice on the Secretary of the Treasury. If rejected, an action for its enforcement must be brought in the ordinary courts within two years of the notice of rejection. See also *Mertens Law of Federal Income Tax* §§ 58A-19 and 58A-23, which points out that a written claim must be made even though the tax is unconstitutional. Individual States of the United States provide for widely differing limitation periods for the recovery of specific taxes levied illegally or

was that of Germany.[77]

10.39 We recommend below[78] that it should be a defence to any claim for recovery that statutory rights of appeal against assessments have not, in certain circumstances, been exhausted. We are aware of the difficulties in operating short limitation periods, as well as the difficulties these pose to practitioners in a legal system with a benchmark limitation period of six years.

10.40 There are dangers to the public revenue if there is an unrestricted right to recover payments made under a mistake or in response to ultra vires demands.[79] However, in this Report, we have recommended four defences to claims for the recovery of sums paid under mistake: non exhaustion of statutory rights of appeal; change in a settled view of the law; compromise and submission; and unjust enrichment of the payer. We believe that together these provide adequate protection to the Inland Revenue in this regard. Additionally, short limitation periods appear to us to be likely to favour those with access to legal advice, rather than the smaller taxpayer and businessman, who is in fact most likely to need the assistance of recovery provisions of the nature proposed. **With these considerations in mind, we recommend that:**

(17) short time limits for the bringing of claims for repayment of tax overpaid as a result of a mistake should not be enacted as a means of dealing with the problem of disruption to public finances. We presently favour retaining the existing six year time limit from the date of

unconstitutionally by the States (as opposed to by the Federal Government, to which the Internal Revenue Code provisions apply): See Palmer *op cit* vol III § 14.20; Field "The Recovery of Illegal and Unconstitutional Taxes" (1931-32) 45 Harv LR 501 and Pannam "The Recovery of Unconstitutional Taxes" (1964) 42 Tex LR 777.

77 In Germany, the taxpayer must lodge an objection with the administrative authority by whom the tax has been imposed within one month from the date of imposition, and if this is rejected, commence action before an administrative court within a further month. These time periods only run if the citizen has been informed of his rights of objection and appeal and is briefed by the administrative authority on each step as it is taken; see *Woolwich* [1993] AC 70, 174 C-G per Lord Goff.

78 Para 10.43 below.

79 In the context of overall United Kingdom Government expenditure in 1993/1994 of £281 billion, the amount raised under the impugned regulations in *Woolwich* (together with accrued interest) of approximately £250 million (Written Answer, *Hansard* (HC) 4 June 1991, vol 192, col 140-141) appears relatively small. However, it approaches the amount which the Department of the Environment planned to spend in 1993/1994 on environmental protection and is almost nine times the amount which the Ministry of Agriculture, Fisheries and Food planned to spend on arterial drainage and coastal protection (Source: "Public Expenditure"; HM Treasury, Cm 2519, Feb 1994). The United States provides a more worrying example. In the 1930's, the unconstitutionality of the Agricultural Adjustment Act (*United States v Butler* (1936) 297 US 1) exposed the US Treasury to claims for refund of over $1 billion in overpaid agricultural levies, much of which had actually been passed on by the food processing companies assessed to farmers and the general public. The US Congress passed legislation providing that only those who had actually borne the burden of the tax could seek a refund, and the validity of this was upheld (Revenue Act of 1936, *Anniston Manufacturing Co v Davis* (1937) 301 US 337).

payment. However, as is the case under the Limitation Act 1980, section 32(1)(c) for actions based on mistake, time should not begin to run against the claimant until he discovers the mistake or could with reasonable diligence have discovered it. (Clause A, section 33AA(3)).

When considering this time limit, it should be recalled that it will be a defence to actions based on mistake that the claimant could, in the circumstances discussed below, have raised the mistake as a defence against an assessment to tax at the appropriate time, and did not do so.

(b) ULTRA VIRES CLAIMS

10.41 There seems to us to be no reason for differing in this context from the recommendation made above in relation to mistake claims. The arguments raised in favour of the introduction of short time limits may seem to be stronger in the case of payments made in response to ultra vires demands, as the public revenues may seem more exposed to such claims.[80] However, there are strong arguments of principle, with which we deal below, against the introduction of special defences to deal with disruption to the public finances arising out of claims for the recovery of sums paid by way of tax raised ultra vires. In any event, the defence of non exhaustion of statutory rights of appeal will apply to claims for recovery on this ground. Moreover, we have not been convinced that the possibility of disruption to the public finances, against which other defences will be available, justifies the creation of arbitrary distinctions between cases by the introduction of shorter limitation periods in one context and not in another. **Therefore, we recommend that:**

(18) short time limits for the bringing of claims for repayment of tax overpaid as a result of ultra vires demands should not be enacted. The time limit should be six years from the date of payment, subject to the usual principles of the law of limitation (Clause A, section 33(4)).

Non Exhaustion of Statutory Remedies

10.42 Our basic approach to the proper relationship between the statutory right of appeal against an assessment to income tax and the right to claim repayment of an overpayment of tax is set out at paragraphs 8.24-8.32 above. However, defining this is difficult. The present position is that in most cases, appeals against assessments must be brought within 30 days of the assessment in question being made, subject to the Inland Revenue's discretion to allow appeals out of time.[81] We are informed that this discretion is apparently liberally exercised. Further, it seems to be possible

[80] Because of the greater likelihood of large numbers of payments having been made in response to ultra vires charging instruments or acts.

[81] TMA 1970, s 49, if the Inland Revenue is satisfied that there was a "reasonable excuse for not bringing the appeal within the time limited, and that the application was made thereafter without unreasonable delay." If the Inland Revenue is not so satisfied, it must refer the application for leave to appeal out of time to the General or Special Commissioners as appropriate.

to seek repayment of overpaid tax under TMA 1970, section 33 in circumstances where assessments have become final and were not appealed under the statutory procedure, and leave to appeal out of time is refused.

10.43 Officials of the Inland Revenue have repeatedly emphasised to us the overriding importance of preserving the finality of the assessment procedure. The time limits for lodging appeals against assessments are still relatively narrow while the time limit for seeking repayments is generous. In principle we feel that this position should be preserved. In the *Woolwich*-type scenario, a taxpayer who has a statutory right of appeal may not benefit from the common-law right of restitution established by the *Woolwich* decision.[82] This position is in our view excessively harsh as a general proposition, as it means that, even where it might not have been reasonable to have expected a taxpayer to take advantage of the statutory mechanism, the taxpayer will be obliged to do so, and may lose the common law remedy. We do however believe that in framing a statutory provision, the law should encourage a taxpayer to raise any matter as an objection to an assessment at the appropriate time, of which he was or should have been aware. The law should not generally permit circumvention of the procedure laid down by Parliament for the determination of liability to tax. Accordingly, **we recommend that:**

(19) it should be a defence to an action under the statutory right to repayment of taxes paid but not due which will replace TMA 1970, section 33, that the applicant has raised the ground of claim on an appeal against an assessment to the amount of tax in question. It should further be a defence to a claim for repayment that the applicant either knew of the ground, or should by the exercise of due diligence have known of the ground, within the time limit for bringing an appeal against an assessment and did not raise it in that manner (Clause A, section 33AA(3)).

We intend that the concept of "due diligence" will be developed by the courts on a case by case basis. We also intend that it should vary in its stringency depending on the circumstances of the individual taxpayer concerned. It would not be reasonable for a small taxpayer, or perhaps even for many medium sized commercial concerns to be required to take sophisticated legal advice on every taxation dispute which arises. It might well be reasonable to expect a large commercial organisation to do so. In particular, the use of the concept of due diligence is not intended to suggest, where the grounds of appeal and of claim are ones of law, that it should be an essential part of satisfying the requirement of diligence that legal advice be taken in all cases by the taxpayer in order to "know" his true position.

[82] See *Woolwich Equitable Building Society v IRC* [1993] AC 70, 169 B-H, 170 A-B, per Lord Goff. Lord Goff explained that in his view the statutory appeal mechanism established by TMA 1970 could not apply to the building society. He then stated that it is for this reason that the building society is not "enabled or required" to seek its remedy through the statutory framework. This may suggest an obligation on the part of a taxpayer who could so benefit to rely on the statutory remedy, which would displace any common law right.

Recovery would Unjustly Enrich the Payer

(a) MISTAKE CLAIMS

10.44 Actions at common law for the recovery of payments made by mistake are based on the doctrine of unjust enrichment. The defendant must therefore have received a benefit at the plaintiff's expense.[83] The Value Added Tax Act, section 80 (previously the Finance Act 1989, section 24), which deals with refunds of overpaid VAT, contains a statutory defence to such claims, which bears a superficial resemblance to this principle. Section 80(3) provides that:

> it shall be a defence, in relation to a claim under this section, that repayment of an amount would unjustly enrich the claimant.

The VAT provisions are based on the unjust enrichment of the claimant by the refund, rather than on the unjust enrichment of the authority by the payment. They are not therefore based on restitutionary principle, which would focus on the latter aspect.

10.45 There are situations in which we can envisage this defence being of assistance in minimising recovery in unmeritorious circumstances. For example, if a taxpayer company went into liquidation owing substantial amounts to the Inland Revenue, it would seem to us to be unjust if an absolute entitlement to a refund based on an earlier mistake could be maintained by the liquidator, who then proceeded to apply the sum recovered to other debts.[84] Similarly, the provision might permit the Special Commissioners, when considering a claim for recovery of tax paid under a mistake of fact or of law, to consider whether repayment would unjustly enrich the claimant because he had underpaid tax in other areas,[85] although the defence has not been applied in this situation in claims for the recovery of overpaid VAT. Its principal application in VAT claims was, it seems, intended to be to situations where a VAT-registered trader passed on the incidence of the tax to individual customers,[86] and thus where repayment to the trader, as opposed to the individual customers, would unjustly enrich him. This is of little relevance to direct taxation.

[83] These large principles are set out in Goff and Jones (4th ed, 1993) p 12 et seq.

[84] Given the statutory orders of payment on insolvency, for example, the liquidator's own fees rank highest for payment out of the company's assets: Insolvency Act 1986, sections 328, 329 and Insolvency Rules 1986 (SI 1986/1925) rules 6.64A (added by SI 1987/1919), 6.224, 10.4, 12.2 - as amended by Finance (No 2) Act 1992, section 9. The recent decision of the VAT Tribunal in *Creative Facility & Oblique Press Ltd v Commissioners of Customs and Excise* MAN/92/1157, 1158 seems to have held that this defence applies to situations of this nature in claims brought under the Finance Act 1989, s 24 (now consolidated in Value Added Tax Act 1994, s 80). We understand from HM Customs & Excise that an appeal to the High Court is pending.

[85] Para 9.22(6)(b) above.

[86] *Computeach International Ltd v Commissioner of Customs and Excise* MAN/91/1224, para 14.18 below.

10.46 We consider that this defence could afford a useful measure of protection to the Inland Revenue, in situations where recovery by the taxpayer would be wholly unmeritorious. It is sanctioned by European Community law in cases where that law prescribes that charges levied contrary to its directly applicable provisions should be recoverable. It is applied, and apparently operates satisfactorily, in claims for the repayment of overpayments of VAT. It differs from the discretion given to the Board of Inland Revenue by TMA 1970, section 33(3) to deny relief since it must be shown that the claimant would be benefited unjustly by a refund of the overpaid tax, and not simply that to grant relief would result in the claimant escaping tax on other sources of income. It differs further from the present provisions in that the defence must be held to have been established by the Inland Revenue by an independent tribunal, with an ultimate appeal to the High Court. We consider it further below in the context of claims for the repayment of amounts paid in response to ultra vires demands. For these reasons, we consider that it should form part of the protection which is granted to the revenue authorities against claims for repayment of overpaid tax. **We therefore recommend that:**

(20) it should be a defence to claims for the repayment of taxes overpaid as a result of mistake that repayment will unjustly enrich the claimant (Clause A, section 33AA(5)).

(b) ULTRA VIRES CLAIMS

10.47 We similarly recommend that no claimant should recover in an action for the repayment of sums paid under an invalid charging instrument where it can be shown that in all the circumstances of the case, recovery would cause him to be unjustly enriched. As we stated above, the defence has apparently operated satisfactorily in the field of VAT refunds since its adoption. It should, we believe, assist the Inland Revenue in defending some of the least deserving claims brought against it for recovery of payments made under ultra vires charging instruments. For example, we have in mind that the defence would be available to the Inland Revenue where the charging instrument was merely "technically" invalid. It could therefore protect the Inland Revenue (and through them other taxpayers) against the risk of a claimant's intervening insolvency where, after remedying the invalidity, the Inland Revenue could reimpose exactly the same charge to tax on the claimant.

10.48 Application of the defence in this area may seem open to the philosophical objection that *Woolwich*-type claims are based on the principle that taxation without Parliamentary authority is constitutionally objectionable. It may be thought that this quality of objectionability remains, whether the excess of Parliamentary authority be merely formal, or substantive. However, it seems to us that the action established in *Woolwich* should not be permitted to be used to work injustice to the State in its various guises. We were given the task of limiting the *Woolwich* principle in a satisfactory way, and this limitation seems appropriate to us. **Accordingly, we recommend that:**

(21) it should be a defence to claims for the repayment of taxes overpaid

as a result of an ultra vires charging instrument that repayment will unjustly enrich the claimant. (Clause A, section 33AA(5).

PART XI
THE MODEL SCHEME AND THE PROBLEM OF DISRUPTION TO PUBLIC FINANCE

Introduction

11.1 Our consultation paper referred to the problem of disruptions to public finance which might result from allowing recovery of payments made under a mistake of law or ultra vires receipts by a public authority.[1] In particular, we took into account the fact that mistakes of law may be more widespread than mistakes of fact, that ultra vires acts by public authorities could have extremely widespread effects and that great administrative disruption might result from permitting recovery.[2] Additionally, the effect of permitting recovery in some instances may be to redistribute the tax burden among a different circle of taxpayers. Further, the effect of a right of recovery on the finances of a particular body would vary enormously depending on its revenue raising ability. We proposed a number of possible methods for dealing with the problem of disruption to public finance. The suggested defences were a defence of disruption to public finance, denying recovery to later challengers,[3] and prospective overruling and change of position.[4] The need for special defences to restitutionary claims aimed at preventing or minimising disruption to public finances has not received unanimous support, either in the context of claims for mistake or ultra vires.[5]

[1] Consultation Paper No 120 "Restitution of Payments made under a Mistake of Law" paras 3.70-3.73.

[2] We generally presumed throughout our consideration of this area that no special protection against widespread mistakes of fact should be afforded to public authorities. They do not enjoy the benefit of such protection at present, and public authorities have not called for such. Indeed, their correspondence with us has proceeded on the basis that widespread mistakes of fact are unlikely. This is true, particularly given the state of modern communications systems. However, it may have been more likely in the past or may still be possible in the commercial sphere when dealing with societies lacking advanced communications. For a reported case, see *Oom v Bruce* (1810) 12 East 225; 104 ER 87.

[3] No retrospective effect for decisions which establish the invalidity of particular acts or instruments. This technique has been called a "novelty stop" by Birks: see "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights" in Finn (ed) *Essays on Restitution* (1990) p 164, 197.

[4] Defences of "passing-on" and "technical invalidity" are irrelevant: income tax cannot with any reality be said to be "passed-on" by the taxpayer; while invalidity applies to the charging instrument and thus refers primarily to taxes paid ultra vires.

[5] See Consultation Paper No 120 paras 3.70-3.73. The Supreme Court of Canada in *Air Canada v British Columbia* [1989] 1 SCR 1161 considered this question and came to sharply divergent views. Wilson J (dissenting), in a passage cited with approval by Lord Goff in *Woolwich* [1993] AC 70, 175, 176, indicated her opposition to the concept of safeguards for Government. This was of course in the context of an unconstitutional statute, which had been found to offend against the Canadian Charter of Human Rights and Fundamental Freedoms. She said (p 1215) "I cannot, with respect, accept my colleague's proposition that the principle [of recoverability] should be reversed *for policy reasons* in the case of payments made to governmental bodies. What is the policy that

Mistake Claims and Serious Disruption to Public Finance

11.2 The precise extent of the problem is, in our view, sustantially reduced by our recommendations that recovery should not be available for mistake of law simply because there has been a change in a settled view of the law by judicial decision[6] and that recovery rights should be subject to the submission and compromise principles. We therefore consider that the only category of circumstances in which widespread mistakes of law could ground recovery would be where the view of the law on which the payment was based is not changed by a subsequent judicial decision.[7] We considered two sets of facts where widespread disruption to public finance might result from errors falling within this category: these are (a) spontaneous shared error by many taxpayers in the construction of some document bearing on their individual liability (for example, all taxpayers or a significant proportion of them may misconstrue the provisions of a particular Inland Revenue form or (perhaps) advisory brochure); and (b) shared error by many taxpayers as to the understanding and application of the law whether it be common law, judicial decision or primary or secondary legislation, where that error is established other than through a subsequent judicial decision.[8]

11.3 These situations are paradigm examples of mistakes of law, and the payer obviously acts under an operative mistake. These are not situations where, due to a subsequent judicial or legislative change, the payer may be said not to have acted under a mistake at all. In principle, therefore, recovery should be allowed.

requires such a dramatic reversal of principle? Why should the individual taxpayer, as opposed to taxpayers as a whole bear the burden of government's mistake?". However the majority of the Supreme Court, in a judgment delivered by La Forest J, held that the principle of recoverability should be reversed for policy reasons. He said (p 1204) "..there are solid grounds of public policy for not according a general right of recovery in these circumstances, and that this prohibition exists quite independently of the law of restitution..[He cited precedents in Kentucky, New York and British Columbia]...The only practical alternative as a general rule would be to impose a new tax to pay for the old, which is another way of saying that a new generation must pay for the expenditures of the old..[He referred to incidents in the United States where Congress had been forced to pass emergency legislation to alleviate the effects of one particular piece of unconstitutional legislation, following the abolition of the mistake of law rule in the United States Internal Revenue Code]".

6 See paras 10.20-10.21, 10.30 above.

7 For example, a sudden realisation by taxpayers and those advising them that the previous judgment of Mr Justice X or the previous interpretation of a particular statutory provision was obviously wrong, or the announcement by the Inland Revenue that it was changing a particular view of the law which it had previously held.

8 This would seem to require a spontaneous realisation on the part of taxpayers in general that a previous understanding of the law was wrong, perhaps as a result of an article in a learned periodical, and see paras 5.2 n 5 and 10.21 n 42 above. It might be argued that the litigation arising as a result of ultra vires swap transactions on the part of local authorities constitutes an example of an understanding of the law, derived other than from judicial decision, which was subsequently changed as a result of a judicial decision. Prior to *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1 swap transactions were generally thought to be *intra vires* local authorities, although case law had never addressed the point.

11.4 The issue can be highlighted by comparing the effect of erroneous taxation advice given by a leading firm of tax practitioners with the effect of advice given by one adviser in a small rural town. The only reason for differentiating the situations is that the level of disruption to public finance arising from permitting recovery in the case of error by a leading firm would be at an objectionable level (an argument which proceeds from policy rather than principle).

11.5 If recovery is denied, the payer still retains his remedy against the advisers in question. This, however, throws the risk of the transaction onto the payer, while permitting the Inland Revenue to retain funds to which it is not entitled. Therefore, we find it difficult to see how we can, on any principled basis, recommend protection by way of special defences to claims for the recovery of sums paid under mistakes of law in order to deal with any perceived problem of disruption to public finance. Any such special defences would have to be recommended purely on policy grounds. With this in mind, therefore, we discuss the merits of the defences which might be considered to deal specifically with this problem.

Possible Defences

(a) A DEFENCE OF SERIOUS DISRUPTION TO PUBLIC FINANCE

11.6 The first option is to approach the problem directly, by the introduction of a defence of "severe disruption to public finance".[9] We have rejected this option for a number of reasons. First, we considered that such a legislative provision would be likely to be virtually impossible to frame with any degree of precision. Secondly, there was a lack of support for any such provision on consultation.[10] Thirdly, fundamental questions of fairness to taxpayers must be addressed before such a provision could be recommended. If an individual taxpayer, whether large or small, has paid tax in circumstances where the law gives a right of recovery, it is a substantial investment of discretion in a tribunal or court to afford it power to deny that right on the basis of expediency. Yet further injustice would be worked by a provision permitting a court to deny recovery where allowing it would establish a "dangerous" precedent. We cannot at present identify any legislative precedent for

[9] Such a defence would mean that a claim for repayment would not succeed where to allow it would result in severe disruption to the public finances, or (perhaps) would set a precedent the application of which would cause severe disruption to public finances.We have in mind here the "test case" or "lead action", where one plaintiff's claim has been advanced as a test case as part of a concerted action by a group of taxpayers acting in unison.

[10] Although consultees were not addressed directly on the issue of whether a specific defence of disruption to public finance should be created, they were requested to consider specific defences (prospective overruling and the like) aimed at dealing with the perceived problem of disruption. There was no support from consultees for measures aimed to deal with the problem of disruption apart from short limitation periods. Consequently we deduce from this that consultees did not see the problem of disruption as one that was severe enough to merit specific attention beyond short limitation periods.

such a denial of a common law right[11] and we consider that the problem of disruption to public finance is substantially reduced by recommendations (12) - (15) and (19) - (21) above. Finally, we recognise that in a clear enough case, Parliament would itself be likely to intervene by passing legislation aimed at controlling the problem.[12] **Therefore, we recommend that:**

(22) the problem of disruption to public finance should not be dealt with by the introduction of a defence permitting denial of recovery where such disruption would result.

(b) PROSPECTIVE OVERRULING

11.7 Prospective overruling was developed as a means of dealing with the effects of unconstitutional legislation by the United States Supreme Court[13] and its applicability in that context is apparent. We discuss it in the context of ultra vires taxes at paragraphs 11.23ff below. However, the technique of prospective overruling is inappropriate in our view to protect against widespread mistakes of law. The technique depends for its application on the overruling by a court of a previous view of the law, with a declaration that the new understanding is only to apply prospectively and not retroactively.[14] However, to apply this might, where the previous settled view of the law results other than from judicial decisions, involve a court declaring that a view of the law, which was never authoritatively declared to be the law, was effectively to be regarded as having been such prior to its decision.

[11] Judicial review may sometimes be denied, or granted only prospectively, see para 11.23 n 49 below.

[12] It should be noted however that certain retrospective legislative methods might be vulnerable to challenge under the European Convention on Human Rights: see *A, B and Company AS v Federal Republic of Germany*, Vol 14 *Decisions and Reports of the European Commission on Human Rights* (1979) p 146; *A, B, C and D v United Kingdom*, Vol X *Yearbook of the European Convention on Human Rights* (1967) p 506; Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* (2d ed, 1990) p 454-467. The provisions of the Finance Act 1991, s 53 which retrospectively rendered abortive the applications of the Leeds Permanent Building Society and the National and Provincial Building Society for judicial review of the same statutory instrument challenged by Woolwich in its application to them are presently the subject of an application by these building societies to the European Commission on Human Rights. We understand that the complaint is proceeding, that the United Kingdom Government has been called on to provide observations, and that a decision on admissibility has not yet been taken by the Commission. See also *R v Commissioners of Inland Revenue ex p Leeds Permanent Building Society and National and Provincial Building Society, The Times*, 28 May 1993 (Div Ct).

[13] Because the power of judicial review was not set out specifically in the United States Constitution, the Supreme Court believed itself to be free to decide in any particular case whether a statute which was found to be unconstitutional should be overruled prospectively or retrospectively. The applicability of the technique is apparent in the context of unconstitutionality of legislation or the control of subordinate legislation by way of judicial review, but not in the context of the common law generally. The technique, or a variant thereof, has been used by the European Court of Justice (see para 11.26 below). Its application is discussed in Nicol "Prospective overruling: A new device for English Courts?" (1976) 39 MLR 542, where a summary of the US and Commonwealth jurisprudence on the subject is given.

