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BEYOND RESTITUTION AND INTO PUBLIC LAW

Woolwich Equitable Building Society v *Inland Revenue Commissioners*[1]

IF damages are sought against a public authority, the claimant has to look to private law for a cause of action.[2] Until the recent case of *Woolwich Equitable Building Society* v *Inland Revenue Commissioners,* a restitutionary claim had similarly to rely on private law: proof of either mistake of fact or of duress was thought to be a condition to recovery of money paid to a public authority.[3] Although their Lordships in *Woolwich* were not sufficiently persuaded of the fact, a right of recovery, independent of mistake or duress, arguably finds some oblique and implicit support[4] in some pre-*Woolwich* cases.[5] That support may be found, in particular, in the facts and outcome of *Hooper* v *Exeter Corporation;*[6] the judgment of Martin B in *Steele* v *Williams;*[7] a *dictum* of Atkin LJ in *AG* v *Wilts United Diaries Ltd;*[8] the restriction, by the House of Lords, of administrative discretion to withhold payment not legally due in *R* v *Tower Hamlets LBC;*[9] and in the recognition of a general right of recovery of *ultra vires* payment made by a public authority in *Auckland Harbour Board* v *R.*[10] The exclusive focus on the private dimension in the *William Whitely Limited* v *R* line of cases,[11] decided as they were before administrative law gained respectability, is understandable. But the increased prominence of that field of law and the

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1 [1993] AC 70, hereafter *"Woolwich".*

2 With the exception of the tort of misfeasance in public office.

3 *Slater* v *Burnley Corporation* (1888) 59 LT 636, *William Whitely Ltd* v *R* [1908-1910] All ER Rep 639, *Twyford* v *Manchester Corporation* [1946] 1 All ER 621, *National Pari-Mutual Association* v *R* (1930) 47 TLR 110.

4 So argued P Birks, "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights" in *Essays on Restitution* (P D Finn ed, 1990), Essay 6.

5 On the basis that the existing law did not support the claim, the conservative minority gave judgment for the Revenue while the bolder majority decided to make new law. This note does not discuss the Lordships' views on the law-making function of the judiciary.

6 (1887) 56 LJQB 457.

7 (1853) 8 Exch 625.

8 (1921) 37 TLR 884.

9 [1988] AC 858.

10 [1924] AC 318.

11 *Supra,* note 3.

desirability of cohering with European Community law[12] make the recognition of a general right of recovery a natural development. Although the outcome in *Woolwich* would seem logically inescapable, the reasoning by which it was reached is not obvious. Orthodoxy has it that restitutionary principles were involved. This note hopes to provoke some thoughts on the possibility of an alternative interpretation based on public law.[13]

The Revenue demanded payment of tax from Woolwich. The latter paid without prejudice to their contention that the regulations upon which the demand was based were void. In an application for judicial review, they succeeded in obtaining a declaration to that effect.[14] The Revenue repaid the tax plus interest from the date of the judgment. Woolwich claimed that interest was recoverable as well for the period going back to the date of payment. The effect of section 35A of the Supreme Court Act 1981 was that Woolwich's claim could only succeed if the unlawfully demanded tax was recoverable as of right as opposed to payable by the Revenue as a matter of administrative discretion. The litigation went up to the House of Lords where Woolwich obtained judgment in their favour by a three to two majority. Their Lordships, even amongst the majority, did not speak with one voice. The closest to a *ratio* can be found in these words of Lord Goff: "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."[15]

This case has been hailed by many as a great legal event.[16] It certainly was, but, contrary to what many believe, it is the public lawyer, and not

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[12] *Amministrazione* v *San Giorgio SpA* [1985] 2 CMLR 658.

