RESTITUTION REMEDIES

Westdeutsche Landesbank Girozentrale v Islington London Borough Council and Other Cases

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The first part of this commentary deals with two aspects of *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* ((1993) 91 LGR 323 (QBD)). These aspects are:

(a) the so-called mistake of law bar to an action in money had and received (or, as Lord Goff called the action in *Lipkin Gorman (A Firm) v Karpnale Limited* [1991] 2 AC 548 (HL), at page 572, "unjust enrichment at the expense of the owner of the money"); and

(b) the change of position defence to a restitutionary claim.

In both cases, this commentary considers briefly how those aspects of the *Westdeutsche Landesbank* case might have been decided in New Zealand. Accordingly, the first part of this commentary is addressed more to New Zealand lawyers than to others. However, the New Zealand issues are sufficiently different to warrant separate comment.

The second part of this commentary deals with what *Westdeutsche Landesbank* and the other local authority swaps cases tell us about the legal characterisation of swaps.

ASPECTS OF THE *WESTDEUTSCHE LANDESBANK* CASE

Mistake of Law and Money Had and Received

Hobhouse J held at first instance in the *Westdeutsche Landesbank* case that the banks could not recover on the basis of a mistake under the head of money had and received because the operative mistake was one of law, and not fact. Just as the Australian High Court has recently held in *David Securities Pty. Limited v Commonwealth Bank of Australia* ((1992) 66 ALJR 768 (HC)) that a debtor's restitutionary counterclaim was well-founded, even though the mistake was a mistake of law or, at best, mixed law and fact, so in New Zealand section 94A of the *Judicature Act* 1908 (NZ), enacted in 1958, has abrogated the distinction in New Zealand, but in the case of mistaken payments only. Section 94A(1) provides that:

> "...where relief in respect of any payment that has been made under mistake is sought in any Court, whether in civil proceedings 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 *Contractual Mistakes Act* 1977 (NZ) has also abrogated the distinction between mistakes of law and fact. Under the *Contractual Mistakes Act* 1977 (NZ), a mistake is defined as a "mistake, whether of law or of fact". Although the *Contractual Mistakes Act* 1977 (NZ) is stated to be a code, it is in fact only a "partial code of the law of contractual mistake" (see *New Zealand Commentary on Halsbury's Law of England*, 4th ed, ch 107, Mistake, at C2). Section 5 provides as follows:

> "(1) Except as otherwise expressly provided in this Act this Act shall have effect in place of the rules of the common law and of equity governing the circumstances in which relief may be granted, on the grounds of mistake, to a party to a contract or to a person claiming through or under any such party.
>
> (2) Nothing in this Act shall affect —
>
> ...
>
> (d) The provisions of...sections 94A and 94B of the *Judicature Act* 1908..."

Section 94B of the *Judicature Act* 1908 (NZ) is dealt with below in the context of the change of position defence.

A New Zealand court has wide powers under the *Contractual Mistakes Act* 1977 (NZ) to grant relief where a contract is formed on the basis of a mistake. This power to grant relief is in prospect wider than equity or the common law might otherwise allow. Section 7(3) provides that the court has:

> "a discretion to make such order as it thinks just and in particular, but not in limitation, it may do one or more of the following things:
>
> ...
>
> (d) Grant relief by way of restitution or compensation."

Since the *Contractual Mistakes Act* 1977 (NZ) is a code, this wide discretion to grant, among other things, restitutionary relief in the case of a mistake leads to the interesting (for New Zealand lawyers, at least) issue whether the analysis of the action for money had and received on the grounds of a mistake laid down by Hobhouse J in the *Westdeutsche Landesbank* case necessarily applies in New Zealand. That is, is it possible in New Zealand to seek relief in an action for money had and received paid under a mistake without relying on the *Contractual Mistakes Act* 1977 (NZ)? Is an action for money had and received on the basis of a mistake one of the "rules of the common law" referred to in section 5 which has as a result been codified out of existence?

For New Zealand lawyers, this issue raises fundamental questions on the relationship between the law of contract and the law of restitution (see McLauchlan and Rickett, "Contractual Mistakes and the Law of Restitution", [1989] *NZ Recent Law Review* 277, at page 277). In broad terms, the issue is whether it is possible, and if it is, to what extent, to maintain a restitutionary claim in relation to a contract formed on the basis of mistake other than by seeking relief under the *Contractual Mistakes Act* 1977 (NZ).