[14] This is, of course, on the assumption that the declaratory theory of the common law is regarded as having some force. See above, Section B, paras 5.2-5.4 above.

In any event, in an appropriate case, the "change in settled view of the law" bar as we have formulated it should deal with most cases of difficulty. **Therefore, we recommend that:**

(23) the technique of prospective overruling should not be applied in an attempt to prevent disruption to public finances caused by claims for recovery of payments made under a mistake of law.

(c) DENYING RECOVERY TO LATER CHALLENGERS

11.8 This technique permits the courts to deny recovery to certain categories of challengers. It would therefore seem to constitute a possible means of controlling disruption to the public finances caused by claims falling outside the scope of the "change in a settled view of the law" bar. Such a mechanism was adopted by the Irish Supreme Court in *Murphy v Attorney General*[15], applying *Defrenne v SABENA.*[16] The Supreme Court denied recovery to all those taxpayers who had not commenced proceedings for the recovery of certain unconstitutionally levied taxes prior to the date of its finding in the challengers' action that the taxes were unconstitutional. It seemed to base its decision on the doctrines of change of position, laches, varieties of estoppel and *res judicata*. The technique would permit the Inland Revenue to ask the court or tribunal hearing the payer-challenger's action to declare that recovery should be allowed only to the payer-challenger (and to challengers who had commenced action before judgment in the case before the court).

11.9 This technique has its attractions,[17] although it is easily capable of avoidance by concerted legal action.[18] However, its application seems to favour those with access to legal advice. The majority of less well advised plaintiffs will probably discover their mistaken view of the law due to the success of the payer-challenger's action. It would additionally tend to favour those with funds available for the financing of private litigation, as it seems to us to be less likely that legal aid would be granted for an action which expressly proceeds on the basis that an existing view of the law is wrong. **We therefore recommend that:**

(24) a court or tribunal determining a claim to recover tax paid should not be legislatively empowered to deny recovery to those who have not

[15] [1982] IR 241.

[16] [1976] ECR 455 (ECJ), and discussion at paras 11.26-11.27 and 14.1 below. In *Defrenne v SABENA* recovery was permitted to Ms Defrenne, and to those who had brought action prior to the European Court's ruling, but to no others. The European Court justified its ruling on the basis of respect for the certainty of past legal relations, but was also clearly influenced by the inactivity of the European Commission in the case. cf *Barber v Guardian Royal Exchange Assurance Co* [1991] 1 QB 344.

[17] Arguably, as the Irish Supreme Court stated, courts have a power to make orders in this form. However, Professor Birks believes that English Courts would be unlikely to be "as bold" - see Birks *op cit* in Finn (ed) *Essays on Restitution* (1990), p 197-198.

[18] See para 11.30 below.

brought proceedings prior to its decision, where to allow subsequent claims for recovery would lead to severe disruption to public finance.

(d) CHANGE OF POSITION

11.10 Another possible solution to the problem of disruption to public finances caused by mistake of law claims is simply to rely on the development of the common law defence of change of position discussed in Section B.[19] In the light of the recognition of this defence in *Lipkin Gorman v Karpnale Ltd*[20] there seem to be three possible approaches to the application of the defence of change of position against public authorities. The first is based on the formulation of the defence in *Lipkin Gorman* itself. The second is based on the approach of the Irish Supreme Court in *Murphy v Attorney General.*[21] The third is based on the approach of the Canadian Supreme Court in *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd.*[22]

11.11 We have seen in Section B that the *Lipkin Gorman* formulation itself is sufficiently wide that it is unnecessary for the public authority to establish that a specific item of expenditure was undertaken on the strength of the receipt in question in order to rely on the defence.[23] However, Lord Goff's speech makes it clear that ordinary or normal expenditure, which the public authority would have undertaken in any event without the receipt in question, is insufficient to establish a change of position.

11.12 The applicability of the defence to receipts by public authorities was considered by Hobhouse J (as he then was) in *Westdeutsche Landesbank Girozentrale v Islington LBC* (the "Swaps" case).[24] He held that as the defendant council had withheld sums from expenditure in previous years to meet its likely liability to make restitution to the plaintiff Bank, no question of change of position arose.[25] Hobhouse J's approach makes it clear that the defence of change of position is capable of applying against a claimant who seeks restitution from a public authority, provided that it is made out on the facts. Islington LBC had failed to establish on the facts of the case that it had changed its position, and this may indicate the potential difficulties in the way of public authorities who seek to rely on the defence. It will always be difficult for

[19] See paras 2.17-2.23 above.

[20] [1991] 2 AC 548.

[21] [1982] IR 241.

[22] (1975) 55 DLR (3d) 1.

[23] See para 2.20 above.

[24] *Westdeutsche Landesbank Girozentrale v Islington LBC* (1993) 91 LGR 323, 387-397, but especially 388-389; aff'd [1994] 1 WLR 938. See also above Section B, para 2.41.

[25] *Ibid*; now under appeal to the House of Lords. Hobhouse J's approach to the defence of change of position was not considered by the Court of Appeal. Both Dillon and Leggatt LJJ, with whom Kennedy LJ agreed, upheld Hobhouse J's finding that restitution should be granted to the plaintiff banks on the basis of sums paid under a transaction entered into for no consideration: [1994] 1 WLR 938, 944-7 per Dillon LJ, 952-953 per Leggatt LJ.

a public authority, and especially for the Crown, to show that it has undertaken items of expenditure other than those which it would in any event have undertaken on the strength of a particular tax receipt. The spending plans of revenue raising public authorities, and particularly those of the Crown, are generally decided in principle several years in advance of the taxation year to which they relate.

The Murphy approach

11.13 In *Murphy v Attorney General*[26] the application of the defence of change of position was considered by the Irish Supreme Court. The point is specifically addressed by Henchy J.[27] After stating the principles of change of position, he continued:

> ...it is beyond question that the State in its executive capacity received the moneys in question in good faith, in reliance on the presumption that the now condemned sections [of the (Irish) Income Tax Act 1967] were favoured with constitutionality. In every tax year from the enactment of the...Act..., until the institution of these proceedings in March 1978, the State justifiably altered its position by spending the taxes thus collected and by arranging its fiscal and taxation policies and programmes accordingly.[28]

11.14 Thus, Henchy J (with whom Griffin and Parke JJ concurred) found that the defence could be claimed by the State. He went on to say that it would be inequitable to order restitution since at the end of each tax year up until the year of challenge, those in charge of the revenues of the State were entitled to close their books for the year in question, and that to order restitution would be tantamount to ordering one set of taxpayers to make restitution to another. This approach is not, however, a pure change of position defence since it depends on a time limit (the end of the year in which the payment was made) rather than any demonstrable inequity resulting from a change of position.

11.15 The apparent discrepancy between the approach of Hobhouse J in the *Islington* case to the availability of the defence of change of position to public authorities, and the approach of the Irish Supreme Court in the *Murphy* case may be explicable because Hobhouse J held that section 2 of the General Rate Act 1967[29] did not require a Council to conduct its financial affairs on a strictly annual basis. Income tax,

[26] [1982] IR 241.

[27] At pages 319 et seq.

[28] [1982] IR 241, 319-20.

[29] Now repealed.

however, is an annual tax, and must be renewed each year by Parliament.[30]

The Canadian approach

11.16 A third, even stricter approach is afforded by the decision of the Canadian Supreme Court in *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd*,[31] where Martland J said that the defendant had to change his circumstances *as a result* of the receipt of the money.[32] This would confine the operation of the defence to specific, matched items of receipt and expenditure. It seems clear from the formulation of the defence in the *Lipkin Gorman* case[33] that Lord Goff did not intend to adopt the Canadian approach.[34] The division of the departments of state into "spending" and "revenue raising" departments would make this specific correlation extremely difficult for the Crown to show.

11.17 The principles governing the exercise of the defence, as well as the situations in which public authorities are likely to be able to rely on it, are therefore still unclear. However, we do not believe the approach of the Irish Supreme Court in *Murphy v Attorney General*[35] to be the correct one, and it is not yet supported by any English authorities. Its acceptance would permit the Crown to claim the defence of change of position wherever a claim for restitution of taxes was brought after the end of the tax year in which they were paid. This would effectively amount to the introduction of a one year limitation period, an option which we have already rejected earlier in this Report.[36] Although, in the light of Hobhouse J's decision in *Westdeutsche Landesbank Girozentrale v Islington LBC*[37] it is at least arguable that the defence of change of position will be available to public authorities, in particular local authorities with limited power to raise revenue, we do not believe, for the reasons set out in paragraph 11.12 above, that it could realistically be relied on by the Revenue in a case of overpayment of tax resulting from a mistake of law. We should note that consultees generally supported our provisional recommendation that the defence should not apply to claims for the recovery of taxes ultra vires, and it is difficult to see why claims based on mistake of law should be in any different position. **We therefore recommend that:**

[30] In the annual Finance Act, which normally receives the Royal Assent in July or August of each year. The Provisional Collection of Taxes Act 1968 gives limited statutory force to the annual Budget Resolutions until the entry into force of the Finance Act. See Whitehouse & Stuart-Buttle *Revenue Law - Principles and Practice* (11th ed, 1993) para 3.22.

[31] (1975) 55 DLR (3d) 1.

[32] *Ibid*, 13.

[33] [1991] 2 AC 548, 579-580.

[34] See Goff and Jones, p 740-741.

[35] [1982] IR 241.

[36] See para 10.40 above.

[37] (1993) 91 LGR 323.

(25) the statutory scheme should not make provision for the defence of change of position.

Ultra Vires Claims and the Problem of Serious Disruption to Public Finance

Provisional Proposals

11.18 In our consultation paper we said[38] that the potential for disruption of the public finances arising from claims for the recovery of invalid charges was often raised as an objection to any reform of the rule which prohibits recovery. We pointed out that a public authority's expenditure was calculated on the basis of anticipated revenue, and that the recovery of a large number of payments from it might result in the reimposition of the same tax in a different manner, or on a different class of taxpayers which might result in injustice. The significance of the disruption factor varies from case to case, depending on the size of the authority in question and the significance of the revenue source involved. We said that in the majority of cases we believed that it would be fairer to allow recovery than to refuse it, but we went on to consider a number of methods, some of which are currently employed by UK tax legislation and some of which are not, in order to deal with this perceived problem.[39]

Summary of Consultation

11.19 Consultees tended to comment on the specific defences which we had proposed as a means of dealing with the perceived problems of disruption to public finance, rather than the legitimacy of addressing the problem itself. Following consultation, it has been forcefully suggested to us that to address the problem of disruption to public finance arising out of claims for the recovery of sums paid in response to ultra vires levies by providing public authorities with special defences in this situation would be contrary to the principled foundation of the *Woolwich* decision itself. It has been argued that, since the *Woolwich* right is founded on the constitutional objectionability of taxation without Parliamentary approval, it cannot be right that a public authority which levies funds in breach of its authority to do so should be permitted to retain these funds simply by arguing that its finances would be disrupted if it was forced to repay. In principle, this is a highly persuasive argument, founded as it is on the speeches in the House of Lords in the *Woolwich* case[40] and on the express provisions of article 4 of the Bill of Rights, 1688.[41]

[38] Consultation Paper No 120, paras 3.70 et seq.

[39] The principal methods presently employed are the "general practice" defence to the recovery of income, corporation, capital gains and petroleum revenue tax (TMA 1970, s 33); the "unjust enrichment of the payer" defence for VAT (VAT Act, s 80) and 6 year limitation periods (all taxes). The application of these, and of "change in settled view of the law" and non-exhaustion of statutory remedies defences to claims for the recovery of overpaid tax, are considered in this Report: paras 10.10-10.48 above. See also 14.14-14.18 below in relation to VAT).

[40] [1993] AC 70, 172, 176 per Lord Goff; 198 per Lord Browne-Wilkinson.

11.20 On the other hand, it may be argued that the realities of the UK's constitutional arrangements have altered considerably since 1689, and that funds raised by the Crown pursuant to its Parliamentary authority are not now used for its own purposes, or for any purposes which Parliament might find intrinsically objectionable, but for the general public good. That being the case, it may be argued that it would be contrary to the interests of the public generally if public bodies were forced to repay funds levied in breach of a Parliamentary authority, but in good faith, as this would disrupt the public bodies' essential public functions. Although bad faith is one ground upon which a public authority's activities may be held to be ultra vires,[42] the activities of a public body may be ultra vires though carried out in good faith, if they are in breach of other requirements of administrative law.

11.21 The argument that a public authority which acts in excess of its powers in the imposition of a tax should not benefit in a claim for the repayment of that tax from any special defences aimed at minimising disruption to its finances has its attractions. However, the acceptance of this argument would lead to the conclusion that no such defences should even be considered in this Report, as their adoption would be not only unprincipled, but constitutionally objectionable.

11.22 We have recommended that the defence of "change in a settled view of the law" should not apply to claims for the recovery of sums levied under invalid statutory instruments,[43] but that the defences of "unjust enrichment of the payer"[44] and "non-exhaustion of statutory remedies"[45] should do so, together with a six year limitation period within which such claims must be brought.[46] The "unjust enrichment of the payer" defence may, in our opinion, deal with cases where the invalidity was merely technical.[47] This is one of the most obvious cases where protection is desirable for any disruption to the public finances which might result from claims for recovery. We deal with the other possible defences we considered in our Consultation Paper[48] below.

Possible Defences

(a) PROSPECTIVE OVERRULING AND SERIOUS DISRUPTION TO PUBLIC FINANCE

11.23 We do not recommend the adoption of a direct defence of "disruption to public

[41] 1688 1 Will & Mar, sess 2, c 2, article 4.

[42] *Smith v East Elloe Rural District* [1956] AC 736.

[43] See above, para 10.30.

[44] See para 10.44ff above.

[45] See para 10.42ff above.

[46] See para 10.36ff above.

[47] See para 10.47 above.

[48] Consultation Paper No 120, paras 3.70-3.86.

finance" for the reasons given in paragraph 11.6 above, which we believe to be equally applicable to claims for the recovery of ultra vires taxes or levies. The technique of prospective overruling was briefly discussed at paragraph 11.7 above, where it was dismissed as being of no obvious application in cases of payments made under a mistake of law. In the context of ultra vires acts by a public authority such as the Inland Revenue, however, the applicability of prospective overruling as a technique for limiting the scope of the recovery rights afforded by a finding of invalidity in relation to particular Revenue acts or charging instruments is apparent. In general, in administrative law, an act which is held to be ultra vires is deemed to have been so from the time at which it occurred and not simply from the point at which its invalidity is pronounced by the courts - in other words *ab initio.*[49] This is a result of the fact that all persons and bodies subject to judicial review have limited powers. There is therefore no question of a choice arising between the methods of prospective or retrospective overruling in the majority of cases, although exceptions have developed in order to cater for situations in which the overruling of a particular administrative act would cause chaos.[50] In the context of judicial review there are also other safeguards.[51] However, it is possible that the safeguards established in administrative law may not apply in all situations where the actions of the Inland Revenue are attacked. For example, it is perfectly possible that the Special Commissioners may be asked to decide on the *vires* of a piece of delegated legislation or a decision of the Inland Revenue,[52] or that the matter may be raised

[49] See *Ridge v Baldwin* [1964] AC 40; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 170 (per Lord Reid); *Hoffmann-La Roche v Secretary of State for Trade & Industry* [1975] AC 295, 365 (per Lord Diplock). See Wade and Forsyth *Administrative Law* (7th ed. 1994) p 337-344.

[50] Examples have occurred in the context of takeovers or monopolies references. See *R v Panel on Take-overs and Mergers ex p Datafin Plc* [1987] QB 815, 842; *R v Panel on Take-overs and Mergers ex p Guinness Plc* [1990] 1 QB 146, *R v Monopolies and Mergers Commission, ex parte Argyll Group Plc* [1986] 1 WLR 763. See also Lord Denning MR in *R v Paddington Valuation Officer ex p Peachey Property Co Ltd* [1966] 1 QB 380, 402 (temporary denial of certiorari quashing entire rating list). The first two cases suggest that in most cases where an act of the Panel was impugned in the course of a takeover battle it would be appropriate to restrict relief to a declaration so that the error might be put right for the future. In such cases, certiorari and mandamus would normally only be granted for breach of natural justice. In the *Paddington Valuation Officer* case, Lord Denning held that certiorari would be temporarily denied, while *mandamus* would issue with immediate effect, thus obliging the rating authority to compile a new list, while temporarily preserving the validity of the former list.

[51] In particular time limits, the requirement of leave and rules of standing: see Supreme Court Act 1981, s. 31(3) and (6) and RSC Ord 53 rr 3 and 4.

[52] In *Chief Adjudication Officer v Foster* [1993] AC 754, it was held that the Social Security Commissioners, when authorised by statute to decide whether a decision of an adjudication officer or social security appeals tribunal was erroneous "in point of law" had jurisdiction to determine any challenge to the *vires* of a provision in delegated legislation whenever it is necessary to determine whether a decision under appeal is erroneous in point of law. The decision was confined to substantive invalidity, as opposed to procedural invalidity, and to some extent was based on the particular words of the enabling statute. On procedural invalidity, see also *Bugg v Director of Public Prosecutions* [1993] QB 473. In his response to Law Com Consultation Paper No 126 (1993) "Administrative Law: Judicial Review and Statutory Appeals" the Presiding Special Commissioner and President

as collateral to a private law action for restitution, recently clarified in *Roy v Kensington & Chelsea FPC*.[53]

11.24 It is, however, generally in the field of constitutional law that the distinction between prospective and retrospective overruling has arisen in other jurisdictions.[54] Several consequences would flow if courts or tribunals were permitted to exercise a discretion to overrule an Inland Revenue charging act or instrument prospectively. First, the traditional theory that administrative acts are presumed valid until found to be invalid, and are then deemed invalid *ab initio* could be displaced in a wide class of cases by the exercise of judicial discretion. Secondly, the delegated legislation would be considered valid until its overruling in the payer-challenger's action. Therefore, those who had paid prior to the ruling on validity would be regarded as having paid under valid regulations, and would have no action for restitution. Those who paid subsequently would (if the impugned instrument had not been replaced) be able to seek restitution, unless some other defence operated to limit recovery. As for the payer-challenger, his recovery rights are more problematic. If the delegated legislation in question is overruled with effect from the date of judgment in the payer-challenger's action, this would imply that his recovery rights are also barred, since he would have paid under a valid charging instrument.[55]

of the Value Added Tax Tribunals stated that the decision in *Foster* meant the Special Commissioners have similar jurisdiction to determine any challenge to the vires of a provision in regulations. VAT decisions predating *Foster* indicate that that tribunal has no power to consider unreasonableness and irrationality when considering appeals on the grounds that the Commissioners of Customs and Excise had failed to take into account a non-statutory requirement or had misled the taxpayer (*Farm Facilities (Fork Lift) Ltd v CEE* [1987] VATTR 80; *Viva Gas Appliances Ltd v CEE* MAN/80/226 Decision No 1164), but may have power to consider whether there has been procedural impropriety (*Food Engineering Ltd v CCE* LON/91/1522 Decision No 7787).

[53] [1992] 1 AC 624.

[54] The technique was developed in the United States, where it is known as "sunbursting" after the decision in *Great Northern Railway Co v Sunburst Oil & Refining Co* (1932) 287 US 358, where the Supreme Court, held that prospectivity might be necessary to avoid injustice or hardship (per Cardozo J) since "the actual existence of a statute prior to the determination of its constitutionality is an operative fact and may have consequences which cannot justly be ignored" (per Hughes CJ - *Chicot County Drainage District v Baxter State Bank* (1940) 308 US 371). The Court regards itself as having a choice between prospective and retrospective overruling on any occasion (*Linkletter v Walker* (1965) 381 US 618). The power has primarily been applied in criminal procedure cases, where, for example, unconstitutionally obtained evidence has been presented at trial, and the complainant has been convicted in reliance on this. The *Defrenne* "novelty stop" is a variant of prospective overruling. See Nicol (1976) 39 MLR 542. Despite the author's arguments, prospective overruling strictly so called has met with no favour in England. See, however, the device used in the cases at para 11.23 n 50 above.

[55] However, European Community law and the decision of the Cour d'Appel in Paris in *Rene Lancry SA v Direction Generale des Douanes* [1994] 1 CMLR 473 may be relevant to these conclusions. The European Court of Justice, in Case C-163/90 *Administration des Douanes et Droits Indirects v Legros* [1992] CLY 4749 had held that a French internal levy was a customs duty or measure having equivalent effect to a customs duty and was accordingly unlawful under the provisions of the EC Treaty. The Court had held that its ruling would have prospective effect only, and the plaintiff company, having commenced action against the impugned levy prior to this, was held entitled to recover. The French Court

Thirdly, the technique might therefore limit recovery in appropriate cases, and it may be that a limitation attached to its exercise, such as a requirement that it be used to deal with substantial disruption to the public finances, would meet the concerns of those who fear the widespread exercise of judicial discretion.[56]

11.25 Attractive though the technique may appear to be,[57] we have come to the conclusion that it should not be applied for the following reasons. First, it has been principally applied in the field of review of legislation on the basis of unconstitutionality, and it has been by no means universally accepted even in those areas. Although adopted as a permitted option in the USA, the Irish Supreme Court rejected it in *Murphy v Attorney General*,[58] and in *South Australia v The Commonwealth*, Latham CJ in the High Court of Australia stated that "[a] pretended law made in excess of power is not and never has been a law at all....If it is beyond power it is invalid *ab initio*".[59] The doctrine has not been easy to apply in the United States[60] and would suffer in this jurisdiction from the absence of a strong basis in academic thought and an absence of case law. Secondly, we believe that the aims of the technique (to limit recovery in situations where widespread disruption to public finance may result from the overruling of an administrative act or instrument) may be better achieved by other, less radical, means. Thirdly, it has been suggested that the application of the technique in the field of taxation would necessarily involve the courts of England and Scotland being given power to overrule each other's decisions.[61] Fourthly, the

emphasised the duty of national customs authorities to refund amounts paid under levies which are found to contravene EC law. This duty can only be modified under EC law as it stands at present by a "novelty stop" ruling by the ECJ. Accordingly, it would be strange if the national law permitted prospective overruling at all, since if the impugned instrument was held by an English Court to be prospectively invalid under EC law, the declaration of prospectivity might itself be contrary to EC law.

56 This possibility was specifically raised by one consultee, who suggested that whatever special defences were adopted to deal with disruption to public finance should be limited by a requirement that the public authority be obliged to prove such disruption as a first step before relying on them.

57 Although views to the contrary have been expressed, see Burrows *The Law of Restitution* (1993) p 358, n 11.

58 [1982] IR 241, per Henchy, Griffin, Kenny & Parke JJ, O'Higgins CJ diss, although the court found that recovery could be limited by other means; see para 11.27 below and also see paras 11.13-11.14 above.

59 (1941) 65 CLR 373 at 408.

60 See the dissenting US judgments cited in the judgement of Griffin J in *Murphy v Attorney-General* [1982] IR 241, 327.

61 Scottish Law Commission Team Position Paper Oct 1993, para 3.218. The difficulty, if there is one, would seem to exist at present. The United Kingdom includes three jurisdictions, and one piece of delegated legislation may apply to all three. See, for example, the Value Added Tax (General) Regulations 1985 (SI 1985/886) which apply to taxable persons and supplies in the United Kingdom. If a court in one jurisdiction were to strike down provisions in this Statutory Instrument as ultra vires, the provisions would fall as to that jurisdiction, but presumably not as to others. However, the practical reality is that courts in one jurisdiction would almost invariably follow another on such a point, and in any event, following the striking down of the regulations in one jurisdiction, the rule-

technique might introduce a practice in relation to cases without EC law implications which might well be objectionable under EC law in cases where the invalidity results from the provisions of EC law.[62] Fifthly, English administrative law has traditionally operated on the basis that acts found to be ultra vires are void *ab initio*. To undermine this would be to undermine a central tenet of administrative law, solely in the field of taxation. We do not believe such a radical approach to be justified. Finally, the technique was discussed only peripherally in our consultation paper[63] and no comments were made by consultees suggesting that we should undertake a serious study of the technique. **We recommend that:**

(26) the technique of prospective overruling should not be applied in an attempt to prevent disruption to public finances caused by claims for the recovery of payments made under ultra vires subordinate legislation.