[13] Used in the broad sense of a body of law governing the exercise of public power. There will be no attempt at precise delineation between private and public laws, itself a highly controversial task: see CHarlow, "'Public' and 'Private' Law: Definition without Distinction" (1980) 43 MLR 241; Sir Harry Woolf, "Public Law – Private Law: Why the Divide? A Personal View" [1986] PL 220; P Cane, "Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept" in *Oxford Essays in Jurisprudence (Third Series)* (Eekelaar & Bell ed, 1987), Ch 3; G Samuel, "Governmental Liability in Tort and the Public and Private Law Division" (1988) 8 LS 277.

[14] Only after a long drawn litigation which ended in the House of Lords: [1990] 1 WLR 1400.

[15] *Supra,* note 1, at 177. It will hereafter be referred to as the *Woolwich* principle. His brother judges in the majority would probably agree with this conclusion but their reasonings, as will be shown, differ.

[16] P Birks, "'When Money is Paid in Pursuance of a Void Authority' – a Duty to Repay?" [1992] PL 580; S Arrowsmith, "Recovery of Unlawful Taxes" (1992) 142 NLJ 1726; E McKendrick, "Restitution of Unlawfully Demanded Tax" [1993] LMCLQ 83; J Beatson, "Public Law, Restitution and the Role of the House of Lords" (1993) 109 LQR 1 and "Restitution of Taxes, Levies and Other Imposts: Defining the Extent of the Woolwich Principle" (1993) 109 LQR 401; A Burrows, *The Law of Restitution* (1993), at 348-361; G Virgo, "Restitution of Overpaid Tax – Justice at the Expense of Certainty" [1993] CLJ 31.

the restitution lawyer, who has cause to rejoice. There are good excuses for believing that *Woolwich* has much to do with the law of restitution; after all, the cause of action was for money had and received and the judges used the language of unjust enrichment.[17] These excuses notwithstanding, given that the law is not what judges say but what they decide, one may legitimately question whether the decision turned at all on any restitutionary principle.

That the Revenue was enriched at the expense of Woolwich by subtraction would appear beyond doubt. Since there is only one other element in the Birksian structure of a restitutionary cause of action,[18] the natural assumption is that the House was concerned with the formulation of the unjust factor. It is all too easy to be led astray by one's preconceptions and familiarity with the language used. In reality, what the case established was not a new unjust factor but a *distinct* principle of restoring legality. The concern was not with the reversal of unjust enrichment but with the control of public power, a fundamental objective of public law. If public authorities transgress their legal limits, it is the task of the courts, in upholding the rule of law, to push them back. This may be done "pre-emptively" by, for example, declaring void an *ultra vires* act, as was the demand for payment in *Woolwich.* However, where the unlawful transaction has been executed, a directory response is needed. Let it be supposed that a building is wrongfully requisitioned by a public authority. Undoubtedly, the court may force the public authority to give up occupation which it obtained unlawfully by issuing an injunction to restrain it from continued possession of the premises.[19] It is the same response when the court forces a public authority to pay back money collected *ultra vires.* Seen in this light, the *Woolwich* right of recovery is more of a public law remedy[20] than a private right enforceable against a public authority.[21] To deny such a right is to draw an indistinguishable distinction between

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[17] Indeed, Lord Goff, *supra,* note 1, at 163, said that the case was "of importance for the future of the law of restitution, since (it) could have a profound effect upon the structure of this part of our law."

[18] As outlined in Prof Birks' influential *Introduction to the Law of Restitution* (1989).

[19] *Cf Patchett* v *Leathern* (1949) 65 TLR 69. Even the Crown is not immune to a petition of right to recover goods wrongfully detained or their value: H Street, *Govermental Liability, A Comparative Study* (1975 reprint), at 121, citing *Bucknall* v *R* (1930) 46 TLR 449; *Tobin* v *R* (1864) 16 CBNS 310 at 358; *Feather* v *R* (1865) 6 B & S 257 at 294; *Buckland* v *R* [1933] 1 KB 329 at 343-4. To them may be added *Tinkler* v *Poole* (1770) 5 Burr 2657 (trover for goods wrongfully seised by a customs-house officer). I thank Assoc Prof L Penna for alerting me to this point. He is not responsible for any error in my choice of authorities nor my interpretation of them.