A commentary of this kind is hardly the place to analyse these issues in any detail. Nonetheless, it is clearly arguable in New Zealand that the action for money had and received on the **grounds of mistake** (as modified by sections 94A and 94B of the *Judicature Act* 1908 (NZ)) has been superseded **generally** (let alone in the context of *ultra vires* contracts) by the *Contractual Mistakes Act* 1977 (NZ). That said, the better view is slightly narrower than this: if there is a valid contract, and money is mistakenly paid under that contract, the remedy is a **contractual** one in which case relief (including the "statutory" restitutionary relief) should be sought under the *Contractual Mistakes Act* 1977 (NZ). If, however, there is no valid contract in the first place, then, as Hobhouse J said in the *Westdeutsche Landesbank* case (at page 367):

> "the correct analysis is that any payments made under a contract which is void *ab initio*, in the way that an *ultra vires* contract is void, are not contractual payments at all."

In other words, if there is no contract, then the relief sought is not contractual relief. It is necessarily restitutionary relief. But, in New Zealand simply because, according to the law of contract, no contract was formed does not mean that relief in the case of a mistaken payment made under a void contract cannot be sought under the *Contractual Mistakes Act* 1977 (NZ) if its jurisdictional requirements are satisfied. Although the point is not settled and is not without difficulty (see McLauchlan and Rickett generally; see also McLauchlan (1986) 12 *NZULR* 123 at pages 141-143), it appears that relief must be sought under this Act. The reason for this is that section 2(3) of the *Contractual Mistakes Act* 1977 (NZ) deems there to be a contract "for the purposes of this Act where a contract would have come into existence but for" the mistake which led to it being a void contract. This sub-section therefore nullifies the use of an argument that no contract was ever formed, an argument which would circumvent the application of the Act (McLauchlan, at page 142).

On this basis, therefore, the analysis of money had and received on the grounds of contractual mistake in the *Westdeutsche Landesbank* case is in effect relevant only for an understanding of the nature of payments made under *ultra vires* contracts in New Zealand. Relief, including restitutionary relief, should be sought under the *Contractual Mistakes Act* 1977 (NZ) and not in a separate restitutionary action. In New Zealand, the *Westdeutsche Landesbank* case could have been decided simply and only under the *Contractual Mistakes Act* 1977 (NZ). Since the court may make any order it "thinks just", it would not, it appears, be necessary in New Zealand also to deal with the equitable tracing issues raised by the *Westdeutsche Landesbank* case in order to grant restitutionary relief in these circumstances. Perhaps also, it may not be necessary to argue that restitution can be sought outside the *Contractual Mistakes Act* 1977 (NZ) where there is a failure (or absence) of consideration which can be said to be a mistake which influenced the parties in their decision to enter into the contract. In these circumstances also, it may be that the *Contractual Mistakes Act* 1977 (NZ) is the basis for relief.

Defence of Change of Position

Since 1958, New Zealand has had a statutory defence of change of position in the context of **payments** made under mistakes of law or fact. This defence is contained in section 94B of the *Judicature Act* 1908 (NZ), which provides as follows:

> Relief, whether under section 94A of this Act [recovery of payments made under mistake of law] or in equity or otherwise, in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position **in reliance** on the validity of the payment that in the opinion of the court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be. (my emphasis)

There are other similar statutory change of position defences in New Zealand in other contexts: see section 311A(7) of the *Companies Act* 1955 (NZ) (recovery by a liquidator of property may be denied if the person from whom recovery is sought has changed his or her position) and section 51 of the *Administration Act* 1969 (NZ) (relief against a person to whom assets forming part of an estate have been distributed may be denied if that person has changed his or her position).

To obtain the defence under section 94B of the *Judicature Act* 1908 (NZ), it is necessary to show that:

(i) there is a mistaken payment (whether of law or fact does not matter);

(ii) the payment was received in good faith;

(iii) the recipient has altered his or her position in reliance on the validity of the payment; and

(iv) it would be inequitable to grant relief to the other party.