(b) DENYING RECOVERY TO LATER CHALLENGERS

11.26 The effect of this defence is discussed at paragraphs 11.8-11.9 above. The technique seems to have originated with the decision of the European Court of Justice in *Defrenne v SABENA*.[64] The European Court based its decision on the significant disruption to the pre-existing basis on which financial transactions involving public expenditure were conducted and the undesirability of this in jurisprudential terms.[65]

making authority would remake the regulations in full, rather than simply for one jurisdiction. Thus, the conferral of a power to the courts of one jurisdiction to overrule those of another does not seem to us to be in issue.

[62] See para 11.24 n 55 above.

[63] As opposed to the related technique of denying recovery to later challengers; see para 11.26 below.

[64] Case C-43/75 [1976] ECR 455. The Court had to consider the effect of its ruling that certain provisions of Belgian legislation which permitted men and women to be paid at different rates for equal work were contrary to the provisions of Article 119 of the EEC Treaty, which had direct effect. To strike down the legislation *simpliciter* would have led to a flood of claims in Belgium against employers for back-pay, and the Governments of the United Kingdom and Ireland as *amici curiae* protested that the same result would apply in their respective countries. It stated that "The fact that, in spite of warnings given, the Commission did not initiate proceedings under Article 169 against the member-States concerned on grounds of failure to fulfil an obligation was likely to consolidate the incorrect impression as to the effects of Article 119. In these circumstances, it is appropriate to hold that, as the general level at which pay would have been fixed cannot be known, important considerations of legal certainty affecting all the interests involved, both public and private, make it impossible in principle to reopen the question as regards the past. Therefore, the direct effect of Article 119 cannot be relied on in order to support claims concerning pay periods prior to the date of this judgment, except as regards those workers who have already brought legal proceedings or made an equivalent claim" [1976] ECR 455, 480-481.

[65] See Wyatt & Dashwood *European Community Law* (3rd ed, 1993) p 63-65. They state that the legal basis of the decision is the principle of "legal certainty" which embraces the notion that parties acting reasonably on the basis of the law as it stands ought not to have their expectations frustrated by subsequent legislative action. The technique is clearly exceptional but has been applied in a number of other cases (see Wyatt & Dashwood *op cit* p 64 n 74).

11.27 The technique was applied again in *Blaizot v University of Liege*.[66] The result of these decisions is that the technique is rarely to be invoked, but when it is, it operates primarily upon the principle of legal certainty, to avoid disturbing legal relationships already entered into in good faith. On the face of it therefore the defence would seem to be of little relevance and limited attraction in a common law legal system. The difficulty is that if tax is paid to the Inland Revenue under a charging instrument which is ultra vires, in common law legal theory, that instrument is void from its outset, and consequently acts done under it are a legal nullity. However, the majority of the Supreme Court of Ireland in the decision in *Murphy v Attorney General*[67] applied it in an evolutionary way, and used the terminology of restitution and unjust enrichment. After holding that an unconstitutional statute[68] was invalid and of no effect *ab initio*, Henchy J (with whom Griffin and Parke JJ agreed) went on to consider[69] whether any effect could be given to the statute, or whether to permit the recovery of taxes exacted unconstitutionally. He held that it was not a universal rule that what had been done in pursuance of a law held to have been invalid would necessarily give rise to a good cause of action, although generally it was the function of the courts to provide legal redress in such situations. The law, he stated, had to recognize that there might be transcendent considerations making such a course undesirable, impractical or

[66] Case C-24/86 [1988] ECR 379. The European Court was again faced with a request for the prospective application of one of its judgments. The Court stated "As [the Court] has held (see in particular Case 61/79 *Amministrazione delle Finanze dello Stato v Denkavit Italiana*), the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 177, the Court gives to a rule of Community law clarifies and defines where necessary the meaning and scope of that rule as it must be or ought to have been understood and applied from the time of its coming into force. It follows that the rule as thus interpreted may, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions enabling an action relating to the application of that rule to be brought before the courts having jurisdiction are satisfied...As the Court recognised in [*Defrenne*], referred to above, it is only exceptionally that it may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict for any person concerned the opportunity of relying upon the provision as thus interpreted with a view to calling in question legal relationships established in good faith...in determining whether or not to limit the temporal effect of a judgment it is necessary to bear in mind that although the practical consequences of any judicial decision must be weighted carefully, the Court cannot go so far as to diminish the objectivity of the law and compromise its future application on the ground of the possible repercussions which might result, as regards the past, from a judicial decision...[However, in this case the Commission may have led the Belgian authorities to consider that the relevant law was in conformity with EC law and therefore]...pressing considerations of legal certainty preclude any re-opening of the question of past legal relationships where that would retroactively throw the financing of university education into confusion and might have unforeseeable consequences for the proper functioning of universities" [1988] ECR 379, 405-407.

[67] [1982] IR 241.

[68] The impugned sections of the Irish Income Tax Act, 1967.

[69] [1982] IR 241, 313 et seq.

impossible,[70] and that the present case was exceptional since thousands of married couples had had tax deducted from their earnings in the same way as the plaintiffs.

11.28 He then held that the plaintiffs' right to recover first arose when they objected effectively to their payment of taxes under the impugned legislation. Up until that time their right to recovery was extinguished by the doctrine of laches, since this operated where a substantial time had elapsed between the circumstances giving rise to the claim and the attempted enforcement of it, coupled with circumstances making it inequitable that the claim should be enforced. Henchy J considered that a time lapse of a full tax year in bringing a claim for the repayment of an unconstitutionally imposed tax was "substantial".[71] He supported this finding by reference to the restitutionary principles of change of position.[72] Similarly, the finding was supported by extensive reference to the judgment in the *Defrenne* case.[73]

11.29 The technique thus has respectable antecedents in both EC law and common law, but suffers from a number of defects which in our view militate against its application in the United Kingdom. First, in the three cases discussed above, the limitation of recovery to the existing plaintiffs *and* those who had commenced proceedings prior to the judgment in the cases in question[74] created no difficulties. However, organised "class" actions (despite the absence of a class action in the American sense) have become more common in this country in recent years. It would be straightforward for solicitors planning a challenge to a charging instrument

[70] He referred to the operation of the doctrines of prescription, waiver, estoppel, laches and particularly *res judicata* and to the decisions in *Thomson v St Catherine's College, Cambridge* [1919] AC 468 and *Henderson v Folkestone Waterworks Co* (1885) 1 TLR 329. He justified his application of the technique as follows "For a variety of reasons, the law recognizes that in certain circumstances, no matter how unfounded in law certain conduct may have been, no matter how unwarranted its operation in a particular case, what has happened has happened and cannot, or should not, be undone. The irreversible progressions and by-products of time, the compulsion of public order and of the common good, the aversion of the law from giving a hearing to those who have slept on their rights, the quality of legality - even irreversibility - that tends to attach to what has become inveterate or has been widely accepted or acted upon, the recognition that even in the short term the accomplished fact may sometimes acquire an inviolable sacredness, these and other factors may convert what has been done under an unconstitutional, or otherwise void, law into an acceptable part of the *corpus juris*. This trend represents an inexorable process that is not peculiar to the law, for in a wide variety of other contexts it is either foolish or impossible to attempt to turn back the hands of the clock": [1982] IR 241, 314.

[71] He cited United States legislation, where claims for the restitution of such payments had been held to have been barred by periods as short as thirty days. See Field "The Recovery of Illegal and Unconstitutional Taxes" (1931-32) 45 Harv LR 501, 519. On United States time limits for challenging administrative acts, see Schwartz, *Administrative Law* (3rd ed 1991) p 472.

[72] See para 11.13 above. [1982] IR 241, 317-321.

[73] [1976] ECR 455; [1982] IR 241, 322-324.

[74] This was certainly the formulation in *Defrenne* ([1976] ECR 455) and *Blaizot* ([1988] ECR 379), and it may be presumed from the formulation adopted by the Irish Supreme Court in *Murphy* ([1982] IR 241). However, the issue was strictly *obiter* in *Murphy* as there were no following actions awaiting decision: the case in question was a pure test case.

to advertise in the professional press inviting contact from others, thus creating a large body of similarly interested challengers. The courts would generally select one or several actions as lead or test cases, and the limitation imposed in *Defrenne* would benefit the Revenue authorities little, since a large number of further actions would have been commenced prior to judgment so as to fall within the exception.[75] Secondly, for any sensible application of the technique, a considerable amount of discretion will need to be invested in the court or tribunal which applies it, and it may also be difficult to frame a suitable limitation to the exercise of the technique. Thirdly, the individual taxpayer may encounter problems in gathering evidence to rebut the Revenue's claims of disruption.

11.30 Notwithstanding its application in EC law and in Irish law, we still regard this solution as something of a radical option. It seems to us that its application in Ireland may best, in restitutionary terms, be rationalised as an application of the defence of change of position.[76] Its principal defects, however, in our view, are first, that it is rather harsh in its application to individual taxpayers; and secondly, that it is easily capable of avoidance by concerted action among taxpayers where its application is most required. It would tend to benefit taxpayers with access to legal advice. In that respect, it seems to us that it would be even more unfair than a short limitation period for the bringing of claims. **Accordingly, we recommend that:**

(27) a court or tribunal determining a claim to recover tax paid should not be legislatively empowered to deny recovery to those who have not brought proceedings prior to its decision, where to allow subsequent claims for recovery would lead to severe disruption to public finance.

(c) CHANGE OF POSITION

11.31 Actions for the recovery of payments of tax to the Inland Revenue raised under charging instruments which are ultra vires are expressly based on restitutionary principles, and are derived from a restitutionary decision.[77] We have discussed the principles which we believe will govern the application of this defence earlier in this Report in the context of payments made under a mistake of law. We believe that the principles are likely to be common to payments made due to the ultra vires nature of a charging instrument, and due to a mistake,[78] and therefore, **we recommend that:**

(28) the statutory scheme should not make provision for the defence of change of position.

[75] We understood this occurred in an unsucessful challenge to the constitutionality of Irish Agricultural Rating legislation.

[76] But see para 11.14 above.

[77] *Woolwich Equitable Building Society v IRC* [1993] AC 70.

[78] See paras 11.10-11.17 above. See in particular the discussion of *Murphy v Attorney General* [1982] IR 241. See further Palmer, *op cit*, vol III §14.20 where the author discusses the decision of the New York Court of Appeals in *Mercury Machine Importing Corp v. City of New York* 3 (1957) NY 2d 418; 144 NE 2d 400, and see para 10.6 above.

Estoppel

11.32 Before leaving this section, something should be said of estoppel, which of course applies both to claims for recovery of payments made by mistake and to claims for recovery of taxes or other charges levied ultra vires.[79] It was made clear in Section B of this Report[80] that we do not propose that the doctrine of estoppel should in any way be affected by our recommendations. We continue to hold that view in relation to claims under the new statutory recovery provisions. To some extent the applicability of estoppel to restrict the recovery of payments of taxes demanded under ultra vires charging instruments or decisions will depend on the court's own views as to the representation required to found an estoppel, and on the extent that estoppel is capable of lying against the particular public body in question. For example, in *Murphy v Attorney General,*[81] O'Higgins CJ (dissenting) indicated that the plaintiffs were likely to be found to be estopped from claiming restitution on the basis of representations made by them simply by accepting the taxation laws in operation and not protesting on payment of charges. Kenny J, on the contrary, found that it was "an unreal assumption" to presume that the Government had acted on a representation by each individual taxpayer in the State. We indicated in our consultation paper that difficulties existed with the application of estoppel,[82] but there was strong support on consultation for taking no steps which might compromise its application. **We therefore recommend that:**

(29) the proposed legislation should not deal with the doctrine of estoppel, and this should continue to apply in claims for the recovery of overpaid tax to the extent (if any) that it presently does.

[79] Subject to the principle that estoppel will not lie against the Crown - *Western Fish Products Ltd v Penwith DC* [1981] 2 All ER 204. Although this is the case, facts which would otherwise go to establish an estoppel against the Crown may well be relied upon as a basis for seeking judicial review: see para 9.14 nn 28, 29, 30 above.

[80] Para 5.17 above.

[81] [1982] IR 241.

[82] See *Avon CC v Howlett* [1983] 1 WLR 605. It is unclear whether mere alteration of one's lifestyle is sufficient to constitute detrimental reliance. Similarly, estoppel does not operate as a defence *pro tanto* and thus lacks the flexibility of a change in position defence. See also *Holt v Markham* [1923] 1 KB 504; *United Overseas Bank v Jiwani* [1976] 1 WLR 964, 968 and Goff and Jones, *op cit*, p 747-750.

PART XII
THE PAYE SYSTEM AND THE SELF-ASSESSMENT SYSTEM

The PAYE System

12.1 The system operates by the direct deduction of income tax at source, by a person who makes a payment of income assessable under Schedule E,[1] in accordance with Regulations[2] which govern the system. The system applies to all emoluments[3] paid by an employer. It operates by cumulative withholding of tax during the tax year, and allows the employee 1/52nd of his tax allowances each week, which is subtracted from 1/52nd of his salary.

12.2 The administrative provisions governing the collection of tax under the PAYE system are set out in Regulations made under powers conferred in ICTA 1988.[4] The Regulations provide that every employer who pays emoluments to an employee during a tax year must deduct income tax in accordance with the appropriate code. For this obligation to apply, a code authorisation must have been issued by the Inspector to the employer.[5] The Inspector has regard when issuing the code authorisation to the employee's reliefs and income, and also to any overpayments or underpayments for previous years.[6] Where the Inspector determines coding which is different in any year from the preceding year, he must (in general) give a notice of coding to the employee.[7] The employee can appeal against the notice of coding to the Inspector and, if the Inspector does not agree with the employee's objection, to the General Commissioners. Further appeal lies on a point of law by case stated to the High Court.[8] Subject to this, and to the Inspector's power to amend codings (see below), the determination of the Commissioners is final.[9] Even when the General Commissioners have determined a coding conclusively, the Inspector may amend it if "the actual circumstances are different from the circumstances by reference to which it was determined by the inspector".[10]

1 ICTA 1988, s 203(1).

2 The Income Tax (Employments) Regulations 1993 (SI 1993/744).

3 "Emoluments" in this context includes expenses, expenses allowances and benefits in kind.

4 The Income Tax (Employments) Regulations 1993 ("the IT (Employments) Regs 1993") (SI 1993/744), replacing the Income Tax (Employments) Regulations, (SI 1973/334).

5 IT (Employments) Regs 1993, regs 6(1) & (2).

6 *Ibid*, regs 7(1) & (2).

7 *Ibid*, reg 10(1), (2).

8 *Ibid*, reg 11(6) and TMA 1970, section 56.

9 *Ibid*, reg 11(7).

10 *Ibid*, reg 12(1).

12.3 Regulations provide for repayment of tax where the employee has overpaid due to the cumulative withholding system. For example, there are provisions governing employees who are absent from work through sickness, or who are absent through trade disputes.[11]

12.4 Assessments are unnecessary for the collection of tax under Schedule E.[12] However, an assessment can be made in respect of Schedule E income, and must be made if the taxpayer so requires by giving notice to the Inspector within 5 years from the end of the year of assessment.[13] Without prejudice to the taxpayer's right to demand an assessment at any time, assessments need not be made except where a taxpayer has not paid his proper Schedule E liability under the PAYE system.[14]

12.5 Appeals against assessments are heard by the General or Special Commissioners on the same basis as that which applies in the case of all other income tax appeals.[15] Thus, should a taxpayer believe that he has overpaid tax under PAYE due to a mistake, or because of the provisions of an ultra vires charging instrument, he can call for an assessment to be made on him, and then appeal against it, as a non-PAYE taxpayer can. If the taxpayer has already appealed against a notice of coding, however, the relationship between the various governing provisions would fall to be considered.[16]

12.6 Having obtained an assessment, a PAYE taxpayer could seek repayment on grounds of error or mistake under TMA 1970, section 33. Relief under that section is currently predicated on the existence of an error or mistake in a "return", which a PAYE taxpayer will not normally complete. "Return", however, includes all statements and declarations made under the Taxes Acts.[17] TMA 1970, section 15

[11] *Ibid*, reg 35-37.

[12] ICTA 1988, s 203(1) "notwithstanding that when the payment is made no assessment has been made in respect of the income and notwithstanding that the income is in whole or in part income for some year of assessment other than the year during which the payment is made".

[13] ICTA 1988, s 205(3) and IT (Employments) Regs 1993, reg 99(1).

[14] ICTA 1988, s 205(1).

[15] IT (Employments) Regs 1993, reg 100(1), (2) and TMA 1970, s 31 and Part V.

[16] According to IT (Employments) Regs 1993, reg 11(7) "Subject to paragraph (6) [*power to state a case for the opinion of the High Court*] and reg 12 [*power to amend notices of coding*], the determination of the General Commissioners shall be final". However, under reg 99(1) "Nothing in these Regulations shall prevent an assessment under Schedule E being made on a person in respect of his emoluments" and under reg 100(1) "..an appeal against an assessment..shall be heard by the General or Special Commissioners....". Presumably the doctrine of res judicata would operate to prevent an appellant raising the same matters against an assessment as he raised against a notice of coding, but in the absence of this, is the determination of a notice of coding "final" so as to exclude any appeal against an assessment of emoluments taxed under that code?

[17] TMA 1970, s 118(1).

provides that an employer must, when required to do so by the Inland Revenue, make a return of his employee's emoluments. Therefore, the recovery right under TMA 1970, section 33 would be capable of being exercised by a Schedule E taxpayer by calling for an assessment and relying on an error or mistake, either in his employer's return, or in any statement made directly by him to the Inland Revenue.

12.7 Against this background, we see no difficulty in extending our recommendations relating to the recovery of overpayments of income tax to tax paid under the PAYE system. The defences will be identical to those recommended in respect of income tax. The defence of non-exhaustion of statutory rights of appeal should not apply to appeals against notices of coding, since these are a limited form of appeal and may not constitute a comprehensive determination of a taxpayer's liability to income tax. **We therefore recommend that:**

(30) the statutory provisions which we recommend to replace Taxes Management Act 1970, section 33 should apply to tax paid under the PAYE system.

The Self-Assessment System

12.8 From 1 October 1994, the Inland Revenue introduced a new system by which corporation tax is collected from companies. This system, known as "Pay and File", essentially involves companies assessing their own liability to tax, under the supervision of the Inland Revenue. This constitutes a fundamental change to the administration of direct taxation in the United Kingdom, and is soon to be extended to personal income taxation.

12.9 Following a Consultation Paper in August 1991[18] and another in November 1992,[19] the Finance Act 1994 makes substantial changes to the legislation governing the administration of direct taxation in the United Kingdom in order to introduce the self-assessment system from the taxation year 1996/1997. Our account of these changes is necessarily brief.[20]

12.10 Where an individual is required under the provisions of TMA 1970, section 8,[21] to make a return to the Inland Revenue, there will also be a requirement, unless an election to the contrary is made, for that individual to make a "self-assessment" of liability to income tax and capital gains tax. Where a person elects not to make a

[18] "A Simpler System for Taxing the Self-Employed" (Inland Revenue, August 1991).

[19] "A Simpler System for Assessing Personal Tax" (Inland Revenue, November 1992).

[20] See Finance Act 1994 (1994, c 9). See also Butterworth's Finance Bill 1994 Handbook (for commentary on the provisions of the Bill as introduced) and Butterworth's Yellow Tax Handbook 1994/1995 (for updated and annotated legislation).

[21] See para 9.7 above. The section has been amended by the Finance Act 1994, s 178, 199(1) & (2)(a) with effect from 1996/1997.

self-assessment, but returns the form by the necessary deadline, the Inland Revenue must then make the assessment on behalf of that person.[22] If the deadline is missed, other provisions apply.[23]

12.11 The Inland Revenue's power to enquire into returns forming the basis of an assessment is to be limited by TMA 1970, section 9A[24] to 12 months from the filing date of the return. If a return is enquired into, it cannot be the subject of a further enquiry under this provision. However, power will still exist to make "discovery" assessments. Following an enquiry, an officer of the Inland Revenue may, under certain circumstances, amend the taxpayer's self-assessment.[25]

12.12 The power to raise "discovery" assessments[26] is carried forward from the existing system. The Finance Act 1994,[27] however, makes a number of important changes to the provisions of TMA 1970, section 29 in this connection. First, an officer will not be permitted to make a discovery assessment where the return was made in accordance with the accepted practice prevailing at the time it was made. This concept was imported from TMA 1970, section 33. Secondly, it must be shown either that there has been fraudulent or negligent conduct on the part of the person making the return or someone else acting on behalf of that person, or that the Inland Revenue official could not reasonably have been expected on the basis of information available to him to have known of the circumstances giving rise to the need for the discovery assessment.[28] Effectively, therefore, once the new system comes into effect, only fraud, neglect or inadequate disclosure are likely to lead to the issue of a discovery assessment, and no discovery assessment can in any event be made where a mistaken return made on the basis of a generally accepted practice caused the underpayment of tax.

12.13 TMA 1970, Part VA[29] contains provisions relating to the payment of self-assessed tax on account, together with a number of consequential changes. The present

[22] TMA 1970, s 9, as amended by the Finance Act 1994, s 179 with effect from 1996/1997.

[23] See TMA 1970, s 28C, inserted by the Finance Act 1994, s 190, 199(1) & (2)(a) with effect from 1996/1997. Essentially the Revenue may make a determination of the individual's liability to tax.

[24] To be inserted by the Finance Act 1994, s 180, 199(1) & (2)(a) with effect from 1996/1997.

[25] This is to enable the Inland Revenue to deal with a potential loss of tax to the Crown as a result of an inadequate self-assessment: TMA 1970, s 28A inserted by the Finance Act 1994, s 188, 199(1) & (2)(a) with effect from 1996/1997.

[26] See para 9.13 above.

[27] s 191, 199(1) & (2)(a).

[28] The Finance Act 1994, s 191(6) defines the circumstances in which information is "deemed to be available" to the officer of Inland Revenue.

[29] To be introduced by the Finance Act 1994, s 192ff & 199(1) & (2)(a).

schedular system of assessment is amended in order to simplify the present arrangements.[30] The most important consequential change provides that all references throughout the Taxes Acts to a person being assessed to tax or charged to tax under an assessment include cases where tax is charged under a self-assessment, or a determination.[31]

12.14 Schedule 19 to the Finance Act 1994 introduces a number of further changes to the charging legislation. For our purposes, paragraph 8 of the Schedule is the principal provision. The paragraph amends TMA 1970, section 33. It provides that the time limit for individual taxpayers making an error or mistake relief claim is to be reduced from six years to five years from the 31 January following the year of assessment in question. It also seeks to exclude relief for error or mistake if the error or mistake was contained in a claim which was made in the return.[32]

12.15 We sought clarification from the Inland Revenue of the meaning and intent of this new limitation on the grounds for relief under TMA 1970, section 33. Although the interpretation of the word "claim" in this context is not entirely clear,[33] there seems to have been an attempt to avoid overlap between the new TMA 1970, section 33 and paragraph 13 of Schedule 19 which introduces a new TMA 1970, section 42. The new provision is intended to ensure that TMA 1970, section 33 does not apply to errors in claims for reliefs and allowances contained in returns, which can currently be rectified by a supplementary claim under TMA 1970, section 42. We were informed by the Inland Revenue that returns containing claims for reliefs and allowances are not presently "returns" such as to ground relief under TMA 1970, section 33, and accordingly the exclusion of relief for overpayments under that section where an overpayment of tax has been caused by an error contained in claims for reliefs and allowances in a return maintains the taxpayer's present position.[34]

12.16 Against this background, we considered whether our recommendations for reform of the existing system of administration of income tax would require modification before they could be applied to the self-assessment system. Our initial view is that there is no reason why the provisions for recovery of overpaid tax which apply under the new system should be more satisfactory than those which currently exist. Relief

[30] ICTA 1988, s 60ff. Amended by the Finance Act 1994, s 200ff.