[20] Sharing the same objective that underlies other public law remedies such as the prerogative orders of certiorari and mandamus.

[21] *Cf* argument of counsel for the Revenue, *supra,* note 1, at 143.

receipt of money and non-money. Futhermore, it would be inconsistent for the court to nullify a demand for payment and then to sanction the receipt of that payment. Indeed, the argument is an *a fortiori* one, for if it is *ultra vires* to demand the payment, the receipt exceeds the jurisdiction by a further step.

It might be argued that the *Woolwich* principle is not without precedent and that it is for the law of restitution what the tort of misfeasance in public office is for tort law: both are specific to public bodies. That is misguided. There is no great conceptual difficulty in classifying the tort of misfeasance as part of tort law since its underlying concern is compensation for loss suffered as a result of wrongdoing. The *Woolwich* principle, on the other hand, is not restitutionary; it seeks to undo *ultra vires* acts and not to reverse unjust enrichment.[22] It is important to segregate two issues: first, what should be done about the *ultra vires* act and, second, whether the public authority should be liable to a private claimant.[23] Public law answers the former and, traditionally, private law the latter.[24] The recognition of the House that the *ultra vires* act should be reversed (the *Woolwich* principle) does not move beyond the first stage of enquiry, the second stage being the consequential liability of the Revenue to pay interest. However, although the *Woolwich* principle is not in itself a private restitutionary principle, it is the source of the right needed to trigger off section 35A of the 1981 Act. At the broadest level, we can deduce this much: if a public body exceeds its authority, public law will in appropriate cases undo the *ultra vires* act; in addition, the party with an interest in having that act undone (which Woolwich obviously had) can claim a right – a "public law right" if you like – to enforce the undoing of that act.[25]

An insistence on justifying the result on the principle of unjust enrichment necessitates a vacuous search for an unjust factor. Lord Browne-Wilkinson formulated it in terms of "want of consideration"[26] while Lord Slynn thought

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[22] For the same reason, the public law interpretation advocated here does no damage to the structure of the law of restitution. The response not being restitutionary, the event which gave rise to it need not be unjust enrichment.

[23] On this, much can be learned from the Italian distinction between "right" and "interest": S Galeotti, *The Judicial Control of Public Authorities in England and Italy – A Comparative Study* (1954), at 13-16, and M Clarich, "The Liability of Public Authorities in Italian Law" in *Government Liability: A Comparative Study* (J Bell & A W Bradley ed, 1991), Ch 10, at 241-242.

[24] There is much controversy whether this divide is justifiable: see *supra,* note 13.

[25] The potential of this approach cannot fail to excite public lawyers. It may be the starting point in breaking free of dependency on private law causes of action when suing for loss against a public authority; much will depend on the scope to be given to the concept of "undoing an *ultra vires* act". Is the compensation for loss suffered not an attempt to put parties back in status quo?

[26] *Supra,* note 1, at 202; his Lordship thought that there might also have been implied compulsion on the facts.

that the case shaded into the categories of duress and claims *colore ojficii.*[27] Lord Goff, by not relying on any of the established unjust factors, seemed to rest recovery simply on the finding that the demand was *ultra vires.*[28] However, his judgment on the whole indicates an amorphous conception of injustice.[29] Professor Birks has interpreted the recovery as policy-based, the policy being to prevent the excess and abuse of public power.[30]