The change of law defence formulated by Lord Goff in *Lipkin Gorman* is wider than section 94B. While section 94B is limited to the recovery of **mistaken payments**, the change of position defence formulated in *Lipkin Gorman* is "a general defence to all restitutionary claims" (Goff and Jones, *The Law of Restitution*, 4th ed (1993) at page 695; see also *Westdeutsche Landesbank*, at page 387). Moreover, while section 94B provides that the person who receives the payment in good faith must have altered his or her position "in reliance on the validity of the payment" (it appears that the spending of money in the ordinary course of business is not sufficient to invoke the defence: see, in the context of section 311A(7) of the *Companies Act* 1955 (NZ), *Baker Timber Supplies v Apollo Building Associations (Tauranga) Society Limited* (1990) 5 NZCLC 66,791; see also *K J Davies (1976) Limited v Bank of New South Wales* [1981] 1 NZLR 262 (HC); in *Westdeutsche Landesbank*, Hobhouse J (at page 390) rejected the bank's contention that, by entering into a hedge, it had changed its position), the cautious formulation of the change of position defence in *Lipkin Gorman* does not restrict the defence to situations where the defendant has altered his position **in reliance** on the validity of a payment (see Goff and Jones at page 741).

Lord Goff's formulation of the defence is also subtly different from the test which the courts have applied in New Zealand for the application of section 94B. That is, Lord Goff's formulation is that "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" (*Lipkin Gorman*, at page 580). On the other hand, in *Farmers' Mutual Insurance Limited v QBE Insurance International Limited* ([1993] 3 NZLR 305 (HC) at page 316), it was said that the test for the application of section 94B is "whether it would be unconscionable to grant relief in the light of the reasonable expectations of the parties".

While there are a number of interesting issues which arise out of section 94B (see, for example, Watts "Judicature Amendment Act 1958 — Mistaken Payments" in Law Commission Report No 25, *Contract Statutes Review* (1993)), the only issue which this commentary discusses is the effect that, following *Lipkin Gorman*, section 94B has on the existence, and development, of the defence **generally** in New Zealand. Although *Lipkin Gorman* has been referred to in a number of New Zealand cases (see, for example, *Martin v Pont* [1993] 3 NZLR 25 (CA)), so far there is no decided New Zealand case which has actually adopted the change of position defence formulated in *Lipkin Gorman*. On the contrary, the New Zealand cases on section 94B tend to have been decided simply on the wording of section 94B without reference to *Lipkin Gorman* (see the *Farmers' Mutual Insurance Limited* case). It is arguable that the existence of section 94B precludes the existence generally (let alone the development) in New Zealand of the defence of change of position (on the basis that, if Parliament had intended there to be such a broad-based defence, it would have legislated accordingly). It is, however, more clearly arguable that, for similar reasons, section 94B precludes the existence of the *Lipkin Gorman* change of position defence in the context of mistaken payments. If this latter argument is correct, it would lead to the odd result that, if the New Zealand courts do in fact follow *Lipkin Gorman* generally (as it is suggested they will), the wider formulation of the defence in *Lipkin Gorman* may apply in all situations **except** mistaken payments. At present, the best that can be said is that the position is not free from doubt (see, for example, *Waitemata Power Board v King Builders* [1992] 3 NZLR 357 (HC) at page 365).

It is, however, suggested that none of these issues would lead to a different decision in New Zealand than the one Hobhouse J reached in *Westdeutsche Landesbank* on the change of position defence.

LEGAL CHARACTERISATION OF SWAPS AND OTHER TRANSACTIONS

Hazell v Hammersmith and Fulham London Borough Council and Others ([1990] 2 QB 697 (CA)) dealt with what were called (at page 740) "swaps of fixed and variable rates in a single currency, namely sterling" as well as interest rate swaptions, interest rate caps, collars and floors and FRAs. This part of this commentary discusses one of the intriguing issues which arises out of this and the other local authority swaps cases. The issue is this: What do these local authority swaps cases tell us about the proper legal characterisation of these transactions? Simply because swaps are expressly documented, and thought of, as "exchanges" (see paragraph [3.38] of AFMA's legal commentary on the ISDA Master Agreement, updated March 1994) does not necessarily mean that the concept of an exchange or the form **always** predetermines the "proper" legal characterisation. There is a difference between, for example, a simple interest rate swap, a cap or a floor, a zero coupon swap and a currency swap (not to mention a repurchase agreement), all of which transactions may be, and these days often are, entered into between the same two counterparties and not necessarily under the umbrella of a master agreement.

The basic proposition of this part of this commentary is that it is in some cases necessary to understand the legal nature of the transaction in question in order to determine what remedies generally, let alone what restitutionary remedies in particular, are available. One of the difficulties is the translation of economic concepts into legal concepts.

