LESSONS OF THE SWAPS LITIGATION

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Incapacity

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1. INTRODUCTION

Four cases in the swaps litigation have now reached the House of Lords. In the first,[1] the local authorities discovered that they did not have the capacity to speculate with public money by entering into swaps on the derivatives markets; the swaps contracts were therefore void. In the second case,[2] the lower courts[3] had confirmed that the net payors under such contracts could get their money back; in Lord Browne-Wilkinson's words in the House of Lords such a "common law restitutionary claim is . . . based on unjust enrichment".[4] In the third case,[5] Lord Goff re-affirmed[6] that "a claim to restitution . . . in English law is based upon the principle of unjust enrichment; . . .".[7] And in

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[1] *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1. See Bamforth, *supra*, ch 2.

[2] *Westdeutsche Landesbanke Girozentrale v Islington LBC* [1996] AC 669.

[3] [1994] 4 All ER 890 (Hobhouse J and CA); [1994] 1 WLR 938 (CA).

[4] [1996] AC 669, 710; in the event, the House of Lords confined the plaintiffs in such actions to simple interest on the awards, on which see FD Rose, *infra*, ch 11.

[5] *Kleinwort Benson Ltd v Glasgow City Council* [1997] 3 WLR 923; [1997] 4 All ER 641 (HL), on which see Robert Stevens, *infra*, ch 12.

[6] Compare his Lordship's reference in *Westdeutsche* ([1996] AC 669, 685) to "a coherent law of restitution, founded upon the principle of unjust enrichment", which he repeated in *Kleinwort Benson v Lincoln City Council* [1998] 3 WLR 1095, 1113; [1998] 4 All ER 513, 530. See generally *Lipkin Gorman v Karpnale* [1991] 2 AC 548 (HL); *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] 2 WLR 475; [1998] 1 All ER 737 (HL); *Pettkus v Becker* (1980) 117 DLR (3d) 257 (SCC); *Pavey and Matthews v Paul* (1987) 162 CLR 221 (HCA); *Dublin Corporation v Building and Allied Trades Union* [1996] 1 IR 468; [1996] 2 ILRM 547 (Irish SC), on which see O'Dell (1997) 113 LQR 247.

[7] *Kleinwort Benson v Glasgow CC* [1997] 3 WLR 923, 931; [1997] 4 All ER 641, 649. And for Lord Clyde, "[t]he claim . . . in the present case . . . is simply and solely a claim for restitution . . . based on the principle of undue enrichment": [1997] 3 WLR 923, 947; [1997] 4 All ER 641, 665, *per* Lord Clyde; *cf* [1997] 3 WLR 923, 948–949; [1997] 4 All ER 641, 666–667, *per* Lord Hutton. Similarly, for Lord Hope, the principle of unjust enrichment "now lies at the heart of the law of restitution in English law": *Kleinwort Benson v Lincoln City Council* [1998] 3 WLR 1095, 1144; [1998] 4 All ER 513, 559.

the fourth,[8] that principle aided the abrogation of the mistake of law bar in the law of restitution and the conclusion that mistake as a ground for restitution would lie even if a void swap were completely performed. However, the "categories of unjust enrichment are not closed";[9] and the House of Lords in *Woolwich EBS v IRC (No 2)*[10] has already recognised the existence of a new unjust factor. It is the aim of this paper to argue for the recognition in principle of incapacity as another. In taking up one of the points made by Professor McKendrick in his comprehensive chapter,[11] the present chapter is offered more by way of addendum to – rather than of commentary upon – his analysis.

Many other cases in the swaps litigation have reached the Court of Appeal. In one such case,[12] it was held that the defence of passing on was not available; in another, *Guinness Mahon v Kensington and Chelsea RLBC*,[13] it was held that failure of consideration as a ground for restitution would lie even if a void swap were completely performed. In the course of his judgment in that case, Waller LJ was concerned to deny the simple equation that "voidness [of a contract] equals rights on both sides simply to have returned to them that which has been transferred"[14] but was equally concerned to stress that that this did "not mean that the court should never provide that remedy in a situation in which a contract is held to be void *ab initio*",[15] so long as the basis of the remedy is "accurately recognised and described so that recovery is only allowed in appropriate situations".[16] Many of those appropriate situations have been greatly illuminated by the swaps litigation: the decision of the House of Lords in *Kleinwort Benson v Lincoln City Council* clarified the operation of mistake as one of the appropriate grounds of recovery; the decision of the Court of Appeal in *Guinness Mahon* demonstrated the operation of failure of consideration as another; in his judgment in that case Waller LJ plainly contemplated that there may be yet others, and if the argument in this paper

[8] *Kleinwort Benson v Lincoln City Council* [1998] 3 WLR 1095; [1998] 4 All ER 513 (HL).