This confusing exercise of identifying the unjust factor is unhealthy. One principle should not be elided with another when they are predicated on distinct policies. To do so confuses thought and does not help point the way forward. The private right to restitution is based on the principle of reversing unjust enrichment between two parties whose individual claims to the benefit in issue have to be weighed. Hence, there is always the need to be clear where the injustice lies in allowing retention of benefit by one at the expense of the other. The doctrine of *ultra vires,* on the other hand, is targeted at controlling the exercise of public power; as such, once there is a finding of *ultra vires,* what remains for consideration is how best to negate the jurisdictional excess. According to such an analysis, the payment ought to be returned because that is the way to push the public authority back to its legal confines: if it illegally extracts payment, the surest way to restore legality is to make it pay back. Issues of unjust enrichment do not figure. Whether the public authority is enriched is beside the point. Otherwise, could it not rely on the enrichment-erasing defence of ministerial receipt by arguing that the payment has been channelled for public use?[31] Whether the enrichment is at the expense of the claimant is just as irrelevant. It comes as no surprise that this requirement was given short shrift by Wilson J in *Air Canada* v *British Columbia*[32] and by Windeyer J in *Mason* v *New South Wales*[33] when rejecting the argument of "passing on".[34] A public law perspective must similarly be adopted when looking

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[27] *Supra,* note 1, at 204.

[28] J Beatson, "Restitution of Taxes, Levies and Other Imposts: Defining the Extent of the Woolwich Principle", *supra,* note 16, part II; A Burrows, *supra,* note 16, at 115, 164 and 349.

[29] Lord Goff, *supra,* note 1, spoke of "justice ... plain to see" (at 171), "matter of common justice" (at 172), "simple call of justice" (at 172), and "broad principle of justice" (at 173). If it was so obvious, why was his Lordship lost for precise definition? The same criticism of uncertainty has been made by E McKendrick and G Virgo, *supra,* note 16.

[30] P Birks, *supra,* note 16, at 587. As a narrower (and seemingly less favoured) alternative, he suggests that the unjust factor can be found in the "protective policy of the Bill of Rights in relation specifically to the imposition of taxes."

[31] The most current analysis of that defence is in P Birks, *Restitution – The Future* (1992), at 139-141.

[32] (1989) 59 DLR (4th) 161, at 170.

[33] (1959) 102 CLR 108, at 146.

[34] This does not exclude the possibility of the party to whom the burden has been passed having a restitutionary cause of action against the party from whom the burden had passed.

at the defences. For example, the uncertain doctrine of submission to honest claim,[35] if it has any role at all in this context, ought to be an extremely limited one since it is in the interest of the public that the principle of legality be zealously protected; the question is not simply one of whether a party ought to be allowed to waive his private rights.[36] The issues for the future have public law dimensions, such as whether the same "invalidity" approach can be extended to provide a distinct ground for compensation[37] and the controversy of fiscal disruption of public finances as a possible defence.[38] They should not be viewed from the angle of the private law of restitution; the best solution can only be reached via public law thinking.[39]

The restitutionary interpretation has some unhappy implications. To treat the *ultra vires* concept as an unjust factor opens up a pandora's box; indeed, the lid was opened by Hobhouse J in *Westdeutsche Landesbank Girozentrale* v *Islington LBC* and *Kleinwort Benson Limited* v *Sandwell BC*.[40] The learned judge, drawing upon, *inter alia,* the terminology of Lords Browne-Wilkinson and Goff in *Woolwich,* applied the concept of no consideration[41] to grant restitution of payments made under swap contracts entered into by the local authorities in excess of their powers. A simplistic unjust enrichment interpretation of *Woolwich* supports that result: in both cases, there was an *ultra vires* element which provided the unjust factor; a payment made pursuant to an *ultra vires* transaction is recoverable. Proceeding down this line of reasoning, one would eventually reach the point of having to concede

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35 Thoroughly explored by S Arrowsmith, "Mistake and the Role of Submission to an Honest Claim" in *Essays on the Law of Restitution* (A Burrow ed, 1991), Essay 2.

36 See para 3.69 of the Law Commission Consultation Paper No 120, *Restitution of Payments Made Under a Mistake of Law* (1991).