[31] Finance Act 1994, s 197.

[32] See Finance Act 1994, paragraph 8, Schedule 19, and the changes therein to section 33 TMA 1970.

[33] It is not defined for the purposes of the Finance Act 1994, nor apparently for the purposes of TMA 1970 or ICTA 1988.

[34] A taxpayer can seek relief for errors in a return of claims for relief and allowances by seeking first to rectify the return, or secondly to make a supplementary claim within the time allowed for the original claim: TMA 1970, s 42(8) & (9).

will still be predicated on an "assessment" and on errors in "returns". The position of the *Woolwich* type claimant is still left unaddressed by the changes to the taxation legislation introduced by the Finance Act 1994. The only positive development in the new legislation from a taxpayer's point of view is the proposed introduction of limitations on the Inland Revenue's power to make discovery assessments where the original return has been made in accordance with "accepted practice". This at least introduces symmetry of treatment between the taxpayer and the Inland Revenue by importing the concept of "accepted practice" from TMA 1970, section 33. However we have criticised the concept of "accepted practice",[35] and do not support its extension. We believe the concept of a settled view of the law, which we expect to cover much of the same ground, is a more principled and satisfactory way of dealing with this issue. We should stress that our recommendations for reform of the statutory provisions governing recovery are not intended to cast doubt on the new limitation to the Inland Revenue's power to raise discovery assessments under the amended TMA 1970, section 29. On the contrary, we believe that ideally this provision and TMA 1970, section 33 should show symmetry of treatment, although we do not believe this to be essential where the balance is in favour of the taxpayer. However, changes of this nature to the administrative provisions governing the taxation system fall well outside the scope of our terms of reference.

12.17 Therefore, we see no reason why our proposed action for recovery of taxes paid but not due, to encompass cases of overpayment should not extend to the system of self-assessment to tax, when introduced. **We therefore recommend that:**

(31) the recommended reforms to the recovery provisions in relation to income tax should extend to income tax paid under the self-assessment system.

[35] See paras 10.12-10.19 above.

PART XIII
INHERITANCE TAX AND STAMP DUTIES

Introduction

13.1 Inheritance tax is administered by the Commissioners of Inland Revenue. Some form of duty on the estate of a deceased person has existed since 1694.[1] It became an ad valorem duty in 1881.[2] Capital transfer tax (a wider tax encompassing this type of duty) replaced estate duty, and the legislation was consolidated in the Capital Transfer Tax Act 1984. From 18 March 1986[3] the tax has been charged primarily on transfers which occur on death and its name changed to inheritance tax. The Act is now called the Inheritance Tax Act ("IHTA") 1984.

13.2 Inheritance tax is imposed on a "chargeable transfer". This is a transfer of value which is made by an individual, but which is not an exempt transfer. Any disposition[4] made by a person is a transfer of value if, as a result, the transferor's estate is immediately after the disposition, less than it would have been had the disposition not been made.[5] A chargeable transfer of up to £150,000 is not subject to inheritance tax, over £150,000 the rate imposed is 40%.[6]

Determination of the Amount Due

13.3 The executors or personal representatives of a deceased person must deliver an account specifying to the best of their knowledge and belief all appropriate property[7] to the Commissioners of Inland Revenue within twelve months of the end of the month in which the death occurred.

13.4 Where it appears to the Commissioners of Inland Revenue that a transfer of value has been made or where a claim in relation to inheritance tax is made to them in connection with a transfer of value, they may give notice in writing to any person who appears to them to be the transferor or the claimant or to be liable for any of the tax, stating that they have determined the matters specified in the notice.

1 Stamp Act 1694.

2 Customs and Inland Revenue Act 1881, s 27 (repealed).

3 Finance Act 1986, s 100.

4 *Ward v Commissioner of Inland Revenue* [1956] AC 391: 'Disposition' was said, for estate duty purposes, to be "not a technical word but an ordinary English word of very wide meaning" (at 400).

5 Similarly, the amount of the value transferred is the amount by which the transferor's estate is less: IHTA 1984, s 3(1).

6 IHTA 1984, Sch 1, amended by Finance (No.2) Act 1992, s 72 (the same limits apply under FA 1994, s 246).

7 IHTA 1984, s 216(1) (amended by the FA 1986, s 101(1), (3), Sch 19 and FA (No 2) 1987, s 96(1), (7), Sch 7).

13.5 Where a determination of inheritance tax in a notice has been given by the Commissioners it is conclusive against the person on whom it is served[8] subject to variation by writing or an appeal.

Appeals

13.6 A person on whom a notice of determination has been served may, within 30 days of service, appeal in writing to the Commissioners against any determination stipulated in the notice and specifying the grounds for appeal. Appeals are normally heard before the Special Commissioners,[9] unless the grounds for appeal are likely to be substantially confined to questions of law, where appeal may be to the High Court.[10] Appeals may be brought out of time if the Commissioners of Inland Revenue or the Special Commissioners consent, on the basis that there was a reasonable excuse for not bringing the appeal within the time limits, and it was brought afterwards without reasonable delay.[11] Unless the Special Commissioners are satisfied that the determination appealed against ought to be varied or quashed, they must confirm it.[12] Any party may question the determination of the Special Commissioners within 30 days on a point of law and request that the Special Commissioners sign and state a case for the opinion of the High Court.[13]

Recovery Provisions

13.7 The provision for recovery of overpayments of inheritance tax is in IHTA 1984, section 241:

> (1) If it is proved to the satisfaction of the Board that too much tax has been paid on the value transferred by a chargeable transfer or on so much of that value as is attributable to any property, the Board must repay the excess unless the claim for repayment was made more than six years after the date on which the payment or last payment of the tax was made...

13.8 This broad recovery right is qualified by section 255 which provides:

> Where any payment has been made and accepted in satisfaction of any liability for tax and on a view of the law generally received or adopted in practice, any question whether too little or too much has been paid or what was the right amount of tax payable shall be determined on the same view,

[8] IHTA 1984, s 221(5).

[9] IHTA 1984, s 222(2).

[10] IHTA 1984, s 222(3); or to the Court of Session, if in Scotland, IHTA 1984, s 222(5).

[11] IHTA 1984, s 223. A party to the appeal before the Special Commissioners may be represented by a barrister, solicitor or accountant; IHTA 1984, s 224(1)(b).

[12] IHTA 1984, s 224(5).

[13] IHTA 1984, s 225(1).

notwithstanding that it appears from a subsequent legal decision or otherwise that the view was or may have been wrong.

13.9 A view of the law can be described as "adopted in practice" only if the Commissioners of Inland Revenue are party to that practice, and an assessment resulting from a mistaken view of the law held by an individual, and not generally, may be reopened.[14] Where repayment is made this is normally of the full amount.[15]

13.10 It might be questioned whether this section covers the situation where tax has been levied ultra vires. The phrase "too much tax has been paid" on a particular transfer may appear to presume that some tax was properly exigible, whereas in the case of an ultra vires levy, no tax would be exigible. On the other hand, the section would certainly seem apt to cover any situation where there had been an overpayment of tax, irrespective of the reason for the overpayment, and it may be that the courts would construe it to cover ultra vires payments, and therefore to exclude the common law.[16] However, the uncertainty seems to us to be unsatisfactory.

Defences

13.11 At present the right to recovery of overpaid inheritance tax is subject only to a time limit of six years and a defence of change in understanding of the law. If the recovery rights for inheritance tax are to conform with those which we recommend should apply to income tax, further defences to the recovery right would be necessary. These are non-exhaustion of statutory remedies, unjust enrichment of the payer, a reformed defence of change in a settled view of the law for mistake claims, and submission or compromise. At first sight, it may seem anomalous for us to recommend a recovery provision for inheritance tax which seems narrower than the existing statutory recovery provisions. However, we consider that the additional defences which we propose take little away from the taxpayer, and in fact represent fair limitations on a taxpayer's right to recover overpaid funds, whether through mistake or as a result of an ultra vires levy. We further consider that these additional defences must be balanced against the proposed removal of the rather broad formulation of the adopted practice defence in IHTA, section 255, when considering whether the taxpayer's overall position against the Inland Revenue is improved as a result of our proposals. If a taxpayer has a statutory remedy which permits him to raise the mistake or the invalidity of the tax on an appeal against a notice of determination, he should do so, rather than paying and putting the taxation authorities to the inconvenience of receiving the funds and considering a claim for a refund later. If a taxpayer pays funds over to settle his liability finally, he should be held to that settlement. Similarly, no taxpayer should be permitted to

[14] *Murray's Trustees v Lord Advocate* [1959] SC 400; see para 10.15 above.

[15] See SP1/80: Written Answer given by the Minister of State, Treasury, Mr Peter Rees, QC, MP, *Hansard* (HC) 16 January 1980, vol 976, col 747.

[16] Paras 7.4-7.8 above.

benefit to an unjust degree from a claim for the refund of taxes overpaid. **Therefore, we recommend that:**

(32) the scheme developed in relation to income tax should apply to inheritance tax (Clause B).

Stamp Duties

13.12 Stamp duty was first imposed under the Stamp Act 1694. The current law is largely contained in the two consolidating statutes, the Stamp Act ("SA") 1891 and the Stamp Duties Management Act ("SDMA") 1891, and is amended by various Finance and Revenue Acts. The scheme of the Stamp Acts is to impose taxation by making it obligatory, either as a practical necessity or otherwise, to pay in order to stamp certain types of documents commonly used within the commercial and legal spheres.

Main Principles

13.13 The fundamental principle of stamp duty is that it is charged on instruments rather than transactions. Thus, if there is no written instrument no duty is payable. In order to determine the rate of stamp duty payable "the legal rule is that the real and true meaning of the instrument is to be ascertained".[17] In addition, it is only necessary that the instrument be stamped for its leading and principal object, and that stamp covers everything accessory to that object.

13.14 Stamp duties are a lucrative form of taxation, and over the past few years it has been the aim of government to reduce the complexity and scope of the duties without losing the source of income. As a result many of the fixed duties and smaller charges have been repealed.

Adjudication

13.15 The administration of stamp duty is under the care and management of the Commissioners of Inland Revenue.[18] They must, where required by any person, express their opinion with reference to any executed instrument on (i) whether it is chargeable with any duty, and (ii) with what amount of duty it is chargeable. This process is called adjudication. It performs a number of functions; it is part of the appeal process, a means of satisfying third parties as to liability and in addition, certain instruments are not to be treated as properly stamped unless adjudicated.[19]

[17] *Limmer Asphalte Paving Co Ltd v IRC* (1872) LR 7 Exch 211.

[18] SDMA 1891 and Inland Revenue Regulation Act 1890.

[19] Conveyance in contemplation of sale (SA 1891, s 12(2)); orders made under the Variation of Trusts Act 1958 (FA 1965, s 90); orders made under the Companies Act 1985, s 427. Also, when exemption or relief is claimed under FA 1930, s 42; FA 1980, s 98; FA 1980, s 102; FA 1982, s 129 and FA 1983, s 46(3); FA 1986, s 75, 76.

Appeals

13.16 Further appeals are by case stated to the Chancery Division of the High Court,[20] with a right of appeal to the Court of Appeal and ultimately to the House of Lords. In Scotland, following the statement of a case by the Commissioners of Inland Revenue, the appeal is heard by the Court of Session sitting as the Court of Exchequer, with a further appeal from there to the House of Lords. There is no system of appeal tribunals and appeal is by case stated directly to the courts. Interest is available on duty ordered to be repaid.[21]

Recovery Provisions

13.17 Various provisions of SDMA 1891 and SA 1891 provide for the recovery of duty in particular situations. SDMA 1891, section 9 provides for recovery of the duty (an "allowance") to be made by the Commissioners in respect of stamps spoiled in a number of cases[22] or used for assorted classes of instruments.[23] For restitutionary purposes it is the recovery of duty paid in situations falling within sub-sections 9(7)(a) and (b) which is likely to be the most relevant. These sub-sections provide for recovery of stamps paid on:

> (a) An instrument executed by any party thereto, but afterwards found to be absolutely void from the beginning, and
> (b) An instrument executed by any party thereto, but afterwards found unfit, by reason of any error or mistake therein, for the purpose originally intended...

13.18 There are two provisos to the operation of these sub-sections. The application for relief must have been made within two years[24] after the stamp has been spoiled or become useless, or, in the case of an executed document, after the date of the instrument. A second and more serious limitation is that "no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence...". This means that if a legal decision is necessary to determine that an instrument is void ab initio, the duty cannot be recovered. Section 9(7) is inapplicable where the instrument fails through non-fulfilment of a condition precedent, or where, being voidable, it is avoided or rescinded by a party who is entitled to do so.

13.19 SDMA 1891, section 10, contains a wider recovery right which is discretionary on

[20] SA 1891, s 13.

[21] Finance Act 1965, s 91, nullifying the decisions in *Western United Investment Co Ltd v IRC* [1958] 1 All ER 257 and *Oughtred v IRC* [1958] 2 All ER 443 on this point.

[22] SDMA 1891, s 9(1)-(6).

[23] SDMA 1891, s 9(7)(a)-(e).

[24] Revenue Act 1898, s 13. Formerly six months.

the part of the Inland Revenue. The section provides that the Commissioners "may" cancel and allow as spoiled[25] any stamp which a person has "inadvertently" used on instruments not liable to duty. The section also extends to the inadvertent use of stamps of greater value than was necessary on instruments liable to duty. SA 1891, section 59(6) gives an unlimited recovery right for an ad valorem duty paid on contracts for the sale of certain property which fall to be charged to duty under the section. The right applies where the contract has been rescinded or annulled, or for any other reason not substantially performed or carried into effect.

13.20 There are two further minor provisions for recovery of overpaid stamp duty. Stamp duty on conveyances and transfers is recoverable if the transaction did not in fact take place and property has been retransferred or the sale took place for less than the consideration on which the stamp duty was paid, provided that the claim is made not later than two years after the making or execution of the instrument.[26] Between 20 December 1991 and 19 August 1992, the threshold of stamp duty on transfers of property other than shares was increased from £30,000 to £250,000 and the Stamp Duty (Temporary Provisions) Act 1992 provided for the appropriate refunds to be made where documents executed on or after 20 December 1991 had been stamped before that date.

13.21 The current provisions of the Stamp Acts therefore permit the recovery of duties paid on instruments which are either void, or unfit for their purpose because of error or mistake, provided that the instrument has not been relied on in proceedings and that the application is made within two years. They also permit recovery where an instrument not liable to duty has inadvertently been stamped, or stamped with a greater duty than was required, subject to a two year limitation period. There are minor recovery provisions for specific classes of failed instruments.

13.22 The variety of situations addressed by the present recovery rights makes it difficult for us to frame our recommendations in this area. Our terms of reference confine us to rationalising the recovery provisions for taxes overpaid due to error or mistake, or due to ultra vires demands on the part of the Revenue. There are many situations where an instrument may fail other than because of mistake, and these situations fall outside the scope of this project. However, if we recommend the introduction of new provisions governing recovery in cases where claims are based on the mistake or ultra vires grounds which we consider in this Report, this will obviously have a consequential impact on the present legislative provisions, making certain parts of the present recovery provisions redundant.[27]

13.23 We cannot, however, hope to deal with all such consequential changes to existing

[25] Thus permitting the making of an allowance under SDMA 1891, s 11.

[26] Finance Act 1965, s 90.

[27] Probably SDMA 1891, s 10 "inadvertence".

legislation in this Report. The Revenue authorities may wish to preserve the broad discretionary provisions for relief in SDMA 1891, section 10 and SA 1891, section 59, alongside the more limited right which we propose. Likewise, parts of SDMA 1891, section 9 may be unnecessary if our proposed scheme is implemented for stamp duty, but this seems to us to be a task for those concerned with the administration of the tax. We believe however that, in principle, the recovery provisions for stamp duty should mirror those for other direct taxes,[28] and therefore, **we recommend that:**

(33) the scheme developed in relation to income tax should apply to stamp duty.

Because of the difficulties set out in paragraph 13.22 and this paragraph, we have not presented a draft clause implementing our recommendations in relation to stamp duties.

[28] We are supported in this by the views expressed to us both on consultation and afterwards to the effect that there should be no diference between the recovery provisions for the various direct taxes.

PART XIV
EUROPEAN COMMUNITY LAW AND INDIRECT TAXES

The Influence of European Community Law

14.1 Indirect taxes are in practice the most likely area of application of European law to the UK's taxation system. The European Community recognises a right to recovery of charges that are in breach of Community law. The Court of Justice affirmed previous case law in *Amministrazione delle Finanze dello Stato v SpA San Giorgio*,[1] and stated:

> ...it must be pointed out in the first place that entitlement to the repayment of charges levied by a Member State contrary to the rules of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes. Whilst it is true that repayment may be sought only within the framework of the conditions as to both substance and form, laid down by the various national laws applicable thereto, the fact nevertheless remains, as the Court has consistently held, that those conditions may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights conferred by Community law.

The Types of Charges Affected

14.2 Value Added Tax ("VAT") is an obvious example of the application of European Community law in this context, being underpinned by EC directives. There are two other situations in which the recovery of charges levied in the UK may be affected by the provisions of European Community law.[2] The first situation is where levies are collected on behalf of the EC by the national government, or are set directly by the EC on a Community-wide basis. The payer may seek to recover such a charge either because the levying provision is itself invalid as in breach of principles of Community administrative law (such as principles of proportionality); or because the levying authority has misinterpreted the provision and levied a charge which is not within its scope. In these situations EC law provides a specific recovery right against the national authority,[3] to be exercised in the national courts.[4] There is

[1] Case C-199/82 [1983] ECR 3595, 3612.

[2] See generally, Consultation Paper No 120 paras 3.39-3.46.

[3] Council Regulation 1430/1979, art 2 and Community Customs Code 2913/92 EEC arts 236-241.

accordingly no need for us to make any recommendations.

14.3 The second situation where European law may be relevant to the recovery of charges levied in the UK is where charges levied by the UK Government are declared to be invalid due to their infringement of some provision of European law. This gives rise to two types of problem meriting separate treatment. The first is in fact an illustration in the field of taxation of a principle which is of general application to all UK legislation following the decision of the European Court of Justice in *R v Secretary of State for Transport, ex parte Factortame (No 2)*.[5] All UK legislation, including tax legislation,[6] is now vulnerable to a declaration of invalidity in the UK Courts where it infringes a provision of directly applicable EC law. National law is obliged to afford a remedy to taxpayers who have paid charges levied under primary or secondary legislation which has been declared to be invalid under European law, because of the "principle of effectiveness"[7] and national rules must not make it "impossible, impractical or extremely difficult" to exercise this remedy.[8] We have chosen in this Report not to make recommendations dealing specifically with this situation for the following reasons.

14.4 The present provisions governing the recovery of most indirect taxes, which contain defences limited to those permitted to EC law, are such as to provide this remedy in any event. In the case of direct taxes the position is different since in the vast majority of claims to recover overpayments there are currently no European Community law implications. Although the provisions which we recommend should govern the recovery of direct taxes may appear to address claims for the recovery of sums levied in breach of directly applicable EC law because such sums are "not due" (Clause A, new section 33(1); Clause B, new section 241(1)) they do not address this situation expressly and the defences we recommend in those provisions are not limited to those presently permitted by EC law. In the case of the defence of "unjust enrichment of the payer", there is uncertainty as to what precisely is

[4] Regulations are not transposed into domestic law, but are directly applicable, Case 43/73 *Variola SpA v Amministrazione Italiona della Finanze* [1973] ECR 981. No action may be brought against the Community itself in respect of the amount unlawfully levied: Cases 5, 7 and 13-24/66 *Kampffmeyer v Commission* [1967] ECR 245; Case 96/71 *Haegeman v Commission* [1972] ECR 1005. The case law is not entirely consistent and the current position has been criticised; see Harding "The Choice of Court Problem in Cases of Non-Contractual Liability under EEC Law (1979) 16 CMLRev 389; Lewis "Joint and Several Liability of the European Communities and National Authorities" (1980) CLP 99; Oliver "Joint Liability of the Community and the Member States" in Schermers, Heukels and Mead (ed) *Non-Contractual Liability of the European Communities* (1988), Ch 10.

[5] [1990] 2 AC 85; [1991] 1 AC 603.

[6] See the recent decision in *R v Inland Revenue Commissioners, ex parte Commerzbank AG* [1994] 2 WLR 128.

[7] Case 33/76 *Rewe v Landwirtschaftskammer Saarland* [1976] ECR 1989; Case 45/76 *Comet v Produktschap voor Siergewassen* [1976] ECR 2043; Case 68/79; *Hans Just I/S v Danish Ministry for Fiscal Affairs* [1980] ECR 501.

[8] Case 199/82 *Amministrazone delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595.

permitted by EC law,[9] but we did not think it right to leave the Crown with inadequate protection against the vast majority of recovery claims which have no EC law implications. In our view, the additional defences which we recommend for claims for the recovery of direct taxes (non-exhaustion of statutory remedies and submission or compromise) do not make it "impossible in practice or excessively difficult" to exercise the *San Giorgio* right in national law. It also appears possible that the "change in settled view of the law" bar would be held not to apply to claims for the recovery of sums which have been, under EC law, invalidly levied since it is drafted only to apply to claims brought on the ground that the amount in question was paid on an erroneous view of the law.

14.5 The second problem arising in taxation law as a result of the supremacy of EC law is a more specific illustration of the first. The EEC Treaty, as well as prohibiting "customs duties and measures having equivalent effect",[10] prohibits the imposition whether directly or indirectly, by any member State of internal taxation in excess of that imposed directly or indirectly on similar domestic products, or which affords indirect protection to other products.[11] Such principles obviously find their most common application in the field of excise duties and similar internal taxes on domestic production of particular products.[12] Excise duties are dealt with in paragraphs 14.20 to 14.23 below. European law prescribes a recovery right where such indirect internal taxes are levied in breach of EC law principles, and permits this to be limited by an unjust enrichment defence,[13] such as that found in the Value Added Tax Act 1994, section 80 (previously the Finance Act 1989, section 24), and by reasonable limitation periods. The UK is further obliged, under the principle of effectiveness, to afford a remedy to taxpayers. At present of the principal indirect

[9] For instance, in the case of direct taxation it might be difficult for the levying authority to satisfy the burden under EC law of proving that the payer would be so enriched by allowing recovery in accordance with the requirement that national remedies provided are not "impossible in practice or excessively diffficult" to exercise: see para 14.3 above (*Amministrazione delle Finanze dello Stato v SpA San Giorgio* [1983] ECR 3595, 3612). On the applicability of this defence to direct taxes, see paras 10.46 and 10.47 above.

[10] Articles 12-17 EEC.

[11] Article 95 EEC.

[12] Although Member States may establish the system of taxation which they consider the most suitable in relation to each product, provided that the system is treated as the point of reference for determining whether the same tax is applied to a similar product of another Member State. But discrimination against imported products with respect to the rate of taxation, basis of assessment, or detailed rules is forbidden. See Case 54/72 *FOR v VKS* [1973] ECR 193, Case 74/76 *Ianelli & Volpi SpA v Paolo Meroni* [1977] ECR 557, Case 127/75 *Bobie Getrankevertrieb v Hauptzollampt Aachen-Nord* [1976] ECR 1079, Case 28/67 *Molkerei Zentrale v Hauptzollampt Paderborn* [1968] ECR 143.