[9] *CTN Cash and Carry v Gallagher* [1994] 4 All ER 714, 720, *per* Nicholls V-C. Similarly, but more generally, in "relation to restitution, there are still questions remaining to be authoritatively decided": *Westdeutsche* [1996] AC 669, 723, *per* Lord Woolf.

[10] [1993] 1 AC 70 (HL). *Cf O'Rourke v Revenue Commissioners* [1996] 2 IR 1; [1996] ITR 81 (HC, Keane J); *British Steel v Customs and Excise* [1997] 2 All ER 366 (CA), 375–379 *per* Scott V-C; see Bamforth, *supra*, ch 2, Part III.

[11] E McKendrick "The Reason for Restitution", *supra*, ch 5.

[12] *Kleinwort Benson v Birmingham City Council* [1997] QB 380 (CA).

[13] [1998] 3 WLR 829; [1998] 2 All ER 272 (CA).

[14] [1998] 3 WLR 829, 843; [1998] 2 All ER 272, 287; an equation which is, to some extent, to be seen in the decision of Morritt LJ in the same case that "it is the very fact that the contract is *ultra vires* which constitutes the total failure of consideration" [1998] 3 WLR 829, 838; (*cf ibid*, 841); [1998] 2 All ER 272, 282; (*cf ibid*, 284).

[15] [1998] 3 WLR 829, 843; [1998] 2 All ER 272, 287.

[16] *Ibid*.

is accepted then incapacity provides a third.[17] It would therefore provide a further ground for restitution upon which the local authorities who were net payors pursuant to the *ultra vires* swaps could rely.

The recognition of incapacity as an unjust factor is justified on the basis of principle, precedent, and policy. Principle, (as discussed Part II) because it is consistent with and may even be required by the principle against unjust enrichment at the heart of the law of restitution. Precedent, because some cases accept it and others assume it (the ground is prepared in Part III, the precedents are analysed in Part IV, and distinguished from other lines of authority in Part V). And policy (as discussed Part VI) because, by reversing the relevant transaction and thereby removing its effects, restitution for incapacity would uphold the policy of incapacity and emphasise the void nature of the transaction.

II. THE ARGUMENT FOR INCAPACITY FROM THE PRINCIPLE OF UNJUST ENRICHMENT

The recognition of incapacity as an unjust factor is justified on the basis of principle, because it is consistent with and required by the principle against unjust enrichment, which is at the heart of the law of restitution. That principle or concept "assists in the determination, by the ordinary processes of legal reasoning, of the question of whether the law should, in justice, recognise the obligation in a new or developing category of case".[18] The ordinary processes of legal reasoning argue for the development of new categories of claim, of new unjust factors, incrementally[19] and by analogy with the decided cases and

[17] Indeed, Waller LJ himself canvassed as a basis of recovery "some policy transcending both the plaintiff's intentions and the defendant's conduct which requires that restitution be granted" ([1998] 3 WLR 829, 843; [1998] 2 All ER 272, 287; taking up a suggestion made by Prof Birks in "No Consideration: Restitution After Void Contracts" (1993) 23 UWALR 195, 206). It is argued below (text with and in nn 262–266, 274–275) that incapacity is an excellent unjust factor with which to give effect – in a principled manner – to any such policy.

[18] *Pavey and Matthews v Paul* (1987) 162 CLR 221 (HCA), 226, *per* Deane J. Compare the position in Canada: "The tripartite principle of general application which this court has recognized as the basis of the cause of action for unjust enrichment is thus seen to have grown out of the traditional categories of recovery. It is informed by them. It is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice. It follows from this that the traditional categories of recovery, while instructive, are not the final determinants of whether a claim lies. In most cases, the traditional categories of recovery can be reconciled with the general principles enunciated in *Petkus v Becker* [1980] 2 SCR 834. But new situations can arise which do not fit into an established category of recovery but nevertheless merit recognition on the basis of the general rule": *Peel v Canada and Ontario* (1993) 98 DLR (4th) 140 (SCC), 154–155, *per* MacLachlin J.