Many (often conflicting) legal opinions and articles have been written on this issue in the last few years. Mainly, the issue has been considered in the context of close-out netting and the availability of insolvency set-off, the point being that insolvency set-off is only available where the cross claims are (or will, perhaps, in the fullness of time become) commensurate money obligations (and, in the case of some of these transactions, it has been argued that some of these obligations are not, or at best may not be, commensurate). However, there is still no settled authority in England, Australia or New Zealand on the proper legal characterisation of these transactions.

On one view, a simple interest rate swap should be characterised as a contract constituting reciprocal obligations to pay debts (see, for example, Shea "Foreign exchange contracts and netting in the UK", *International Financial Law Review*, January 1990). On another view, a simple interest rate swap should be characterised as an executory contract to exchange money (see, for example, Wood, *English and International Set-off* (1989), at page 62; Wood and Terray, "Foreign exchange netting in France and England", *International Financial Law Review*, October 1989; Wood, "Insolvent counterparties: too hot to handle?", *International Financial Law Review*, October 1992). This latter, modern, view is the so-called "money" theory.

Once a foreign currency is introduced (for example, a currency swap whether or not there is an exchange of the principal currencies), there is a third possibility. According to this third view, the foreign currency is, legally, a commodity, in which case the swap should be characterised as a contract to buy or deliver a commodity or, if two foreign currencies are involved, commodities (see, for example, Derham, "Set-off and Netting of Foreign Exchange Contracts in the Liquidation of a Counterparty", [1991] *Journal of Business Law* 463 (Part I) and 536 (Part II)). So far as this "commodity" theory is concerned, the foreign currency in a currency swap (and also, for that matter, in a foreign exchange transaction) is **the object** of exchange (ie, it is a commodity) rather than a **medium** of exchange (ie, money). This is the traditional legal distinction between a money obligation and a commodity obligation (see, for example, Mann, *The Legal Aspect of Money*, 5th ed. (1992), at page 191). On this view, a cross-currency swap is properly characterised as two foreign exchange contracts, a spot contract settled on the initial exchange date, and a forward contract to be settled on the final exchange date, coupled with an interest swap. According to the "commodity" theory (Derham, at page 468):

> "the foreign money is measured, and therefore is a commodity, or, at least given that the foreign money obligation is to be performed by arranging a bank credit rather than by physical delivery, the obligation is not a money obligation."

As far as the interest swap element of a cross-currency swap is concerned, the "commodity" theory takes the view that the foreign currency does function as money, because the cross foreign currency obligations are not being **measured** against each other (ie, their values are independent of each other) (Derham, at page 469).

The "money" theory, on the other hand, takes the view that any foreign currency, whether the subject of a foreign exchange contract or a currency swap, should be treated as money (but obviously not legal tender) rather than a commodity (see Wood, *English and International Set-off*, at page 60). Equally, the "money" theory does not consider that the obligation to deliver a foreign currency pursuant to an executory foreign exchange contract constitutes a debt (but see Shea, "Foreign exchange contracts and netting in the UK", *International Financial Law Review*, January 1990).

Interest swaps were of course not the only sorts of transactions in which the various local authorities were engaged. The Hammersmith and Fulham Council was also heavily engaged in interest rate caps, collars and floors. The legal characterisation of an interest rate cap or floor is different from an interest rate swap. This is so, regardless of whether these transactions are characterised legally as executory contracts or as contracts to pay unascertained amounts in the future (ie, contingent debts) for a premium. Perhaps the best approach is to view these transactions as if they were insurance contracts (see, for example, Coleman, "Swaps, FX, and the 'Full Two-Way Payments' Fallacy", *Butterworths Journal of International Banking and Financial Law*, May 1993, at paragraph 5.5). If they are, although the non-defaulting party's claim is in general in damages, nevertheless the buyer of a cap or a floor is owed a stream of payments by the seller. That is, these transactions give rise to a debt obligation.

In the context of netting and close-out, the distinction between these different legal characterisations is important where there is no master agreement which would enable the parties to terminate outstanding obligations and convert those obligations into reciprocal debts which are capable of set-off. However, the significance of these different legal characterisations is not limited to the availability of insolvency set-off. The distinction is important because the remedies available to the parties may, in some circumstances, be quite different.