[13] Which EC law defines. See Case 104/86 *Commission v Italy* [1988] ECR 1799, Cases 331,376 & 378/85 *Les Fils de Jules Bianco SA v Directeur General des Douanes et Droits Indirects* [1988] ECR 1099, Case 240/87 *Deville v Administration des Impots* [1988] ECR 3513. See also *Tayside Numbers Ltd v The Commissioners of Customs and Excise* EDN/92/129 (unrep). cf *Hans I/S Just v Danish Ministry for Fiscal Affairs* [1980] ECR 501; the ruling has been criticised as contributing to the distortion of competition, eg *Hubeau* [1985] 22 CMLRev 87, but it has been confirmed in many subsequent cases.

taxes, only VAT can be recovered in national law under a recovery right which is as wide as EC law prescribes. If our recommendations on excise duties are implemented, overpayments would be recoverable under a similar right. Charges levied directly by the EC are recoverable under EC law provisions. We are aware of no other indirect taxes which might be invalid for breach of EC law.

Value Added Tax

The Nature of VAT

14.6 It is unnecessary for our purposes to provide a detailed account of the legislative provisions which impose a charge to VAT in the United Kingdom.[14] The tax is imposed by UK legislation,[15] based on the provisions of the relevant European Directives.[16]

14.7 The tax is imposed on taxable supplies[17] of non-exempt goods and services[18] in the UK.[19] It operates largely as a tax on consumer expenditure by affording traders and business persons who are registered for VAT (known as "taxable persons") a credit mechanism which permits them to recover tax paid on goods and services supplied to them by others.

The Collection of VAT

14.8 The Department of Customs and Excise is entrusted by statute with the care and management of VAT in the United Kingdom.[20] The tax is administered through a network of Local Valuation Offices ("LVOs") across the UK.

14.9 Although the legislation does not provide for a formal clearance procedure, the Commissioners encourage traders to seek guidance from their LVO in cases of doubt. They have therefore adopted a practice of giving formal rulings on liability matters when requested to do so.[21]

[14] See De Voil "Value Added Tax", Butterworth's UK Tax Guide ("Butterworth's") 1994/1995 ed. Tiley (London, 1994), Part XI.

[15] At present the Value Added Tax Act ("VATA") 1994, and relevant sections of the Finance Acts 1985-1994.

[16] The 1st, 6th, 8th, 10th, 13th and 17th Council Directives on VAT, the Mutual Assistance Directives as applied to VAT and the Relief on Imported Goods Directives. See Butterworth's § 64:11, n 4-6.

[17] Or events treated as supplies. See Butterworth's § 65:15-65:31.

[18] Certain goods and services are exempt from VAT; others are zero-rated. For details see Butterworth's § 69:01-69:46.

[19] And on certain goods which are removed to the UK. See VATA 1994, ss 1(3) and (4), 10, 15.

[20] VATA 1994, Sch. 11, para 1(1).

[21] Unlike the Inland Revenue, cf *R v IRC, ex parte Matrix-Securities Ltd* [1994] 1 WLR 334 .

14.10 Where a formal ruling is given, it may be possible to appeal against it to a VAT Tribunal.[22] If the ruling given later turns out to be incorrect, and the trader suffers some detriment when a new ruling is imposed, there are at least three possible remedies. The first is to apply to the Commissioners for relief under the terms of a Parliamentary Statement of 21 July 1978.[23] The second is to apply for judicial review. The third is to complain to the Parliamentary Commissioner for Administration.[24]

14.11 The tax is collected by taxable persons on behalf of the Commissioners.[25] A taxable person is someone who is either properly registered for VAT, or who is required to be registered, whether or not he is actually registered.[26] The legislation defines the circumstances in which a trader must register.[27] The tax becomes due at the time of supply of goods or services, and the supply is treated as taking place at its "tax point", which is determined in accordance with rules laid down in statute.[28] A taxable person is entitled to credit for so much of his input tax (tax on goods or services purchased by him in the course of business) as is allowable.[29]

14.12 The legislation prescribes accounting periods,[30] by reference to which a taxable person must furnish a tax return on the prescribed form within prescribed periods.[31] If a trader makes an error in calculating his input tax credits or output tax liabilities in a prescribed accounting period, he makes an "underdeclaration" or "overdeclaration" of liability. If the misdeclaration does not exceed £2,000, the trader may correct his VAT account.[32] In other circumstances, the trader may make a claim for repayment under section 80 of the Value Added Tax Act (see below).

14.13 VAT is also collected under assessments made direct on the taxable person by the Commissioners. Assessments must comply with certain requirements,[33] and must

[22] If it represents a "decision" in a field in which the Tribunal has jurisdiction.

[23] Written Answer, *Hansard* (HC) 21 July 1978, vol 161, col 426. Jurisdiction is limited to the items set out in the VAT Act 1994, ss 82, 83.

[24] Which can only be done through an MP (section 5(1) Parliamentary Commissioner Act 1967).

[25] VATA 1994, ss 1(2), (3).

[26] VATA 1994, s 3.

[27] Butterworth's § 66:03 et seq.

[28] Butterworth's § 67:02 et seq.

[29] VATA 1994, s.25(2); Butterworth's § 67:19.

[30] VATA 1994, s25(1); VAT (General) Regulations 1985 (SI 1985/886), reg 58(1), (3), (5).

[31] Butterworth's § 68:01.

[32] See VAT (Accounting and Records) (Amendment) Regulations 1993, (SI 1993/761).

[33] Butterworth's § 68:10.

be made within certain time limits.[34]

Recovery Rights

14.14 Section 80 of the Value Added Tax Act 1994 (previously section 24 of the Finance Act 1989) imposes a statutory duty on the Commissioners to repay amounts paid to them by way of value added tax "which was not tax due to them".[35] On the face of it, this would seem to cover both the situation where payment is made through mistake of law, and where payment is made under an ultra vires charging instrument. The Commissioners' liability to repay arises only where a claim is made for the purpose by the applicant in the manner prescribed.[36] The applicable limitation period is six years from the date of payment,[37] except where the claim is based on mistake, when the period runs from the time when the claimant discovered the mistake or could with reasonable diligence have discovered it.[38] The only defence available to the Commissioners against a claim for repayment is section 80(3) of the Act:

> It shall be a defence, in relation to a claim under this section, that repayment of an amount would unjustly enrich the claimant.

We have already proposed[39] that this defence should be adopted in the statutory schemes governing the repayment of other taxes. This variant of an unjust enrichment defence, as was pointed out in our consultation paper,[40] is permitted under EC law where actions are brought for recovery of charges set by the EC or by national governments on its behalf in breach of provisions of the EEC Treaty.

14.15 The section came into force on 1 January 1990,[41] but applies retrospectively, subject to the six year limitation period. There is a right of appeal to a VAT Tribunal from a decision of the Commissioners in relation to claims.[42] The Commissioners are liable to pay interest on claims if the overpayment by the applicant is due to an error on the part of the Commissioners,[43] at a rate prescribed by the Treasury by order.[44]

[34] Butterworth's § 68:13.

[35] VATA 1994, s 80(1).

[36] VATA, s 80(2), (6); VAT (Accounting and Records) Regulations 1989, (SI 1989/2248). VAT Form 652 may be used, but its use is not compulsory.

[37] VATA 1994, s 80(4)

[38] VATA 1994, s 80(5).

[39] See paras 10.46-10.48 above.

[40] Consultation Paper No 120, para 3.83.

[41] Finance Act 1989(Recovery of overpaid Tax and Administration)(Appointed Days) Order, S.I. 1989/2271.

[42] VATA 1994, s 83(t).

[43] VATA 1994, s 78(1).

14.16 The section provides an exclusive remedy, as section 80(7) provides that:

> Except as provided by this section, the Commissioners shall not be liable to repay an amount paid to them by way of value added tax by virtue of the fact that it was not tax due to them.

Thus, it appears that in the case of VAT, the common law *Woolwich* right has been excluded by operation of section 80(7), and that any claim to be brought for restitution of an amount paid under an ultra vires charging instrument must be brought by invoking section 80.

14.17 VAT is underpinned by EC Directives.[45] Because the provisions of some Directives are capable of having direct effect under European law, the provisions of actual or proposed statutory provisions on VAT must be in conformity with European law, or be vulnerable to challenge for failure to comply with provisions of the VAT Directives. European law, as already pointed out, requires national law to afford a recovery right for charges levied in breach of it, requires national courts to provide a remedy to individuals seeking such recovery and at present recognises only two limitations on the right of recovery. These are the defence of "unjust enrichment" (as found in Value Added Tax Act 1994, section 80) and a "reasonable" limitation period. The provisions of section 80 were therefore obviously framed to reflect current European law.

14.18 HM Customs and Excise indicated their satisfaction with the current provisions in their response to consultation.[46] Since that response section 24 has been the subject of several tribunal decisions. In *Creative Facility Ltd & Oblique Press Ltd v The Commissioners of Customs and Excise*[47] the VAT Tribunal was concerned with the question of whether a repayment of overpaid tax to a liquidator would amount to unjust enrichment of the claimant. The tribunal stated:

> Section 24 of the 1989 Act is silent as to the recovery of overpaid value added tax in cases where the claimant is in liquidation; but it does provide a specific defence to a claim for repayment of tax if that repayment would unjustly enrich the claimant. The Tribunal can see no reason why insolvency law

[44] The Value Added Tax Act 1983 (Interest on Overpayments etc)(Prescribed Rate) Order 1993 (SI 1993/192).

[45] See para 14.6 n 16 above.

[46] Letter dated 15 January 1992 from ML Saunders CB, Solicitor to HM Customs and Excise to Peter Gibson J (then Chairman of the Law Commission): "...in the two years since the distinction between payments made under mistake of law and under mistake of fact was abolished, the Commissioners have encountered no problems...[however]..in the absence of any litigation, or even the prospect of litigation, sections 24 and 29 of the Finance Act 1989 must be regarded as untested...".

[47] MAN/92/1157 and 1158, p 13-14; the appellants have appealed to the High Court against the Tribunal decision. No date has yet been fixed for the hearing.

should take precedence over the law relating to unjust enrichment. In the present case in the opinion of the Tribunal it is legitimate for the Commissioners in deciding whether there will be unjust enrichment to consider whether the claimant will repay the tax to the various customers who are entitled to have it repaid.

Other cases on the "unjust enrichment" defence have been concerned with establishing whether the claimant suffered the effective incidence of the tax out of profits. It has been said of the section: "as a defence to a claim for overpayment of tax it is more a question of assessing the measure of damages than a true defence to an action. The claimant ought to be restored to his previous position by being repaid the amount of the overpayment minus what he had 'passed on' to his customers in mitigation of the damage to himself."[48]

14.19 Since the Commissioners of Customs and Excise are satisfied with the operation of the provisions for recovery in section 80 and since this affords an effective statutory recovery scheme for both payments under mistake and ultra vires payments, we do not recommend any alteration to the current statutory scheme. We are fortified in this conclusion by our belief that the present law was framed to accord closely with European Community law and our consequent reluctance, in view of the significant influence of EC law on VAT, and indeed indirect taxes generally, to recommend anything which may even remotely risk a breach of that law.[49] Therefore, **we recommend that:**

(34) the current statutory scheme for the recovery of overpaid Value Added Tax in section 80 of the Value Added Tax Act 1994 (previously section 24 of the Finance Act 1989) should not be altered.

Excise Duties

14.20 It will be apparent from what we have said above that we believe that the same recovery provisions should apply to excise duties as are applied to other forms of internal indirect taxation and to VAT. Excise duties are charged on a variety of goods produced in or imported into, and on certain licences issued in, the United Kingdom. The principal heads of duty are: on alcoholic beverages,[50] on hydrocarbon oil,[51] on tobacco products,[52] on betting and gaming activities,[53] and on excise

[48] *Computeach International Ltd v The Commissioners of Customs and Excise* MAN/91/1224, p 14.

[49] See paras 14.1-14.6 above.

[50] Alcoholic Liquor Duties Act 1979; no licence is necessary for brewing beer or duty payable for the licence to distil spirits.

[51] Hydrocarbon Oil Duties Act 1979.

[52] Tobacco Products Duty Act 1979.

[53] Betting and Gaming Duties Act 1981.

licences which are required for certain activities.[54] However, not all excise licences require a fee to be paid.

14.21 All excise duties are under the care and management of the Commissioners of Customs and Excise, and their collection and administration are accordingly governed by the Customs and Excise Management Act 1979.[55] The Finance Act 1994 provides for the introduction of air passenger duty and insurance premium tax. Air passenger duty is to be a duty of excise, and is under the care and management of the Commissioners.[56] Insurance premium tax is not so defined, and accordingly is treated separately here.

14.22 The Finance Act 1989, section 29 makes certain provisions which relate to the recovery of amounts of excise duty paid under mistakes, whether of fact or of law. It provides that, in proceedings against the Commissioners for restitution of an amount paid by way of excise duty, "proceedings shall not be dismissed by reason only of the fact that the amount was paid by reason of a mistake of law". However, it is to be a defence to any such proceedings that "repayment of an amount would unjustly enrich the claimant". Since the section refers to "proceedings" and the legislation provides no statutory route for such proceedings to be taken, it is to be presumed that proceedings lie at common law, with common law defences to restitutionary claims consequently continuing to apply.

14.23 For the reasons stated above generally, we do not believe this to be a suitable provision in relation to excise duties. The provisions of European law are particularly relevant to excise duties, as we have sought to explain in paragraphs 14.1 to 14.5 above. Even if levies which are invalid under EC law can be said to have been paid under a mistake of law, so that section 29 affords a comprehensive recovery right, the status of the common law restitutionary defences under EC law is unknown. Further, section 29 of the Finance Act 1989 does not make specific provision for recovery of sums paid under levies which are ultra vires, and we consider that it should do so, in the light of our general approach to the development of the *Woolwich* principle. To provide for a recovery provision similar to section 80 of the Value Added Tax Act 1994 (previously section 24 of the Finance Act 1989) for excise duties would appear to us to meet the requirements both of European law and of the *Woolwich* decision. We are fortified in this by comments expressed to us by HM Customs and Excise, both during and after consultation. During consultation they expressed their satisfaction with the operation to date of section 80 of the Value Added Tax Act 1994 and its statutory

[54] For example, keeping a car or other mechanically propelled vehicle on a public road in Great Britain: Vehicles (Excise) Act 1971. Also licences required for operating casinos, bingo halls and gaming machines.

[55] Apart from Vehicle (Excise) Duty, which is administered by the Department of Transport.

[56] FA 1994, s 28-44.

predecessor. Later, on seeing a draft of our proposed recommendation in relation to section 24, they confirmed that view and further stated that the Department would welcome a similar provision in relation to excise duties. This is especially the case since the Finance Act 1994 sets up the Combined VAT and Duties Tribunal, and thus a statutory tribunal is now available for hearing claims for the recovery of overpaid excise duties. Therefore, **we recommend that:**

(35) overpaid excise duty should be recoverable in the same circumstances as overpaid Value Added Tax and legislation, modelled on section 80 of the Value Added Tax Act 1994, should be introduced in respect of excise duty. (Clause C).

Insurance Premium Tax

14.24 The tax will be introduced by the Finance Act 1994 on or after 1 October 1994.[57] Schedule 7, paragraph 8 of the Act gives a recovery right where amounts have been paid "by way of tax which was not tax due" to the Commissioners. The recovery right is practically identical to that given in the case of VAT by section 80 of the Value Added Tax Act 1994. We consider that the recovery right afforded in relation to VAT is a satisfactory model for recovery of indirect taxes in general,[58] and therefore, **we recommend that:**

(36) the existing provision for recovery of insurance premium tax should not be amended.

[57] See Part III and Schedule 7.

[58] See paras 14.14-14.19 above.

PART XV
NATIONAL INSURANCE CONTRIBUTIONS AND COUNCIL TAX

National Insurance Contributions

The System

15.1 There are four classes of contributions to the National Insurance contributory scheme. Class 1 contributions, which are due in respect of the earnings of "employed earners",[1] are classified alternatively as "primary" and "secondary" contributions. Primary contributions are due directly from the employed earner, while secondary contributions are due from the "secondary contributor" (mostly employers). Class 1A contributions are payable by employers in respect of cars and private use petrol provided to their employees. Class 2 contributions are payable by self-employed earners.[2] Class 3 contributions are voluntary contributions which can be paid to satisfy contribution conditions of entitlement to benefits.[3] Class 4 contributions are payable on business profits from a trade, profession or vocation.[4]

15.2 Class 1 contributions are payable under the PAYE system by the employer, who deducts primary contributions from emoluments paid to the employee and returns both these and the employer's own secondary contributions to the Inland Revenue. In its turn, the Inland Revenue will account for the sum received to the Department of Social Security ("DSS"), which administers the National Insurance Fund. The Social Security (Contributions) Regulations 1979[5] (the "Contributions Regulations") incorporate the provisions of former PAYE Regulations, and provide for deduction of employee's contributions at source. Class 1A contributions may similarly be deducted by the employer from the emoluments paid to the employee, and returned to the Inland Revenue, although it is possible for employers to pay these contributions direct to the DSS by bank giro.

15.3 Class 2 contributions are paid direct to the DSS either by bank giro or on receipt of a statement.[6] Class 4 contributions are collected through inclusion in the Schedule D Case I or II assessment to income tax, and payment is made to the Collector of Taxes. Income tax appeals provisions apply to the termination of Class

[1] Broadly employees and office holders; Social Security Contributions and Benefits Act ("SSC&BA") 1992, s 2(1)(a).

[2] £5.65 per week: SSC&BA 1992, s 11(1) as amended by SI 1994/544.

[3] SSC&BA 1992, s 13(1)(2).

[4] SSC&BA 1992, ss 15-18.

[5] SI 1979 No 591 as amended. See *Halsbury's Statutory Instruments*, vol 18 pp 95-100.

[6] Contributions Regulations, regs 53A, 53B, 54, 54(2), 54A.

4 contribution liability, but not to any question of exception from liability or deferment of liability.[7]

Recovery Provisions

15.4 The Contributions Regulations provide for recovery in most cases where contributions have been overpaid. Regulation 32 provides that:

> Subject to the provisions of regulations 31 and 35 of these regulations..where there have been paid in error by a person or a secondary contributor..any contributions (other than Class 4 contributions), or there has been any payment in excess of the...annual maximum...such contributions shall be returned by the Secretary of State to that person or the secondary contributor, as the case may be...

subject to a number of requirements. Application must be made in the prescribed form, within six years from the end of the year of payment, or within a longer period where the contribution was paid in error, and the Secretary of State is satisfied that the person concerned had good reason for not making the application within the appropriate period. The recovery right is subject to a *de minimis* provision, which prevents applications being made for recovery of amounts not exceeding £0.50, in the case of Class 1A contributions, or of amounts not exceeding 1/15th of the standard contribution rate at the upper earnings limit for Classes 1 and 2 contributions (approx £2).[8] The regulations prescribe an order of priority for repayment of contributions.[9]

15.5 Class 4 contributions may be recovered under Regulation 69 of the Contributions Regulations, which permits recovery provided (1) that the claim is for more than £0.50; and (2) that application is made in such manner as the Secretary of State may determine, within six years from the end of the year of assessment in question, or within two years from the end of the year of payment.

15.6 Both recovery rights are subject to the Secretary of State's power to treat amounts overpaid as if they had been paid on account of contributions properly payable. In the case of Class 4 contributions, this right is found in Regulation 68 of the Contributions Regulations.[10] In the case of Class 1A contributions, Regulation 31(2)

[7] SSC&BA 1992, Sch 2, para 8.

[8] Contributions Regulations, reg 7, as amended by SI 1994/563, reg 2(2); the upper earnings limit is £430, the standard contribution rate is 2% on the first £57 and 10% on the remainder, so the actual contribution rate is approx £33, of which 1/15th is approx £2 (figures taken from *Butterworths UK Tax Guide 1994-95*).

[9] Contributions Regulations, reg 32(2), (3).

[10] It applies wherever a payment is made for any year of assessment, and where either (i) the earner would have been exempt from contributions for that year; or (ii) the payment had been made in error in circumstances where the Inland Revenue would not be liable to

provides that overpaid amounts may be retained by the Secretary of State on account of secondary Class 1 contributions or Class 2 contributions otherwise properly payable. In the case of other classes of contributions overpaid, Regulation 31(1) permits the Secretary of State, provided that the amounts paid were "of the wrong class, or at the wrong rate, or of the wrong amount" to retain these on account of other contributions properly payable.[11] It should be noted that because Class 4 contributions are collected under the income tax assessment system, they can be recovered through adjustment of the assessment on an appeal in the same manner as for income tax.[12]

Administrative Remedies

15.7 Section 17(1) of the Social Security Administration Act 1992 gives the Secretary of State jurisdiction over "principal questions", which basically means any issues relating to a person's liability to contributions.[13] Inquiries into such matters on behalf of the Secretary of State are generally held by officials. There are five possible routes of recourse against such a decision. The first is to apply to the Secretary of State to have the decision set aside on the grounds that this is required in the interests of justice.[14] The second is to apply to the Secretary of State for a review of the decision on the grounds that fresh evidence has come to light or that the previous decision was erroneous in law.[15] The third is to appeal to the High Court on a point of law.[16] The fourth is to apply for judicial review of the Secretary of State's decision. The fifth, and last, remedy, is to apply to the Parliamentary Commissioner for Administration for relief on grounds of maladministration.[17]

Contributions paid by Mistake

15.8 The existing grounds of recovery of social security contributions are different depending on whether the contribution is a Class 4 contribution, or any other Class

repay it; or (iii) the payment was in excess of the amount due for that year; or (iv) the payment was in excess of the statutory annual maximum.

[11] It is possible this would not extend to contributions paid ultra vires, as these may not be of the "..wrong class..wrong rate..or..wrong amount" (reg 31(1)), but may never have been due in the first place.

[12] SSC&BA 1992, sch 2, para 8; see para 9.12 above.

[13] The issues are (a) whether a person is an earner and, if he is, as to the category of earner in which he is to be included, and (b) whether the contribution conditions for any benefit are satisfied or otherwise relating to a person's contributions or his earnings factor. The principal exception from the Secretary of State's jurisdiction is liability for Class 4 contributions, which is determined by the General or Special Commissioners of Income Tax, with an appeal to the High Court on a point of law.

[14] The full grounds are set out in the Social Security (Adjudication) Regulations 1986, (SI 1986/2218), reg. 11.

[15] The full grounds are set out in the Social Security Administration Act 1992, s.19(1).

[16] Section 18(3) of the Social Security Administration Act 1992.

[17] See para 14.10 n 24 above.

of contribution. We can find no principled justification for the limitation by Regulation 32 of the recovery right for Class 1, 2 and 3 contributions to 1/15th of the standard contribution payable for a year at the upper earnings limit, which we calculate to be approximately £2. The recovery right afforded by Regulation 69 for Class 4 contributions does not contain such a limitation on minimum repayments, but does adopt the alternative limitation of £0.50, which Regulation 32 also employs for Class 1A contributions. Since the recovery rights discussed above were framed against a common law background which afforded no recovery right for payments made under a mistake of law, it may be that such limitations were thought to be justified. We see the force of arguments that, because amounts paid by way of social security contributions may be smaller than those paid by way of other taxes, the authorities should not be disturbed by trivial claims for the recovery of small sums. However, this limitation can, we believe, now only be justified on policy grounds. We received no response from the DSS on consultation and it is difficult for us to evaluate the policy arguments in favour of this provision.