37 P Craig, *Administrative Law* (2nd ed, 1989), at 464-468; *Administrative Justice – Some Necessary Reforms, Report of the Committee of the Justice – All Souls Review of Administrative Law in the United Kingdom* (1988) paras 11.8 (compensation) and 11.88 (restitution); *supra,* note 25.

38 *Supra,* note 33, at paras 3.70 – 3.73.

39 The public domain is not a field that restitutionary lawyers are particularly equipped to toil in; they have first to adopt a public law perspective as Prof Birks had to do in his essay "Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights", *supra,* note 5, at 201-204.

40 Judgment dated 12 February 1993. As yet not officially reported, but see *The Times,* 23 February 1993. According to *The Times,* 30 December 1993, this decision has been approved by the Court of Appeal. *Cf Morgan Guarenty Trust Co* v *Lothian Regional Council* which is reported in *The Times,* 30 November 1993.

41 His Lordship thought that consideration was absent rather than that it had failed. In this, he has perhaps unwittingly brought back to life the *Chandler* v *Webster* [1904] 1 KB 493 fallacy (exposed by the House in *Fibrosa Spolka Akcyjna* v *Fairbairn Lawson Combe Barbour* [1943] AC 32) of treating the contractual promise as the relevant consideration.

that actions in restitution may be brought on all void transactions.[42] This has too much of an upsetting effect[43] (although, one concedes that, with major re-orientation of the existing framework, the doctrine of absence of consideration is not entirely unworkable).[44] The public law approach is likely to offer a more refined analytical tool: the acts of entering into the swap contracts were *ultra vires.* The issue is whether to (and to what extent we should) reverse the excess of jurisdiction. In principle, this would call for a balancing of the interest in safeguarding the principle of legality against the public harm likely to be incurred by taking a particular course of action to enforce that principle.[45] Consider the fully executed first Sandwell contract in *Westdeustche Bank.* It was a commercial deal in which both parties took the risk of fluctuation in the interest rate. This is hardly the case of the imposition of public power on the powerless. The deterrence against abuse must be seen in a more subdued light in this context. Even if it justifies dismantling an executed commercial bargain, it can be so only if the public, to whom the Councils were accountable, would derive outweighing benefits. That these legitimate concerns were not investigated in *Westdeutsche Bank* should surely raise doubts about the suitability of applying a private law solution to a public law problem.

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[42] And, in the extreme, even gifts: A Burrows, "Restitution of Payments Made Under Swap Transactions" (1993) 143 NLJ 480, at 480-481. Prof Birks (*supra,* note 16, at 588) dislikes reliance on the concept of "no consideration" as an unjust factor because it merely adds "a layer of abstraction between unjust and the real explanation of the right to restitution." *Cf* Treitel, *The Law of Contract* (8th ed, 1991) who holds the view that the void nature of a contract is itself a ground for claiming restitution of money paid (at 993) or for services rendered thereunder (at 936).

[43] It carries the recognition of a *condictio indebiti* – an action for the recovery of money on the ground that it was not due – to an extent unlikely to have been envisaged by Lord Goff. (See the narrow grounds on which his Lordship dismissed the first objection of the Revenue, *supra,* note 1, at 172.) It certainly does not represent what was thought to be the law: *cf* S Arrowsmith "Ineffective Transactions and Unjust Enrichment: a Framework for Analysis" (1989) 9 LS 121, at 123-125.

[44] It seems to have worked well enough for the Germans. The (West) German Civil Code (s 812 BGB) contains a concept of *Leistungs-kondiktionen* which allows recovery of benefit transferred "without legal ground". See Zweigert & Kotz, *An Introduction to Comparative Law,* translated by T Weir (2nd rev ed, 1992), at 578-579.

[45] This sentiment is reflected in the judgment of Lord Templeman in *Hazell* v *Hammersmith LBC* [1991] 2 WLR 372, at 389-390.

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