For example, and in very broad terms, if the relevant transaction creates debt obligations, then the remedy of the party owed the debt is in debt for the nominal amount of the debt, plus interest. If, on the other hand, the relevant transaction is a money or a commodity obligation, the remedy of the party owed that obligation is in general unliquidated damages for loss, subject to the duty to mitigate. Also, if vested (contingent or actual) debts are created, they may not, in the absence of contractual termination and close-out rights, be cancelled. Finally, if the "commodity" theory is correct, is the restitutionary action in **money** had and received available?

With these thoughts in mind, then, what do the local authority swaps cases tell us about the legal nature of these transactions? Regrettably, but not surprisingly, the answer is very little. In the first place, the House of Lords in *Hazell v Hammersmith and Fulham London Borough Council and Others* ([1992] 2 AC 1 (HL)) held that the interest rate swaps entered into were *ultra vires* the local authority because they were not incidental to its statutory borrowing powers. The argument that an interest rate swap could properly be regarded as "debt management" was rejected by Lord Templeman (at pages 34-35). The interest rate swaps and other interest rate derivatives considered in that case were not borrowing contracts notwithstanding the fact that the contracts involved the language of borrowing. This conclusion does not of course necessarily mean that these transactions do not give rise to debts. Simply because an obligation is not the repayment of a loan does not mean that is not a debt.

However, there are dicta in the *Hazell v Hammersmith* case and some of the other local authority swaps cases which raise some interesting issues about the commercial substance, if not necessarily the legal characterisation, of these transactions. For example, in the Court of Appeal in the *Hazell v Hammersmith* case ([1990] 2 QB 697, at page 787), the following statement appears:

> "When an interest rate swap is entered into by way of interest rate risk management, the commercial substance of the transaction is no more a means of 'raising money' than would be taking out an insurance policy, or varying the rate of interest payable on a loan by agreement with the lender. (This is not to say that some swap transactions do not lend themselves to being used, improperly, for money raising purposes: 'deep discounted' swaps, where the interest rate is reduced in order to generate a large front-end premium, are an example.)"

This passage suggests that some interest rate swaps (the example given is a deep discount or off-market swap) may be characterised (commercially, if not legally) as money raising or borrowing contracts.

In fact, the swaps the subject of the *Westdeutsche Landesbank* case involved (and no doubt they were deliberately selected as test cases for this reason) the payment by the bank to the local authority of front-end premiums (about 10 per cent. of the notional principal amount). There were seven of these off-market interest rate swaps with a notional principal amount of about £175 million on which the local authority received in aggregate almost £20 million of front-end premiums. These "contracts did not purport to be and were not expressed as contracts of loan but simply as interest rate swap contracts" (*Westdeutsche Landesbank*, at page 333; see also page 338). The reason for entering into these swaps was quite simple. The local authority needed additional revenue in the particular year. These swaps enabled the local authority (incorrectly) to treat these front-end premiums as revenue items in its accounts. These payments were treated in the local authority's accounts (*Westdeutsche Landesbank*, at page 336):

> "as if they were payments of interest on money which had been lent out by the Council. This of course they were not. No loan of any capital sum was involved in any of the swap contracts and the 'principal' was wholly notional."

This statement raises the question whether it would have mattered if the "principal" was not wholly notional and had been exchanged (as in a currency swap). Hobhouse J earlier described (at page 327) the discounted off-market interest rate swaps which he was considering as a:

> "form of off-balance sheet borrowing by providing for the payment by one party of an initial sum (the 'up front payment', or, as it was sometimes called, a 'front-end premium')."

The last case is the recent (and as yet unreported) Scottish Court of Session, Outer House decision in *Morgan Guaranty Trust Company of New York v Lothian Regional Council* (28 October 1993). In this case, the following statement appears (transcript, at page 5):

> "As is made clear in the English decisions, swap arrangements use the language of borrowing but do not in fact involve in **substance** borrowing to any extent **except in so far as it is instantly set off to an equivalent extent by cross-lending.**" (added emphasis)

If this statement is correct, then some interest rate swaps "in substance" involve borrowing (which should give tax lawyers something to think about). Does this commercial substance necessarily mean that these kinds of swaps cannot, notwithstanding their form, be characterised legally as constituting reciprocal debts? Because of the nature of the transactions in question, that is swaps, unlike standardised futures contracts, are individually tailored to fit the particular circumstances, it is possible to imagine a swap which, the "commodity" theory aside, is, in all but name or legal effect, a borrowing — for example, a zero coupon cross-currency swap where there is an "exchange" of "principal" — and which might legally be characterised as, if not as a borrowing, then at least as constituting reciprocal debts.