15.9 The existing provisions contain no specific recovery right for payments of contributions levied ultra vires. The recovery right under Regulation 32 (for contributions other than Class 4) is limited to contributions paid in error or in excess of the annual maximum. It would, of course, be arguable that every payment under an ultra vires regulation or instrument was a payment made under a mistake of law, but the legislation should in our view deal expressly with the point. The right under Regulation 69 is limited to contributions paid by an earner who should have been exempt who paid in error, or who paid amounts in excess of the annual maximum. Again, the rights should in our view be consistent among themselves, and should provide expressly in statute for the exercise of the *Woolwich* right, which we consider undeniably applies in this instance.

15.10 There were no particular calls during consultation for any limitations to the *Woolwich* recovery right in the case of social security contributions. The existing recovery right for contributions paid in error is in fact considerably wider than those provided for most other taxes and duties, in that it affords relief wherever a claimant has overpaid due to error, subject to a statutory form of set-off, and a *de minimis* provision.

15.11 When considering whether any recommendations should be made for the reform of the law relating to the recovery of contributions paid through mistake, we must avoid making recommendations for change purely for its own sake, and we do not at this stage recommend repeal of the current limitations on recovery where the amount sought to be recovered is less than 1/15th of the standard contribution rate between the upper and lower limits (or less than £0.50 for Class 1A contributions). It may be that those concerned with the administration of the National Insurance Fund should look again at these provisions in the light of our Report, and consider whether they should be retained. They may well constitute a sensible protection for

the public revenues against a series of small claims, which would be costly to administer. Also, we do not recommend the abolition of the present statutory set-off of amounts which a claimant seeks to recover against other amounts owed by him as this, in our view, avoids circuity of action.

15.12 However, the Regulations do not deal expressly with the recovery of sums paid ultra vires. The wide nature of the rights afforded by the Contributions Regulations to recovery of contributions overpaid through mistake suggests that the DSS were, at the time of their introduction, less concerned than the other revenue authorities at the potential disruptive effects of allowing recovery for mistake of law. There is no real reason to suppose that a right of recovery for ultra vires charges will be any more disruptive. Accordingly, we favour extending the right to recovery presently contained in the Contributions Regulations, to any sums paid on account of contributions but not due, so as to cover contributions levied under ultra vires secondary legislation. Being a change which would be effected by an amendment to the Contributions Regulations by the DSS, this is not a recommendation on which we will be presenting a draft clause implementing our proposal. **We recommend that:**

(37) the existing scheme for the recovery of social security contributions paid in error should be unaltered, except for the inclusion, by the amendment of the Contributions Regulations of payments made under ultra vires secondary legislation.

Council Tax

Introduction

15.13 The current system of local government finance is the Council Tax.[18] It is the third method of local taxation to be operated within five years[19] and replaced the Community Charge[20] on April 1 1993.

15.14 The Council Tax discarded the basic principle of the Community Charge, that there should be a uniform charge on all adults resident in a particular area. However, the new tax combines concepts of the Community Charge with a property tax. The Council Tax reverts largely to the premise of the old system of rating, in which the unit of charge was the dwelling. The crucial departure for Council Tax is that the basis for calculation is the capital value of the property, and not its hypothetical letting value.

[18] Introduced by the Local Government Finance Act ("LGFA") 1992.

[19] Domestic rating under the General Rate Act 1967 was abolished by LGFA 1988, s.117 to be replaced by the Community Charge. The Community Charge provisions of the 1988 Act (as amended) were replaced in turn by LGFA 1992, of which Part I applies to England and Wales.

[20] LGFA 1988, Part I.

The Charge

15.15 A standard charge for each band is levied on a notional household of two adults. A personal element is retained by providing for discounts for particular classes of taxpayer. A 25% discount is available for single residents[21] and a 50% discount for unoccupied residences or second homes. In addition, exemptions from paying the Council Tax will apply to students, student nurses, youth trainees, those on income support, prisoners, the elderly, dependent relatives and the severely mentally handicapped. Exempt persons are disregarded for the purposes of a discount.[22]

Banding

15.16 Properties have been banded in eight broad-value bands in accordance with their open market value. Thus, the rate of charge is not based directly on the value of a particular property but depends on the relevant band that it falls into.

15.17 For England the bands[23] and proportions[24] are as follows:

Values	Band	Proportion
Up to £40,000	A	6
Up to £52,000	B	7
Up to £68,000	C	8
Up to £88,000	D	9
Up to £120,000	E	11
Up to £160,000	F	13
Up to £320,000	G	15
Over £320,000	H	18

Calculation of the Charge

15.18 After calculation of the net budget requirement of the council for the year, this is divided by the tax base (number of taxpayers) to give the basic amount of tax which would apply to a property in the central band (band D). This figure provides the average; the charges for dwellings in the other bands will be determined by

[21] LGFA 1992, s 11.

[22] LGFA 1992, Sch 1.

[23] LGFA 1992, s 5(2); the same proportions as England apply to each band for Wales and Scotland, but the values of the properties within those bands vary. Scotland's top band starts at £212,000, with the lowest band up to £27,000 and middle bands covering the range £45,000 to £80,000 (LGFA 1992, s 74(2)). In Wales band A is up to £30,000 and band H is £240,000 and above (LGFA 1992, s 5(3)).

[24] LGFA 1992, s 5(1).

multiplying this average by the relevant proportions. The band A charge will be six-ninths of the average and band H, eighteen-ninths, or double. This means that the charge for the highest band will be three times the size of the charge in the lowest band.[25]

Valuations

15.19 This approach has meant that a widescale valuation of the 21 million properties in Great Britain has been necessary. The Local Government Finance and Valuation Act 1991 introduced the necessary powers for the Council Tax valuations to be undertaken;[26] it made the money available to the Inland Revenue, as well as giving them power to appoint outside valuers to undertake the work. However, valuations had begun before that Act received Royal Assent,[27] and so were made without statutory authority. The process had to be restarted to avoid mass invalidity of the valuations.[28] In addition, regulations made under the LGFA 1992[29] specifying how dwellings are to be valued came into force on March 31 1992, leaving potential problems with valuations made under the 1991 Act. The 1992 Act requires the valuation to be on "dwellings", but the previous provision charged "domestic property". There would be no difficulty if there was no change in substance, but that was precisely the intention.[30]

15.20 It is misleading to suggest that all dwellings were valued, since the banding took place by reference to key property types which are representative of the main property types in the locality. There were certain assumptions made in the valuation process.[31] The basic principles are that the property would be sold on the open market with vacant possession, and that the estate sold was the freehold or, in the case of a flat, a 99 year lease at a nominal rent. In addition, the valuer is required to assume that the property was in a reasonable state of repair[32] on April 1, 1991. This could lead to inequitable results, as the actual capital values of houses can

[25] For details of calculation of the charge see LGFA 1992, ss 30-37.

[26] It also abolished the existing capping restrictions, giving the Secretary of State much wider powers and discretion to cap local authorities where he considers their expenditure to be excessive.

[27] On July 25, 1991.

[28] Hansard HC (1991) vol 192 col 934.

[29] The Council Tax (Situation and Valuation of Dwellings) Regulations 1992 (SI 1992/550), Part III.

[30] The changed wording was targeted at shared bathrooms in communal houses, but it cannot be guaranteed that it is restricted to that situation.

[31] Contained in the Council Tax (Situation and Valuation of Dwellings) Regulations 1992 (SI 1992/550).

[32] Council Tax (Situation and Valuation of Dwellings) Regulations 1992, reg 6(6), which reads: "In determining what is "reasonable repair" in relation to a dwelling for the purposes of paragraph (2), the age and character of the property and its locality shall be taken into account".

differ enormously depending on the condition of the property. A further assumption is made that the property is to be permanently restricted to use as "a private dwelling",[33] and so the potential development value of the property is discounted. Also, the increased value of the property owing to special adaptation for the use of the disabled can be ignored.[34]

Appeals

15.21 Appeals against charges to Council Tax can be on two grounds: banding decisions[35] or personal liability to tax and calculations of amounts payable.[36]

15.22 Appeals on banding decisions are to be directed in the first instance to the listing officer responsible for maintaining the valuation list. Before November 30 1993 an application for re-banding could have been made on the basis that the banding valuation assigned to the dwelling was not applicable to it. After that date appeals are only available on a more limited basis - where there is a change in taxpayer; or a material increase in value accompanied by a relevant free market sale; or a decrease resulting from demolition of part of the building or a change in the physical state of the locality or adaption for use by a disabled person. An appeal may be made to a Valuation Tribunal within six months from the listing officer's decision.

15.23 On liability to tax or a disagreement about calculating the amount of tax payable the taxpayer must first write to the local authority responsible. Appeals are possible on a variety of factors, including whether a dwelling is exempt; whether it is the sole or main residence of a taxpayer; or where the single person's discount is not awarded. In addition, because of the daily nature of the Council Tax, appeals on "any calculation" of the charge could be numerous. If the local authority rejects the grievance or fails to respond within 2 months[37] the claimant may take the case to the Valuation Tribunal.[38] The only two routes for appeal from the Valuation Tribunal are through judicial review of the tribunal's decision, within 90 days, or to the High Court on a point of law, within six weeks.

[33] Council Tax (Situation and Valuation of Dwellings) Regulations 1992, reg 6(2)(i).

[34] Council Tax (Situation and Valuation of Dwellings) Regulations 1992, regs 6(2)(g) and (h), 6(3), 6(4) - the property must be assumed to have one unadapted kitchen, bathroom and toilet. There is apparently no requirement that a disabled person must live there, and if they did a further reduction may be possible under the Council Tax (Reductions for Disabilities) Regulations 1992 (SI 1992/554).

[35] LGFA 1992, s 24; appeals under this section go at first instance to the listing officer.

[36] *Ibid*, s.16.

[37] *Ibid*, s 16(7)(c).

[38] Descendants of the local valuation courts for Rates and the Valuation and Community Charge Tribunals for the Community Charge.

Recovery Provisions

15.24 Recovery of overpaid Council Tax is provided for in the Council Tax (Administration and Enforcement) Regulations 1992.[39] There are several provisions for repayment: regulation 24 deals with adjustments to instalment payments; regulation 25 has a similar provision for lump sum payments; and regulation 28 concerns overpayments resulting from the joint and several liability of spouses to the charge. Regulation 31 is a catch-all provision, and states that:

> If there has been an overpayment, the amount overpaid...
> (a) shall be repaid if the person so requires, or
> (b) in any other case shall (as the billing authority determines) either be repaid or credited against any subsequent liability of the person to make a payment in respect of any council tax of the authority.

15.25 The legislation specifies no time limit for recovery, and so the Limitation Act 1980, section 9 applies, which provides for a six year time limit from the date the cause of action accrued in respect of sums recoverable by virtue of an enactment.

15.26 The provisions for recovery of overpaid Council Tax are unlimited for recovery of payments made under a mistake of law. It seems unjustifiable to us to limit taxpayers' existing rights in any way by introducing further defences, and shorter limitation periods. Representatives of the local authorities who responded on consultation did suggest that the *Woolwich* right should be limited in its application to them.[40] However, these representations were made before the introduction of the present wide ground for recovery (in 1992). Parliament and the Department of the Environment acting under Parliamentary authority have therefore recently seen fit to introduce a virtually unlimited recovery right, and we do not see that we should interfere with that decision retrospectively. The provisions adopted for recovery of overpayments of the Uniform Business Rate are identical to those adopted for Council Tax, and we similarly recommend no change. Although there is no specific ground for restitution in either provision on the basis that the charge was levied ultra vires it is likely that it would be held to be included within the current provisions, on the basis that an "overpayment" includes situations where a tax has been levied and paid with no legal basis for its recovery. To provide the certainty necessary in the field of taxation law, however, **we recommend that:**

> **(38) the existing provisions for the recovery of council tax and the uniform business rate should be unaltered, except for the inclusion by amendment of the Regulations of payments made under ultra vires secondary legislation.**

[39] SI 1992/613.

[40] The Commission for Local Administration for England and Wales suggested that "there should be no right to recover payments made earlier than the commencement of the financial year immediately preceding that in which the error was discovered".

Because this recommendation involves an amendment to secondary legislation, we do not present a draft clause implementing this proposal.

PART XVI
RESIDUAL DUTIES FALLING WITHIN THE SCOPE OF WOOLWICH AND PROCEDURE

Introduction

16.1 We have indicated our view that the common law *Woolwich* principle applies to all taxes, duties, levies or charges levied in excess of statutory authority by a public or quasi-public body.[1] It will be apparent from this formulation that the reforms and safeguards to the *Woolwich* right which we have recommended in relation to the principal existing central and local government taxes cannot therefore be exhaustive of the potential scope of the right. We must therefore consider how best the principle should be developed in relation to these residual levies and charges, to which our recommended recovery provisions would not apply.

16.2 Certainty is generally desirable in the field of revenue law, and this is one of the factors which influenced us in our approach to the development of the *Woolwich* right. Whatever we recommend in relation to residual duties must also provide a sufficiently certain regime to ensure that the finances of the smaller public and quasi-public authorities are predictable and reliable. It may also be recalled that a legislative provision may (in some instances) be productive of greater uncertainty than the evolving common law. There are three alternatives open to us for dealing with the residual charges: the first two are statutory. First, legislation could be introduced, allowing recovery of charges levied by "public bodies" only (a residual recovery right). Secondly, legislation could give a right to recover charges levied by certain public bodies, listing those bodies with the statutory power to charge to which the recovery rights would apply. Thirdly we may choose to recommend that the development of this limited, but constitutionally important, area should be left to the common law.

Statutory Recovery Rights

16.3 The first option is to accord a recovery right wherever taxes are (a) paid under error or mistake to "public" bodies, or (b) levied ultra vires by "public" bodies (or bodies acting under a statutory authority to charge). This right would then be subject to defences, probably modelled on the defences which we recommend in relation to the recovery rights for income tax.

16.4 The Scottish Law Commission has criticised this option on the grounds of vagueness. It believes that to define a recovery right by the "public" as opposed to "private" nature of the charging body is to invite litigation on the distinction. It points to the difficulties experienced in administrative law[2] in establishing the

[1] See paras 6.42-6.43 above.

[2] Under RSC Ord 53, following the decision in *O'Reilly v Mackman* [1983] 2 AC 237.

distinction, and is reluctant to introduce such a distinction into Scots' law.[3] However, although rights of recovery must be uniform in the field of Central and Local Government taxation across the United Kingdom, this is not necessarily the case with a residual recovery right, which might apply only in England and Wales.

16.5 There are, however, a number of disadvantages in recommending such a statutory right. It is difficult to predict to which situations the right will apply in the future, and also the potential scope of the right; it will, therefore, be hard to frame. Even if a statutory right could be worded satisfactorily, it will be inflexible in its application to future restitutionary claims. Some small authorities may require a high degree of protection from disruption of their finances, while some public authorities may need hardly any protection. Such protection might well be afforded by the development of the defences of change of position, and submission or compromise, at common law.

16.6 The second option is to provide for a statutory recovery right which applies to listed bodies or categories of bodies. In this regard, we have looked closely at the statutory instruments which enact the EC Public Procurement Directives into English law.[4] These statutory instruments set out lists of the categories of bodies to which the procurement regimes are to apply. These might be thought to represent a starting point from which a suitable list of bodies or categories of bodies subject to the recovery right might be framed.

16.7 We then sought to formulate a list of the bodies to which the recovery rights should apply. One possible list is as follows:

(1) Ministers of the Crown;
(2) Government Departments;
(3) Local authorities (meaning any parish council, community council, district council, county council, metropolitan district council, London borough council, the Council of the Isles of Scilly and the Common Council of the City of London);
(4) The Northern Ireland Assembly;
(5) Fire authorities (whether established under the Fire Services Act 1947, the Fire Authority for Northern Ireland or the London Fire and Civil Defence Authority);[5]
(6) Police authorities (whether established under the Police Act 1964, any joint authorities established under that Act, or the Police Authority for Northern

[3] See paras 1.13 and 8.34 above.

[4] The Public Works Contracts Regulations 1991 (SI 1991/2680); The Public Supply Contracts Regulations 1991 (SI 1991/2679); The Utilities Supply and Works Contracts Regulations 1992 (SI 1992/3279).

[5] Though of these only the London Fire and Civil Defence Authority, in its capacity as successor to the Metropolitan Board of Works, seems to have power to raise a levy of any kind (on insurance companies operating in London).

Ireland);[6]

(7) Authorities established under the Local Government Act 1985, section 10;[7]

(8) Joint authorities established under the Local Government Act 1985, Part IV;[8]

(9) Any body established under the Local Government Act 1985, section 67;[9]

(10) The Broads Authority;[10]

(11) Education authorities;[11]

(12) Planning authorities for national parks and parks authorities;[12]

(13) English Heritage;[13]

(14) Privatised utility companies, where subject to statutory regulation;[14]

(15) Harbour authorities (as defined under the Harbours Act 1964) and the Port of London Authority;[15]

(16) Corporations, unincorporated bodies or groups of persons appointed by or through the Crown or any Minister of the Crown or either House of Parliament to act together, for the provision of needs in the general interest, and not having an industrial or commercial character, and with a limited

[6] Though again, none of these seem to have power to levy a charge.

[7] Joint Waste Disposal Authorities set up by order of the Secretary of State after the abolition of the Greater London Council. These do not appear to have a power to charge.

[8] Metropolitan police authorities, Northumbria Police Authority, metropolitan fire and civil defence authorities, London Fire and Civil Defence Authority, metropolitan county passenger transport authorities. Whether these authorities have powers to charge is unclear, although passenger transport authorities would presumably have a power to charge in respect of their services.

[9] Bodies established to take transfers of the residuary property of the GLC and the metropolitan county councils after their abolition. Their power to charge has not been established.

[10] Power to charge not established.

[11] Power to charge not established.

[12] Power to charge not established.

[13] Power to charge not established.

[14] We believe that such bodies would be subject to the scope of the *Woolwich* right, especially since their power to charge is sometimes limited by statute, albeit to a minor extent. The case of *Foster v British Gas Plc* [1991] 1 QB 405 (ECJ); [1991] 2 AC 306 (HL) establishes that such bodies are likely to be regarded as "public" under European law and that accordingly breaches by them of European law in their charges would oblige them to accord an adequate remedy under that law.

[15] Harbour, dock and pier authorities pose a particular difficulty. Most were established under private Act of Parliament or Royal Charter prior to the Harbours, Docks and Piers Clauses Act 1847. After that Act, they were established by private or local Act, but with the provisions of the 1847 Act incorporated. The 1847 Act included a power to charge rates, and a limitation on that power. The General Pier and Harbour Act 1861 permitted the development of harbours under provisional orders issued by the Board of Trade, and the Act conferred a power to charge. The legislation was amended by the Harbours Act 1964, which amended the limitations on the power to charge and introduced a definition of "harbour authority". Given the mass of earlier legislation, it is difficult to establish whether that definition is comprehensive.

statutory power to charge.[16]

16.8 Although the list approach is sufficiently certain to overcome the concerns presented by the statutory scheme based on the distinction between "public" and "private" law, the above draft demonstrates that this approach is clearly unsatisfactory. To adopt a list which would even approach the status of being comprehensive would involve a search through all primary legislation.[17] Adopting a list which did not purport to be comprehensive would risk drawing unjustifiable distinctions[18] between bodies with statutory powers to charge and bodies of a "public" nature, all of whom are in our view within the scope of the *Woolwich* principle, but only some of whom under the list approach would be afforded the protection of defences to the exercise of the right. We, therefore, feel unable to recommend a recovery right based on this list approach. For all these reasons **we recommend that:**

(39) the common law right to restitution of ultra vires receipts by public authorities should not be replaced by a comprehensive statutory recovery right for such receipts.

Common Law Development

16.9 If the *Woolwich* right is not to be codified and limited by statute in its operation to residual duties, the common law would apply in the form in which we have proposed that it should be amended in Section B of this Report. Therefore, as well as recovery for compulsion or duress (in respect of which there are indications that the categories of compulsion are not closed)[19] payments of such duties made under a mistake of fact or mistake of law would be recoverable. These rights of recovery would be subject to the defences of (i) change of position on the part of the receiving authority;[20] (ii) change in a settled view of the law,[21] and (iii) submission or compromise.[22] The standard limitation period would also apply. Where such duties were levied ultra vires, they would also be recoverable under the *Woolwich*

[16] But if such bodies are to be included, and similar bodies established for industrial purposes excluded, it may be difficult to see why the privatised utilities should be included.

[17] For example, research carried out by the Commission identified 373 charging provisions in local and personal legislation between 1900 and 1939. This did not attempt to identify provisions in public general legislation during that period which contained charging provisions.

[18] For example, why should the Grimsby Harbour Board (being a "harbour authority" within the meaning of the Harbours Act 1964) be included, whereas the Ascot Racecourse Board (which does not fit neatly within any categorisation, but has a statutory power to charge) is excluded?

[19] See *South of Scotland Electricity Board v British Oxygen* [1959] 1 WLR 587 and *Woolwich Equitable Building Society v IRC* [1993] AC 70, 165, 173, 198, 201 and see paras 6.13-6.16 above.

[20] See paras 11.12-11.17 above.

[21] See paras 5.2-5.13 above.

[22] See paras 2.25-2.38 above.

principle, provided that no statutory rights of recovery operated to displace its operation. As the *Woolwich* right is expressed to be a restitutionary one, we believe that the courts would apply the defences of change of position and of submission or compromise.

16.10 Some may regard this situation as unsatisfactory, because it would afford insufficient protection to public bodies against claims for the restitution of taxes paid to them due to error or mistake, or in response to ultra vires demands. It may also be argued that this will encourage litigation as the boundaries of the recovery rights are established. However, we believe the potential variety of claims which may arise make this an ideal area for the common law to operate in as it can, in this field, provide the flexibility which would be lacking in a statutory provision. Also, it is likely that there will be very few cases that fall solely within the residual right, and that those will turn on their particular facts. It is appropriate, therefore, that development should be on a case-by-case basis. We envisage that the restitutionary defences of change of position, and submission or compromise, will be developed by the courts to afford appropriate levels of protection to payees in need of it. The private law (as amended) will continue to apply to public authority payees in this residual category who receive payments made under a mistake of law. We are fortified in our conclusions by the fact that consultees in this residual category did not request special safeguards.[23] Therefore, **we recommend that:**

(40) development of the right to restitution of ultra vires receipts by public authorities should, save for the specific recommendations we have made in this Report, be left to the common law.

Procedure and Interest

Interest

16.11 The Woolwich Building Society continued its litigation against the Inland Revenue primarily in order to obtain payment of interest on the sum overpaid by them, the original overpayment having been repaid by the Inland Revenue on an *ex gratia* basis. It was common ground that interest would be available under the Supreme Court Act 1981, section 35A, provided that the sum claimed was a present debt due from the Inland Revenue to Woolwich. Therefore, interest may now be claimed under section 35A in an action for recovery of overpaid tax under the *Woolwich* principle.

16.12 If a claim for repayment is brought under the statutory repayment provisions ICTA 1988 section 824 provides for the payment of "repayment supplement" on amounts repaid by the Inland Revenue, but only where the repayment takes place at least 12

[23] Apart from local authorities, whose position has been dealt with recently by Parliament in relation to Council Tax; see paras 15.13 ff above.

months after the year of assessment.[24] Repayment supplement is calculated at the same rate as the rate charged by the Inland Revenue on tax overdue.[25] There are separate provisions relating to corporation tax, and to income tax paid by companies on payments received by them.[26]

16.13 A taxpayer will be charged interest at the prescribed rate[27] on tax which is overdue under any assessment from the due date until payment. There is, therefore, some inequality between the treatment of taxpayers where they bring claims for repayment of overpaid tax against the Inland Revenue, and their treatment when the Inland Revenue brings claims against them for payment of overdue tax. It has been suggested to us that these regimes should be made equal and fair. It seems inequitable to us that taxpayers should be obliged to pay interest on tax paid late from the moment it should have been paid, while the Inland Revenue is only obliged to pay interest from the start of the next fiscal year.

16.14 Although it is not within our terms of reference to make recommendations relating to the basis on which interest should be paid to taxpayers on claims for the recovery of overpaid tax, we believe that those responsible should consider amendments to the regime governing interest payments, especially since those regimes are less favourable to the taxpayer than the regime which would apply to a common law *Woolwich* claim. This difference cannot in our view be justifiable. The same general comment applies to the other statutory provisions permitting the recovery of overpaid tax.

Procedure

16.15 One of our guiding principles in our reform of the law in this area has been to preserve the role of the statutory tribunals established by Parliament for determining questions of liability to tax, by preventing the common law right established in the *Woolwich* case from being used to circumvent this appeal procedure.[28] We believe that the specialist taxation tribunals are, with the exception of one class of case,[29] the best forum for the resolution of claims for the recovery of overpaid tax. In general, therefore, we believe that claims for the recovery of overpaid direct taxes should lie, after the refusal of a claim by the Board, to the Special Commissioners,

[24] ICTA 1988, s 824(1).

[25] Finance Act 1989, s 178.

[26] ICTA 1988, s 826.

[27] Finance Act 1989 s 178.

[28] Cf paras 10.42-10.43 above (our proposed defence of "non exhaustion of statutory remedies").

[29] For recovery of sums overpaid because of ultra vires subordinate legislation.

as TMA 1970, section 33(4) presently provides.[30] In the case of overpaid indirect taxes, we believe that claims for their recovery should lie in the first instance to the newly established VAT and Duties Tribunals.[31]

16.16 Where the basis of a claim for recovery of tax paid is the invalidity of a statutory instrument which was fundamental to the charge to tax, there is no objection in principle to the issue of *vires* being heard and determined by the Special Commissioners.[32] However, some consultees questioned whether the taxation tribunals are the appropriate forum for the resolution of issues of *vires*, in view of the specialist administrative law nature of such arguments, and the fact that the members of the tax tribunals are generally appointed for their expertise in taxation law and practice.

16.17 We do not consider that the tax tribunals are necessarily an inappropriate forum for the resolution of issues of the *vires* of statutory instruments. However, in certain cases, the members of the tax tribunals may themselves prefer to have the benefit of the views of a tribunal with experience in the field of administrative law on questions of *vires*. We therefore believe that it should be open to the tax tribunals, whether on an application made for the purpose by either party, or on the tribunal's own motion, to refer questions of *vires* of subordinate legislation to the High Court for determination. It is not strictly within our terms of reference to make recommendations on this issue, although it is a matter that will require consideration if our substantive recommendations are taken forward. In that connection, we believe that those responsible should give serious consideration to this question.

[30] Cf Inheritance Tax Act 1984, s 241, which does not provide a right of appeal to the Special Commissioners; Stamp Duties Management Act 1891, s 9, which does not provide a right of appeal from a refusal by the Commissioners of Inland Revenue to make an allowance in respect of spoiled or misused stamps.

[31] Finance Act 1994, Part I, Chapter II.

[32] *Chief Adjudication Officer v Foster* [1993] AC 754 (HL) (statutory tribunals may hear and determine issues of *vires* of subordinate legislation).

SECTION D
CLAIMS BY PUBLIC BODIES

PART XVII
THE PRESENT LAW

Recovery Under the Common Law

17.1 The distinct position of public authorities has been recognised by the common law, which has applied a special rule to permit them to recover payments made beyond their statutory authority. In *Auckland Harbour Board v R* Viscount Haldane stated that:[1]

> Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires and may be recovered by the Government if it can... be traced.

17.2 Lord Haldane's statement suggests that it is not necessary that the payment be made as a result of mistake for it to be recoverable.[2] The principle was stated to be wider than that which applies between citizens and appears to allow recovery simply because the payment was ultra vires. Lord Haldane appears to limit the principle to payments made from the Consolidated Fund, but such a limitation appears anomalous. The rule is said to be based on public policy: namely the protection of public funds from unlawful dissipation. This rationale suggests that it probably ought to apply to all ultra vires payments made by government.

Defences at Common Law

17.3 The Supreme Court of Victoria in *Commonwealth v Burns*[3] held that the Government cannot be estopped from claiming repayment: "a party cannot be assumed by the doctrine of estoppel to have lawfully done that which the law says that he shall not do". English law also recognises the limitations of estoppel in public law[4] although in certain situations a public body may be estopped by a representation made by it even where the representation is ultra vires.[5] If this approach were to be extended to ultra vires payments, a narrow defence of estoppel

1 [1924] AC 318, 327.

2 See also *Commonwealth of Australia v Crothall Hospital Services (Aust) Ltd* (1981) 36 ALR 567; *Sandvik Australia Pty Ltd v Commonwealth of Australia* (1989) 89 ALR 213.

3 [1971] VR 825, 830 per Newton J.

4 See Craig, *Administrative Law* (3rd ed, 1994) Ch 18.

5 *Western Fish Products Ltd v Penwith DC* [1981] 2 All ER 204. See generally Craig, *Administrative Law*, op cit, p 474-6 and note also the protection of "legitimate expectations": see Section C, para 9.14 above.

might be developed. A defence of change of position[6] has only recently been recognised in England, and it will apply to this type of situation. The question whether a citizen might raise as a defence that the Government has made a compromise or a submission to an honest claim does not appear to have been considered, although general restitutionary principle suggests that it should apply in this context.[7]

Recovery under Statute

17.4 The recovery of welfare benefits, including social security benefit, child benefit, income support, family credit and certain payments from the Social Fund[8] is dealt with by the Social Security Administration Act 1992, section 71 and the relevant regulations.[9] By these provisions overpayments by the Government (including those made under mistake of law) are only recoverable if caused by a claimant's misrepresentation or failure to disclose a material fact.[10] However, non-recoverable payments may be offset against other benefits payable.[11] This would include payments made as a result of mistake of law.

European Community Law

(a) PAYMENTS MADE UNLAWFULLY UNDER COMMUNITY PROVISIONS

17.5 A number of schemes concerned with agricultural products, administered by member states on behalf of the Community, provide for subsidies and grants to be paid from Community resources. Payments made under such schemes may infringe Community law, for instance, in the case of a discriminatory subsidy, or payment of a subsidy may be based on an erroneous interpretation of Community legislation. Any action for recovery must be brought against the payee in national courts in accordance with national law and procedure.[12]

6 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548; see Section B paras 2.17-2.23 above.

7 See Section B, paras 2.25-2.38 above. See generally Goff and Jones (4th ed, 1993) p 50-54, 127-130, 142, 268-272.

8 Specified in Social Security Administration Act 1992, s.71(11).

9 Social Security (Payments on account, Overpayments and Recovery) Regulations 1988 (SI 1988/664) on which see *R v Secretary of State for Social Security, ex p Britnell* [1991] 1 WLR 198.

10 Social Security Administration Act 1986, s 71(1); SI 1988/664, reg 5. See *Plewa (Executrix of the estate of Jozef Plewa, decd) v Chief Adjudication Officer* [1994] 3 WLR 317 (HL) overruling *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712. A pensioner was overpaid due to his innocent failure to disclose certain material facts. The Social Security Act 1986, s 53 was held to impose liability on third parties for innocent misrepresentation or failure to disclose resulting in an overpayment. However, s 53 only applied prospectively (overpayments made before 6 April 1987 were governed by Social Security Act 1975, s 119); and, in *Plewa*, the pensioner's widow was not liable to repay.

11 SI 1988/664, reg 5.

12 Case 265/78 *H Ferwerda BV v Produktschap voor Vee en Vlees* [1980] ECR 617; Case 54/81 *Firma Wilhelm Fromme v Bundesanstalt fur Landwirtschaftliche* [1982] ECR 1449; Cases 205-215/82 *Deutsche Milchkontor GmbH v Federal Republic of Germany* [1983] ECR 2633.

17.6 This basic principle is qualified by Community legislation and other rules of Community law. Member States are under a general obligation to provide for the recovery of agricultural subsidies,[13] and the remedy must comply with the principle of effectiveness. In the absence of specific legislation it seems that the same requirement would arise from general principles of Community law to uphold the policies behind the Community law restrictions.[14] However, substantial limitations on recovery are permissible and may indeed be required by Community law to protect the recipient's legitimate expectations in the security of his receipt.[15] Thus, recovery may be circumscribed by a short limitation period, a defence of change of position or where there has been no "fault" on the part of the payee. In this context any national remedy must also comply with the principle of non-discrimination; the remedy must be neither more or less favourable than that which applies to comparable domestic claims.[16]

(b) UNLAWFUL STATE AIDS

17.7 "State aids", that is, aid given by the authorities in member states from their own resources, may also raise restitutionary problems.[17] An aid payment without prior notification to the European Commission or which is paid during a period of "review" by it, or which, following such review, is found incompatible with European law, will be unlawful.[18]

17.8 An action to recover an unlawful payment must be brought in national courts and will be determined according to national law and procedure,[19] but subject to the principles of effectiveness and non-discrimination. There may be no restrictions on recovery where the payee has not got a legitimate expectation that the payments are lawful and in several cases on state aids it has been held that there is no such expectation.[20] It seems unlikely that an unlawful state aid will arise as a consequence

[13] Council Regulation 729/70, article 8(1).

[14] In *Ferwerda*, it is clear that the court considered the same principles would apply where there was no relevant legislative provision.

[15] See the statement in Case 11/76 *Netherlands v Commission*, [1979] ECR 245, 278, suggesting that it may not be possible under Community law to recover sums paid in error, thus considerably reducing the impact of the regulation.

[16] *H Ferwerda BV v Produktschap voor Vee en Vlees* [1980] ECR 617. *Deutsche Milchkontor v Federal Republic of Germany* [1983] ECR 2633 concerned the permissibility of provisions which restricted the right of the administration to recover. *Firma Wilhelm Fromme v Bundesanstalt* [1982] ECR 1449 concerned the stringency of the burden on the recipient - here the question of whether interest could be demanded from the recipient.

[17] Wyatt and Dashwood *European Community Law* (3rd ed, 1993) Ch 17.

[18] EC Treaty, Art 92, 93; Case C-5/89 *Commission of the European Communities v Federal Republic of Germany, The Times*, 8 November 1990.

[19] EC Treaty, art 93. See Wyatt and Dashwood, op cit, p 540-541.

[20] Case C-5/894 *Commission of the European Communities v Federal Republic of Germany, The Times*, 8 November 1990. The case concerned a state aid which was unlawful for failure to notify the Commission at all. No doubt the same principles would apply to aids which are

of a mistake of law as opposed to a mistake of fact or a deliberate breach of Community rules.

The Case for Reform

Summary of Provisional Proposals

17.9 The Consultation Paper did not make provisional recommendations for change to the current rule, but identified three options, and invited comment. The first option was to leave the current law unchanged. The second option was to assimilate the law to the general private law, which would permit recovery where the payment was made under a mistake of law, subject to the defences recommended in Section B of this Report.[21] The third option was to permit recovery only where fault or misrepresentation on the part of the payee could be identified.[22]

Response on Consultation

17.10 The response on consultation on this issue was disappointing. However, of those consultees who did respond, none expressed support for the third option in paragraph 17.9 above, and most who addressed the issue supported the second option.

The Scope of the Present Right

17.11 It is important to recall the development of the common law in *Woolwich Equitable Building Society v IRC*[23] since the Consultation Paper was published. The present rule in this area is probably limited to payments made by Central Government,[24] and so its scope is not as wide as the potential scope of the recovery right for private payers established in *Woolwich*. Although the *Auckland* recovery right would be unlikely in our view to apply to expenditure by local authorities, semi-state bodies and privatised utilities, as in our view the *Woolwich* rule does to payments to such bodies,[25] expenditure by such bodies may well be recoverable on other restitutionary

unlawful for the other reasons mentioned above.

[21] Change of position (paras 2.17-2.23 and 5.14-5.15 above); submissions to an honest claim and compromises (paras 2.25-2.38, 5.18 above); Change in the law or understanding of the law (5.3-5.13 above).

[22] As the provisions on recovery of welfare benefits presently provide.

[23] [1993] AC 70.

[24] The rule was established in *Auckland Harbour Board v R* [1924] AC 318, where it was stated as applying to "any payment out of the consolidated fund made without Parliamentary authority". The limitation to payments out of the Consolidated Fund, as opposed to payments out of Departmental Budgets is probably anomalous. However, once a payment has been properly appropriated from the Consolidated Fund to the spending Department, the issue of the *vires* of the payment may become significantly more complex, as many areas of Departmental expenditure will be for the discretion of the relevant Minister, out of the funds provided by Parliament.

[25] See Section C, para 6.42 above.

grounds.[26] Recovery of payments made by such bodies, in the absence of any special rule, would be governed by the ordinary private law of restitution, or by any specific statutory provisions.

17.12 Lord Goff referred to the possible proprietary nature of the remedy afforded to the Crown by the *Auckland Harbour Board* case.[27] If the right to recover is limited to circumstances where a right to trace (and therefore an equitable proprietary right) exists, the existence of such a right alters the context of this discussion somewhat, and makes us reluctant to recommend that it should be removed from the Crown. If the comments in the *Auckland* case go so far, the limitation of the recovery right to situations where a right to trace can be established also render it a quite narrow right.

Arguments against Reform

17.13 Given that consultees did not express strong views for or against the reform of the present rule, such reform is only required if it is felt that the present position is either unworkable, inequitable or inefficient. The second option (assimilation) has the merit of being consistent with the general private law and with principle. However, it lacks the advantage of the present rule: of being predictable in its application and providing clear safeguards for public authorities. This is also a deficiency of the third option. When considering the third option, we also believe that fault and misrepresentation on the part of the payer are difficult concepts to introduce into this area of the law of restitution. Although they have been applied in the recovery provisions for social welfare payments, they have no obvious link

[26] Following the "swaps" litigation, payments by local authorities under ultra vires contracts are recoverable on grounds of "failure of consideration" or perhaps "absence of consideration" (*Westdeutsche Landesbank Girozentrale v Islington LBC* (1993) 91 LGR 323 aff'd [1994] 1 WLR 938). It is possible that this doctrine may be extended to other ultra vires commercial transactions by public bodies. Finally, following *Westdeutsche*, it has been questioned whether, given that payments under invalid contracts may be recovered, the position of ultra vires payments is *a fortiori*. See Section B, para 2.41 above.

[27] *Woolwich Equitable Building Society v IRC* [1993] AC 70, 177 per Lord Goff. It is hard to see how the Crown's claim could ever be proprietary, as there is unlikely to be a fiduciary relationship between the subject and the Crown, unless the Courts were prepared to construct one based on the circumstances of the payment (see *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105, where the Court imposed a fiduciary relationship where a payment was made under a mistake of fact). The reference to tracing in the *Auckland* case itself is brief ([1924] AC 318 at 327 "Any payment out of the consolidated fund made without Parliamentary authority is simply illegal and ultra vires, and may be recovered by the Government if it can, as here, be traced"). In the earliest authority cited in the *Auckland* case, *Dodington's Case* (1596) Cro Eliz 545, 78 ER 791, the report states that "...in truth, these were not any due fees: and, whether his executor shall be charged with these sums so received? was the question. After argument it was adjudged, that he should be charged: for..the Privy Seal is not sufficient authority to dispose of the Queen's treasure, unless where it is due; and, he disposing of it otherwise, it is out of his authority...in every..case where he receives the Queen's money, knowing it to be the Queen's money, he is chargeable: but if he received it in payment, not knowing it was her money...it is otherwise." The focus on the payee's knowledge may suggest an equitable foundation to the right, and therefore a connection with tracing. The other authorities cited in the *Auckland* case add nothing to this discussion.

with the requirement that the payment be ultra vires. An ultra vires payment may have no link with the behaviour of the payee at all.

17.14 The present rule accords a benefit to the state as payer which would not be available under the *Woolwich* rule to a private payer, and which will not be available to a private payer under our proposed reforms and safeguards to that rule. However, the state frequently - and sometimes justifiably - benefits in litigation from advantages not available to the private individual, and this in itself does not seem to us to be a convincing argument for altering the current rule. No responses on consultation suggested that differentiation between the position of the state and the private payer was flagrantly inequitable.[28] In any event, the decision in the *Woolwich* case has lessened that differentiation.

17.15 Although some consultees expressed doubts on the merits of special legal rules (such as the present one) which owe their existence to a perceived need to protect the public finances from disruption, we are less sceptical. We have been prepared, we believe with justification, to recommend limitations on the right established by the *Woolwich* case for payers to recover taxes levied ultra vires. We do not therefore believe that the present right for the Crown to recover payments made by it which are ultra vires should be abolished purely because it represents a protection for the Crown against disruption to the public finances.

17.16 The scope of the existing recovery right which public authorities enjoy was given by Lord Goff in the *Woolwich* case as one of the justifications for extending a similar right to citizens. It may be argued that, if the right given to the citizen is to be limited as we propose, so should the right which public authorities enjoy.[29] However, Lord Goff's observations later make it clear that he envisaged the citizen's new rights as being subject to limitation, in a manner deemed appropriate by Parliament.[30]

[28] Although Lord Goff in *Woolwich* did characterise the difference between the relative positions of the state and the private payer as "most unattractive" (177C); see para 17.16 n 29 below.

[29] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, 177B-C per Lord Goff: "if the Crown pays money out of the consolidated fund without authority, such money is ipso facto recoverable if it can be traced...It is true that the claim in such a case can be distinguished as being proprietary in nature. But the comparison with the position of the citizen, on the law as it stands at present, is most unattractive".

[30] *Ibid* [1993] AC 70, 174 per Lord Goff: "I agree that there appears to be a widely held view that some limit has to be placed upon the recovery of taxes paid pursuant to an ultra vires demand. I would go further and accept that the armoury of common law defences, such as those which prevent recovery of money paid under a binding compromise or to avoid a threat of litigation, may be either inapposite or inadequate for the purpose".

The Effect of Reform

17.17 The specific statutory provisions which govern the recoverability of welfare payments seem to us to deal with the situation which is most likely to arise in practice between the citizen and the Crown. The practical area of application of the present recovery rule is therefore quite limited, and may well extend only to payments of salaries, grants and awards ultra vires and to payments under ultra vires contracts.

17.18 If the general private law[31] were to be applied to payments by the Crown which are not covered by specific statutory provisions, in preference to the present rule, as would be the case if the second option in paragraph 17.9 above were adopted, this would still allow recovery in most of the situations where the current recovery rule applies. For example, payments under mistakes of fact or law, and payments under invalid contracts would be recoverable.[32] All mistakes of law on the part of a public authority as to its own jurisdiction or capacity lead, in administrative law, to its acts being ultra vires, and thus all payments where the public body is under a mistake of law as to its capacity to pay would seem to us to fall within the present rule. It seems to us that the only situation where a payment which is recoverable under the present law would not be recoverable if the general private law were applied, is where the public body was not under any mistake as to its capacity to make the payment when it is made, but its ultra vires nature was due to other reasons.[33] We suggest that such situations are rarely likely to arise in practice, and therefore that the practical effect of a reform to the present rule by the second option would be marginal.

Conclusions

17.19 We are mindful of the need to prevent, wherever possible, against the potential which any reform of the law may have for generating litigation. The present rule, as is the nature of absolute rules, tends towards certainty and the avoidance of case law. There appear to have been only two reported cases on this topic in almost 400 years. We are also conscious of the relatively limited practical impact of reform, as suggested by the assimilation approach, and of the arguments against it. The arguments of principle for reform do not appear to us to hold sway to any great degree. The practical arguments against a move towards the application of the private law are principally arguments tending to support the sanctity of the state's finances, and to avoid the dissipation of state funds, whether unlawfully or in litigation, which could otherwise be avoided.

17.20 Given that the present recovery right is a restitutionary right established by the

[31] As we have suggested that it should be reformed.

[32] Although the Crown's limited capacity to contract in certain circumstances may affect the application of the common law rules.

[33] For example, an improper exercise of discretion on the part of the authority in whom the power to make the payment was vested.

common law, and although there is no authority in that regard, we believe that the standard restitutionary defences of change of position, and submission or compromise, would, and should, apply. The right given to the state, even within its sphere of application to payments by Central Government is not therefore, we believe, unlimited. The application of these defences would also, we believe, protect the citizen's interests in areas where these are most at risk by the existence of an automatic right on the part of the Crown to recover payments made ultra vires.

17.21 Accordingly, **we recommend that**

(40) the present rule, which allows the Crown to recover all payments which are made by it ultra vires should not be altered.

We have come to this conclusion, however, on the basis that the common law defences of change of position and submission or compromise will apply in this context.

SECTION E
SUMMARY OF RECOMMENDATIONS

SECTION B: RESTITUTION OF BENEFITS CONFERRED UNDER A MISTAKE OF LAW

We recommend that:

(1) The rule precluding recovery of payments made under a mistake of law be legislatively abrogated (paragraph 3.12 and Draft Bill, clause 2).

(2) There should not be a comprehensive statutory right of recovery for payments made under a mistake of law (paragraph 4.4).

(3) The proposed legislation should provide that the classification of a mistake as a mistake of law or as a mistake of fact shall not of itself be material to the determination of a claim for restitution and that restitution should not be denied on the ground that the mistake in question is a mistake of law (paragraph 4.10 and Draft Bill, clause 2).

(4) The legislation should:

(a) encompass services rendered and non-pecuniary benefits conferred under a mistake of law; and

(b) abrogate the mistake of law rule for those things in the same manner as for mistaken payments

(paragraph 4.12 and Draft Bill, clause 1).

(5) A restitutionary claim in respect of any payment, service or benefit that has been made, rendered or conferred under a mistake of law should not be permitted merely because it was done in accordance with a settled view of the law at the time, which was later departed from by subsequent judicial decisions (paragraph 5.13 and Draft Bill, clause 3).

(6) There should not be legislation on the defence of change of position (paragraph 5.15).

(7) The proposed legislation should not deal with the position of compromises and submissions to honest claims (paragraph 5.18).

(8) The proposed legislation should have prospective effect only (paragraph 5.20 and Draft Bill, clause 4(1)).

(9) The proposed legislation should not affect the balance of argument as to the

existence of the bar to recovery of a payment made under a mistake of law, prior to the legislation coming into force (paragraph 5.20 and Draft Bill, clause 4(2)).

(10) The proposed legislation should ensure that any enactment which restricts or excludes the possibility of a mistake claim in circumstances where such a claim would otherwise be possible should have the same effect on mistake claims brought by virtue of Draft Bill, clause 2 (paragraph 5.20 and Draft Bill, clause 4(3), (4)).

SECTION C: ULTRA VIRES RECEIPTS BY PUBLIC AUTHORITIES

In respect of ultra vires receipts by public authorities, we recommend that there should be a series of specific amendments to the recovery provisions for overpaid tax in taxation legislation governing the principal central and local government taxes, to reflect the emergence of the *Woolwich* principle, the proposed abolition of the mistake of law bar and the need for defences against the exercise of both rights.

We recommend that:

Income Tax, Corporation Tax, Capital Gains Tax and Petroleum Revenue Tax

(11)(a) There should be repeal of the Taxes Management Act 1970, section 33 and replacement by a right on the part of all taxpayers charged to tax, whether under an assessment or otherwise, to recover tax paid but not due irrespective of the presence or absence of any mistake on the part of the taxpayer;
(b) the right to repayment is to be exercised by application in writing to the Board of Inland Revenue in the first instance with an appeal to the Special Commissioners and with a further appeal on a point of law[1] to the High Court (paragraph 9.25 and Draft Clause A, new section 33(1)-(7)).

(12) Overpayments of tax should not be regarded as paid under a mistake of law on the part of the taxpayer (and consequently not due and recoverable on that ground) merely because the taxpayer paid in accordance with a settled view of the law that the payment was due, and later judicial decisions have departed from that view (paragraph 10.20 and Draft Clause A, new section 33AA(6)).