These dicta are mentioned not by way of suggesting that these transactions do constitute reciprocal debts. Rather, they are mentioned simply to make the point that the issues have not been decided and that not all swap and derivatives transactions are necessarily, in legal terms, generically the same.

To explore the ramifications of these ideas, even in the context of restitutionary remedies, is beyond the scope of this commentary. However, there are three points which can be made.

First, from a New Zealand perspective, some swaps (such as off-market swaps with front-end premiums) may well be characterised as one or two credit contracts under the *Credit Contracts Act* 1981 (NZ). So also, by the way, might caps, collars, floors, currency options, cash settled swaptions and bond options, all of which involve an initial payment in the form of a premium, be characterised as credit contracts. If these transactions are credit contracts, a New Zealand court is empowered to re-open the contract if one of the parties has exercised a right in a manner which is oppressive, unconscionable or in contravention of reasonable standards of commercial practice. This is one (albeit minor) reason for not including limited two-way payments clauses in New Zealand.

Secondly, and again from a New Zealand perspective, regardless of how these transactions are characterised, a statutory manager in New Zealand has the statutory power to elect to suspend payment of "his" or "her" debt or contractual obligation while requiring payment of the non-defaulting party's debt or reciprocal obligation. Under both of New Zealand's statutory management statutes, that suspension does not constitute a breach of contract; nor does it relieve the non-defaulting party of its obligation to perform its side of the contract (see section 128 of the *Reserve Bank of New Zealand Act* 1989 and section 44 of the *Corporations (Investigation and Management) Act* 1989).

Lastly, this possibility brings into sharp focus one of the particularly difficult aspects of the *Westdeutsche Landesbank* case. This is the so-called *Sinclair v Brougham* ([1914] AC 398 (HL)) *ultra vires* exception for borrowing contracts to the personal action for money had and received. As Leggat LJ said in the Court of Appeal in the *Westdeutsche Landesbank* case (transcript, at page 12), *Sinclair v Brougham* is authority that a borrowing contract is an exception to the proposition that money paid under an *ultra vires* contract is recoverable in an action for money had and received. He went on to say that (transcript, at page 12):

> "restitution will not be ordered where to do so would have the effect of enforcing a void contract...In relation to a contract other than a borrowing contract the effect of restitution is to put the payer into the position in which he would have been if the transaction had never been entered into."

By implication, although the issue was neither raised nor considered in this way, the *Westdeutsche Landesbank* case has in effect held that a simple interest rate swap under which a front-end premium of 10 per cent. or so was paid is not a borrowing contract which is subject to the *Sinclair v Brougham* exception. Whether the same conclusion follows for a zero coupon swap or a cross-currency swap where there is "cross-lending", or for a cap or a floor, is still open to question. In particular, it is not clear whether the *Sinclair v Brougham* exception applies only to borrowing contracts or whether it also applies to contracts which do create debt obligations but which are not borrowing contracts. As Hobhouse J said, (at page 368):

> "...the courts should not grant a remedy which amounts to the direct or indirect enforcement of a contract which the law requires to be treated as ineffective. Since the obligation which law and equity require the conscience of the receiver to recognise is in effect an obligation to repay money, it is hard to think of any situation where this qualification will be relevant save where the void contract was one which purported to create a debtor and creditor relationship as was the case in *Sinclair v Brougham*..."

If the *Sinclair v Brougham* exception does apply to these transactions, and they are *ultra vires*, then money paid under them will not be recoverable in an action for money had and received.

But, if *Westdeutsche Landesbank* is right, then the characterisation of one of these transactions does not matter. Regardless of the availability of the action for money had and received, then, in circumstances where there is a fiduciary relationship, *Westdeutsche Landesbank* is authority that the equitable remedy of tracing is available. To use John Lehane's excellent phrase, it does not appear to matter that this involves "doing, with minimal indirection, what cannot be done directly". Whether this conclusion will be upheld, either on appeal or in subsequent cases, remains to be seen. In this context, it is worth noting that Goff and Jones (at page 84) take the view that a proprietary claim such as a tracing claim should never lie in these circumstances. There is a great deal to be said for that view. If and when the *Westdeutsche Landesbank* case does go to the House of Lords, it will be interesting to see how Lord Goff deals with this issue.