(13) There should be no special provision enabling a payer-challenger of a previously settled view of the law to recover, on that ground alone, overpayments of tax as made under a mistake of law, nor do we recommend any such provision for later payers who commence action before the decision in the case of the payer-challenger (paragraph 10.21).

[1] With no restrictions as to subject matter.

(14) The change in a settled view of the law bar (recommendation (12)) should not apply to claims for the recovery of sums paid to the Revenue as a result of the invalidity of subordinate legislation which created or was fundamental to the collection of the charge to tax (paragraph 10.31 and Draft Clause A, new section 33AA(6)).

(15) and (16) It should be a defence to an action for recovery of an overpayment of tax that a claim for the tax in question was contractually compromised, or that payment was in response to litigation commenced by the Inland Revenue against the taxpayer concerned. However, it should not be a defence that the payment was made in response to a mere threat to litigate, unless that payment would also qualify as a contractual compromise (paragraphs 10.34-10.35 and Draft Clause A, new section 33AA(4)).

(17) and (18) Short time limits for the bringing of claims for repayment of tax overpaid as a result of a mistake or ultra vires should not be enacted as a means of dealing with the problem of disruption to public finances. We presently favour retaining the existing six year time limit from the date of payment. However, as is the case under the Limitation Act 1980, section 32(1)(c) for actions based on mistake, time should not begin to run against the claimant until he discovers the mistake or could with reasonable diligence have discovered it (paragraphs 10.40-10.41 and Draft Clause A, new section 33(4)).

(19) It should be a defence to an action under the statutory right to repayment of taxes paid but not due which will replace TMA 1970, section 33, that the applicant has raised the ground of claim on an appeal against an assessment to the amount of tax in question. It should further be a defence to a claim for repayment that the applicant either knew of the ground, or should by the exercise of due diligence have known of the ground, within the time limit for bringing an appeal against an assessment, and did not raise it in that manner (paragraph 10.44 and Draft Clause A, new section 33AA(3)).

(20) and (21) It should be a defence to claims for the repayment of taxes overpaid that repayment will unjustly enrich the claimant (paragraphs 10.46-10.47 and Draft Clause A, new section 33AA(5)).

(22) The problem of disruption to public finance, which we consider is substantially reduced by recommendations (12) - (15) and (19) - (21), should not be dealt with by the introduction of a defence permitting denial of recovery where such disruption would result (paragraphs 11.6 and 11.23).

(23) and (26) The technique of prospective overruling should not be applied in an attempt to prevent disruption to public finances caused by claims for recovery of payments made under a mistake of law, or by claims for the recovery of

payments made under ultra vires subordinate legislation (paragraphs 11.7 and 11.25).

(24) and (27) A court or tribunal determining a claim to recover tax paid should not be legislatively empowered to deny recovery to those who have not brought proceedings prior to its decision, where to allow subsequent claims for recovery would lead to severe disruption to public finance (paragraphs 11.9 and 11.30).

(25) and (28) The statutory scheme should not make provision for the defence of change of position (paragraphs 11.17 and 11.31).

(29) The proposed legislation should not deal with the doctrine of estoppel, and this should continue to apply in claims for the recovery of overpaid tax to the extent (if any) that it presently does (paragraph 11.32).

(30) The statutory provisions which we recommend to replace Taxes Management Act 1970, section 33 should apply to tax paid under the PAYE system (paragraph 12.7).

(31) The recommended reforms to the recovery provisions in relation to income tax should extend to income tax paid under the self-assessment system (paragraph 12.17).

Inheritance Tax

(32) The scheme developed in relation to income tax should apply to inheritance tax (paragraphs 13.1-13.11 and Clause B).

Stamp Duty

(33) The scheme developed in relation to income tax should apply to stamp duty (paragraphs 13.12-13.23).

Value Added Tax

(34) The current statutory scheme for the recovery of overpaid Value Added Tax in section 80 of the Value Added Tax Act 1994 (previously section 24 of the Finance Act 1989) should not be altered (paragraphs 14.14-14.19).

Excise Duty

(35) Overpaid excise duty should be recoverable in the same circumstances as overpaid Value Added Tax and legislation, modelled on section 80 of the Value Added Tax Act 1994, should be introduced in respect of excise duty (paragraph 14.23 and Draft Clause C).

Insurance Premium Tax

(36) The existing provision for recovery of insurance premium tax should not be

amended (paragraph 14.24).

Social Security Contributions

(37) The existing scheme for the recovery of social security contributions paid in error should be unaltered, except for the inclusion, by the amendment of the Social Security (Contribution) Regulations 1979,[2] of payments made under ultra vires secondary legislation (paragraph 15.12).

Council Tax and Uniform Business Rate

(38) The existing provisions for the recovery of Council Tax and the Uniform Business Rate should be unaltered, except for the inclusion by amendment of the Regulations of payments made under ultra vires secondary legislation (paragraph 15.26).

Residual taxes, duties and levies falling within the scope of Woolwich Equitable Building Society v. Inland Revenue Commissioners[3]

(39) and (40) The common law right to restitution of ultra vires receipts by public authorities should not be replaced by a comprehensive statutory recovery right for such receipts, and the development of the right to restitution of ultra vires receipts by public authorities should, save for the specific recommendations we have made in this Report, be left to the common law (paragraphs 16.8 and 16.10).

SECTION D: ULTRA VIRES PAYMENTS BY PUBLIC AUTHORITIES

We recommend that:

(41) The present rule which allows the Crown to recover all payments which are made by it ultra vires should not be altered (paragraph 17.21).

(Signed) HENRY BROOKE, *Chairman*
JACK BEATSON
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
30 September 1994

2 1979 SI No 591 as amended.

3 [1993] AC 70.

APPENDIX A

Draft
Restitution (Mistakes of Law) Bill

ARRANGEMENT OF CLAUSES

A

B I L L

INTITULED

An Act to make provision in relation to claims made in any proceedings for restitution in respect of acts done under mistake. A.D. 1994.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Claims to which Act applies.

1.—(1) In this Act "mistake claim" means a claim made in any proceedings for restitution of a sum in respect of an act done under mistake.

(2) In this Act "act" includes anything which may found a claim for restitution, that is to say, the making of a payment, the conferring of a non-pecuniary benefit or the doing of work.

Abrogation of mistake of law rule.

2. The classification of a mistake as a mistake of law or as a mistake of fact shall not of itself be material to the determination of a mistake claim; and no such claim shall be denied on the ground that the alleged mistake is a mistake of law.

Effect on mistake claim of judicial change in the law.

3.—(1) An act done in accordance with a settled view of the law shall not be regarded as founding a mistake claim by reason only that a subsequent decision of a court or tribunal departs from that view.

(2) A view of the law may be regarded for the purposes of this section as having been settled at any time notwithstanding that it was not held unanimously or had not been the subject of a decision by a court or tribunal.

EXPLANATORY NOTES

References to "Recommendations" are to the Summary of Recommendations in Part V of this Report.

The Bill deals only with two aspects of the law of restitution applicable to claims based on mistake. That law, which is still being developed by the courts, is otherwise unaffected by the Bill.

Clause 1(1) describes the kind of restitutionary claims with which the Bill is concerned. Those claims (made in respect of acts done under mistake) are referred to in the Bill as "mistake claims".

The acts which may give rise to a mistake claim are defined in *clause 1(2)* by reference to the general law of restitution, and so are described in general terms. The formulation is intended to cover any act for which the law currently allows a mistake claim or for which it might in the future do so.

Clause 2 implements recommendation 3 and ensures that any mistake (whether it would be classified as one of law or fact under the present law) may in principle found a claim for restitution. The effect is to abolish the rule precluding restitution for acts done under a mistake of law.

The first limb of the clause prevents claims being determined in the future simply by reference to any classification of mistakes as mistakes of law or fact. Any other consideration affecting the determination of a claim is unaffected by the clause, even though it may be more likely to arise in relation to one kind of mistake than another.

The second limb confirms that a person will be able to bring a mistake claim in circumstances where under the present law the claim would be barred under the mistake of law rule.

Clause 3 implements recommendation 5 and concerns situations where an act is done in accordance with a view of the law that at the time is regarded as settled, but it appears from a subsequent legal decision that that view of the law was or may have been wrong. It has effect in place of any similar rules that the courts might otherwise have applied in those situations. The policy behind the clause is discussed in paragraphs 5.2 to 5.13 of the Report.

Subsection (1) ensures that an act done in accordance with settled law does not found a mistake claim made on the ground that that view was wrong. It is immaterial whether the alleged mistake related to the claimants legal obligations or to some other legal matter relevant to the act in question. The question in any case whether a view of the law on which an act was done was "settled" will be for the courts to determine in the light of *subsection (2)*, which confirms that a view of the law on any point need not be held unanimously or have been the subject of a specific legal decision in order to be "settled".

Savings.

4.—(1) This Act does not affect any mistake claim (whenever made) in respect of an act done before the date on which this Act comes into force.

(2) Without prejudice to the generality of subsection (1), nothing in this Act shall be taken to affect any question as to the existence or operation before that date of any rule whereby a mistake claim would be denied by reason of the alleged mistake being a mistake of law.

(3) An enactment which has the effect of excluding or restricting the right to bring a mistake claim in any particular circumstances shall have the same effect on any right to bring a mistake claim in those circumstances that may arise by virtue of section 2.

1978 c. 30.

(4) In subsection (3) "enactment" includes an enactment comprised in subordinate legislation within the meaning of the Interpretation Act 1978.

Short title, commencement and extent.

5.—(1) This Act may be cited as the Restitution (Mistakes of Law) Act 1994.

(2) This Act shall come into force on such day as the Lord Chancellor may appoint by order made by statutory instrument.

(3) This Act extends to England and Wales only.

EXPLANATORY NOTES

Clause 4 deals explicitly with three supplementary matters, although each proposition might otherwise be deduced by the reader from the rest of the Bill.

Mistake claims brought in respect of acts done before the commencement of the Bill remain subject to the common law and are to be unaffected by *clauses 2 or 3*. As there may be arguments in relation to such cases as to the application of the mistake of law rule to mistake claims, *subsection (2)* prevents any argument that Bill may be used to indicate that any particular view of the common law is correct or able to be developed only by legislation. Those matters are to be determined by the courts as if the Bill did not exist.

Subsection (3) is concerned with existing enactments which exclude or restrict the right at common law to bring mistake claims in particular circumstances. It ensures that any mistake claim founded on a mistake of law which could be made in the same circumstances by virtue only of *clause 2* is taken to be excluded or restricted by that enactment to the same extent.

APPENDIX B

Draft
Tax Clauses

ARRANGEMENT OF CLAUSES

DRAFT CLAUSES/SCHEDULES

Amendment of the Taxes Management Act 1970

A. For section 33 of the Taxes Management Act 1970 there shall be substituted the following sections— Recovery of overpaid tax.

"Recovery of overpaid tax.

33.—(1) Where a person has paid an amount by way of tax which was not tax due from him, the Board shall (subject to this section and section 33AA below) be liable to repay the amount to him.

(2) The Board shall only be liable to repay an amount under this section on a claim in writing made to them for the purpose.

(3) No amount may be claimed under this section after the expiry of 6 years from the date on which it was paid, except where subsection (4) below applies.

(4) An amount paid by reason of a mistake may be claimed under this section at any time before the expiry of 6 years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it.

(5) The Special Commissioners shall hear and determine any appeal brought from the decision of the Board on a claim under this section.

(6) Except as provided by this section or by or under any other enactment, the Board shall not be liable to repay an amount paid to them by way of tax by virtue of the fact that it was not due.

(7) References in this section to "tax" include references to interest on tax.

Defences to claims for repayment of overpaid tax.

33AA.—(1) The Board shall not be liable to repay an amount claimed under section 33 above if or to the extent that a defence under this section applies to the claim.

(2) It shall be a defence to a claim made on any ground that the ground was considered on an appeal by the claimant against an assessment relating to the amount in question.

(3) It shall be a defence, in the case of a claim made on a ground that has not been put forward by the claimant on an appeal against an assessment relating to the amount in question, that the ground was or by the exercise of due diligence should have been known to the claimant—

(a) if no such appeal has taken place, before the end of the period in which he was entitled (under section 31 above) to bring an appeal, or

(b) if such an appeal has taken place, before the hearing of the appeal.

EXPLANATORY NOTES

References to "Recommendations" are to the Summary of Recommendations in Section E of this Report.

The clauses illustrate the kind of provisions required to implement our recommendations on (a) the taxes covered by the Taxes Management Act 1970, (b) inheritance tax and (c) excise duties. They are not intended to be exhaustive and do not take account of any consequential amendments or other procedural or supplementary provisions that may be required to meet our proposals. The recovery rights conferred by the clauses will supplement any other existing statutory mechanisms for resolving tax disputes.

Clause A

This clause implements recommendations 11 to 31. It inserts new sections 33 and 33AA in place of the current section 33 of the Taxes Management Act 1970 (which empowers the Board of Inland Revenue to repay tax paid in error).

Section 33

Subsections (1) and (2) implement recommendation (11). They provide for the new basic recovery right in relation to the taxes dealt with in the Taxes Management Act 1970. Any amount paid as tax which was not due (either because no tax was properly due from the taxpayer or an overpayment was made) is in principle recoverable, subject to the provisions of section 33 and 33A.

Subsections (3) and (4) implement recommendations (17) and (18) and provide for a 6 year limitation period running from the date of payment or, in the case of a mistake, from the date on which the mistake was or should have been discovered.

Appeals against a decision on a claim under section 33 may be made by virtue of section 42 of the Taxes Management Act 1970. The effect of *subsection (5)* is to exclude the possibility of the General Commissioners hearing such appeals (recommendation (11)(ii)).

The new provisions (taken with the appeals procedure for challenging assessments) are intended to provide an exhaustive system for dealing with payments of tax which are not due. *Subsection (6)* excludes any common law right which might, apart from section 33, have given the tax payer a right to restitution in respect of such payments.

Section 33AA

The defences in section 33AA may defeat a claim to repayment of an amount paid by way of tax in whole or in part.

If a taxpayer has the opportunity to use the appeals procedure under the Taxes Management Act 1970 to argue that an assessment is incorrect on any ground he must be expected to do so. *Subsection (2)* prevents arguments disposed of on appeal being re-opened on a claim under section 33. *Subsection (3)* prevents claims where a ground has not been put forward on an appeal but which could have been because the taxpayer knew or should have known about it either before the end of the period in which he is entitled to bring an appeal or before any hearing of an appeal (recommendation (19)).

(4) It shall be a defence to any claim that the amount in question was paid—

(a) in pursuance of an agreement between the claimant and the Commissioners settling proceedings relating to the payment of that amount; or

(b) in consequence of proceedings enforcing the payment of that amount being brought by the Commissioners.

(5) It shall be a defence to any claim that the repayment of the amount in question would unjustly enrich the claimant.

(6) In the case of a claim made on the ground that the amount in question was paid in accordance with an erroneous view of the law, it shall be a defence that—

(a) the view in accordance with which the amount was paid was a settled view of the law, and

(b) the amount was, on that settled view, tax due from the claimant,

notwithstanding that a subsequent decision of a court or tribunal departs from that settled view.

This subsection does not apply to a claim made on any ground depending on the invalidity of any subordinate legislation.

(7) A view of the law may be regarded for the purposes of subsection (6) above as settled notwithstanding that it was not held unanimously or had not been the subject of a decision by a court or tribunal."

Amendment of the Inheritance Tax Act 1984

Recovery of overpaid tax.

B. For section 241 of the Inheritance Tax Act 1984 there shall be substituted the following sections—

1984 c. 51.

"Recovery of overpaid tax.

241.—(1) Where an amount—

(a) has been paid as tax due on the value transferred by a chargeable transfer or on so much of that value as is attributable to any property, but

(b) was not tax due,

the Board shall (subject to this section and section 241A below) be liable to repay the amount.

(2) The Board shall only be liable to repay an amount under this section on a claim in writing made to them for the purpose and specifying the grounds on which the amount paid is alleged to be excessive or otherwise not due.

(3) No amount may be claimed under this section after the expiry of 6 years from the date on which the payment of tax was made, except where subsection (4) below applies.

Subsection (4) reproduces a common law rule, that a compromise of, or submission to, legal proceedings cannot normally be re-opened (recommendations (15) and (16)).

Subsection (5) implements recommendation (20) and (21).

Subsections (6) and (7) implement recommendations (12) to (14). A taxpayer cannot rely on legal decisions made after the payment to establish a mistake of law, if the law on the basis of which he acted was settled law at that time. The defence will not apply in cases where, owing to the invalidity of any relevant subordinate legislation, any demand for the payment of the tax in question is an *ultra vires* demand.

Clause B

This clause inserts a new section 241 and 24A in the Inheritance Tax Act 1984. The provisions are aimed at achieving substantially the same effect for inheritance tax as clause A achieves for the taxes dealt with by the Taxes Management Act 1970 (recommendation (32)).

Section 241(2) requires a claim to specify the grounds on which it is made. That requirement is not necessary in clause A as section 42 of the Taxes Management Act 1970 allows the Board to determine the form of claims made under that Act. No similar provision exists in the Inheritance Tax Act 1984.

(4) An amount paid by reason of a mistake may be claimed under this section at any time before the expiry of 6 years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it.

(5) An appeal shall lie from a decision of the Board on a claim under this section by a notice of appeal in writing given within thirty days of the decision; and the provisions of this Act shall apply to such an appeal as they apply to an appeal against a notice of determination.

(6) Except as provided by this section or by or under any other enactment, the Board shall not be liable to repay an amount paid by way of tax by virtue of the fact that it was not due.

(7) References in this section to "tax" include references to interest on tax.

Defences to claims for repayment of overpaid tax.

241A.—(1) The Board shall not be liable to repay an amount claimed under section 241 above if or to the extent that a defence under this section applies to the claim.

(2) It shall be a defence to a claim made on any ground that the ground was considered on an appeal by the claimant against a notice of determination relating to the amount in question.

(3) It shall be a defence, in the case of a claim made on a ground that has not been put forward by the claimant on an appeal against a determination relating to the amount in question, that the ground was or by the exercise of due diligence should have been known to the claimant—

(a) if no such appeal has taken place, before the end of the period in which he was entitled (under section 222(1) above) to bring an appeal, or

(b) if such an appeal has taken place, before the hearing of the appeal.

(4) It shall be a defence to any claim that the amount in question was paid—

(a) in pursuance of an agreement between the claimant and the Commissioners settling proceedings relating to the payment of that amount; or

(b) in consequence of proceedings enforcing the payment of that amount being brought by the Commissioners.

(5) It shall be a defence to any claim that the repayment of the amount in question would unjustly enrich the claimant.

(6) In the case of a claim made on the ground that the amount in question was paid in accordance with an

erroneous view of the law, it shall be a defence that—

(a) the view in accordance with which the amount was paid was a settled view of the law, and

(b) the amount was, on that settled view, tax due,

notwithstanding that a subsequent decision of a court or tribunal departs from that settled view.

This subsection does not apply to a claim made on any ground depending on the invalidity of any subordinate legislation.

(7) A view of the law may be regarded for the purposes of subsection (6) above as settled notwithstanding that it was not held unanimously or had not been the subject of a decision by a court or tribunal."

Excise duties

Recovery of overpaid excise duty.

C.—(1) Where a person has paid an amount to the Commissioners of Customs and Excise by way of excise duty which was not duty due to them, they shall be liable to repay the amount to him.

(2) The Commissioners shall only be liable to repay an amount under this section on a claim being made for the purpose.

(3) It shall be a defence to a claim under this section that repayment of an amount would unjustly enrich the claimant.

(4) No amount may be claimed under this section after the expiry of 6 years from the date on which it was paid, except where subsection (5) below applies.

(5) Where an amount has been paid by reason of a mistake, a claim under this section may be made at any time before the expiry of 6 years from the date on which the claimant discovered the mistake or could with reasonable diligence have discovered it.

(6) A claim under this section shall be made in such form and manner and supported by such documentary evidence as the Commissioners may prescribe by regulations; and regulations under this subsection may make different provision for different cases.

(7) Except as provided by this section, the Commissioners shall not be liable to repay an amount paid to them by way of excise duty by virtue of the fact that it was not duty due to them.

(8) This section does not apply to an amount paid before the day on which this section comes into force.

1989 c. 26.

(9) Section 29 of the Finance Act 1989 (recovery of overpaid excise duty) shall cease to have effect in relation to amounts paid by way of excise duty, except in relation to proceedings in respect of an amount paid by way of excise duty before the day on which this section comes into force.

(10) This section shall come into force on such day as the Commissioners may appoint by order made by statutory instrument.

EXPLANATORY NOTES

Clause C

This clause implements recommendation (35) by providing for a statutory recovery right in place of any common law right to restitution in respect of sums paid by way of excise duty that was not tax due. The provisions are largely modelled on section 24 of the Finance Act 1989 (now consolidated as section 80 of the Value added Tax Act 1994) which created a statutory recovery right in respect of overpaid VAT.

Subsection (8) The new right is not to apply retrospectively. The common law recovery right (as modified by section 29 of the Finance Act 1989) will continue to apply to payments made before the commencement of the clause.

Subsection (9) repeals section 29 of the Finance Act 1989 (which modified the common law right to restitution of overpaid excise duty) so far as it applies to payments by way of excise duty, save as it applies to proceedings (whenever brought) in respect of amounts paid before commencement. Although car tax has been abolished it is still possible for section 29 to continue to apply to outstanding claims in respect of payments made before that tax was abolished. Accordingly the subsection only repeals section 29 in its application to excise duty.

APPENDIX C

List of persons and organisations who commented on Consultation Paper No 120

GOVERNMENT BODIES

HM Customs and Excise
Inland Revenue
Public Trust Office

JUDICIARY AND PRACITITIONERS

(i) Judiciary

Lord Justice Glidewell
Lord Jauncey of Tullichettle
Lord Lowry
Mr Justice Millett
Mr Justice Mummery
Mr Justice Warner

(ii) Barristers

Gerald Barling QC
William Blair QC and Richard Salter
John Gardiner QC, Nicholas Underhill QC and Jonathan Peacock
Anthony Grabiner QC and David Pannick QC
Keith Mason QC (Solicitor General of New South Wales)

(iii) Solicitors

S J Berwin & Co (Adrian Shipwright)
Clifford Chance
Lovell White Durrant (D S Baker)
P J Thompson

(iv) Legal Organisations

Chancery Bar Association, Robin Dicker
Law Reform Committee of the Bar Council
The Law Society's Consumer and Commercial Law Committee
London Common Law and Commercial Bar Association
Society of Public Teachers of Law Restitution Section, F D Rose

ACADEMIC LAWYERS

Neil Andrews, Churchill College, Cambridge
Professor B H Birks, All Souls College, Oxford
Andrew Burrows, Lady Margaret Hall, Oxford
David Capper, The Queen's University of Belfast
Professor Brice Dickson, University of Ulster
David Feldman, University of Bristol
Steve Hedley, Christ's College, Cambridge
Professor John McCamus, Osgoode Hall Law School
Ewen McKendrick, St Anne's College, Oxford
R O'Dair, University College London
D R Salter, University of Birmingham
Professor R J Sutton, University of Otago
Andrew Tettenborn, Pembroke College, Cambridge
Professor G H Treitel, All Souls College, Oxford
Professor Sir William Wade, Gonville and Caius College, Cambridge

Peter Watts, University of Auckland
Professor David Williams, Queen Mary and Westfield College London

LOCAL AUTHORITIES
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Association of District Councils
Association of Metropolitan Authorities
R Prince, Harrow LBC, Department of Law

INTEREST GROUPS AND TRADE UNIONS
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Birmingham Midshires Building Society
Britannia Building Society
British Bankers' Association
Building Societies' Association
Halifax Building Society
Institute of Revenue, Rating and Valuation
Leeds Permanent Building Society
Norwich and Norfolk Chamber of Industry and Commerce
Police Federation of England and Wales

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