[19] *Cf O'Rourke v Revenue Commissioners* [1996] 2 IR 1, 18; [1996] ITR 81, 100 *per* Keane J.

the existing unjust factors.[20] "Extending the law by reasoning by analogy is as old as the common law itself . . . in the thirteenth century it was pointed out that, "if any new and unwonted circumstance shall arise then, if anything analogous has happened before, let the case be adjudged in like manner, proceeding *a similibus ad similia* . . .".[21] As to the recognised unjust factors, "possible instances are money paid under duress, or as a result of a mistake of fact or law or accompanied by a total failure of consideration".[22] A linking thread can very easily be discerned, on the basis of which an argument by analogy in favour of incapacity can very easily be made.

The thread linking the unjust factors of duress, mistake and failure of consideration is that, in all three cases, the plaintiff had no real intention to enrich the defendant, so the payment was unintended, non-consensual or involuntary.[23] The essence of each of these three recognised causes of action is that

[20] In other words, the most natural process for the development of *new* unjust factors is the third approach outlined at the beginning of Part II of McKendrick, *supra*, 86–88. Compare the contemporary understanding of the principles underlying the development of new categories of negligence as a matter of English law (see *eg Murphy v Brentwood* [1991] 2 AC 398 (HL)), which, like the principle against unjust enrichment, might be described as descriptive. The tort of negligence as it is understood in those jurisdictions which still adopt the approach in the speech of Lord Wilberforce in *Anns v Merton LBC* [1978] AC 728 (HL) might be described as prescriptive. Canada is one such jurisdiction (see *eg Kamploops v Nielsen* (1984) 10 DLR (4th) 641 (SCC)). It likewise adopts a similarly prescriptive approach to the principle against unjust enrichment: see *eg Peel v Canada*, *supra*, n 18. On that approach, all that would be necessary is to argue that a new cause of action merited recognition on the basis of the general rule (or that cases of incapacity were such that there ought to be restitution unless the defendant can show that there was a "juristic reason" for the enrichment, the fourth approach outlined at the beginning of Part II of McKendrick (above)); but even then, an incremental argument by analogy with the existing categories or unjust factors could still persuasively inform that recognition.

[21] *D v C* [1984] ILRM 173, 189, *per* Costello J (Irish HC), citing Bracton, *De Legibus*, quoted in (what is now) Cross, *Precedent in English Law*, 4th ed (Oxford, 1991), 26; followed *RT v VP* [1990] 1 IR 545, 556 (Irish HC, Lardner J); affirmed *UF v JC* [1991] 2 IR 330 (Irish SC); developing the law of nullity of marriage by accepting, by analogy with established grounds, that a mental incapacity causing an inability to enter into and sustain a normal marital relationship constituted a ground for nullity (as had been held in *RSJ v JSJ* [1982] ILRM 263 (Irish HC, Barrington J) analogising that incapacity with the recognised ground of impotence).

[22] *Dublin Corporation v Building and Allied Trades Union* [1996] 1 IR 468, 483–484; [1996] 2 ILRM 547, 558, *per* Keane J. Similarly, it "is the mistake by the payer which, as in the case of failure of consideration and compulsion, renders the enrichment of the payee unjust" *Kleinwort Benson v Lincoln City Council* [1998] 3 WLR 1095, 1146; [1998] 4 All ER 513, 561, *per* Lord Hope). Also compare the classic statement of Lord Mansfield in *Moses v Macreflan* (1760) 2 Burr 1005, 1012, 97 ER 676, 681: the action for money had and received "lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express, or implied;) or extortion; or oppression; . . .".

[23] *Jones v Waring & Gillow* [1926] AC 670, 696 (the mistaken payor had "no real intention . . . to enrich" the defendant); *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353, 378 (same); *Rogers v Louth County Council* [1981] IR 265, 271; [1981] ILRM 143, 147 (money paid "involuntarily . . . as the result of some extortion, coercion or compulsion in the legal sense"); *Fibrosa Spolka Aekyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32, 61 (money paid for a consideration which has failed: there is "in such circumstances no intention to enrich the payee").

an enrichment is unjust because the plaintiff did not intend the defendant to have the enrichment:[24] he did not properly consent because he was mistaken, or because he was compelled, or because his condition of the defendant's retention was unfulfilled. In all these cases, the plaintiff can "say, in effect, "I did not mean the defendant to have this value',"[25] because, as Professor Birks puts it, "my judgment was not properly exercised (or, not exercised at all) in the matter of your getting it".[26]

Where a company[27] acts *ultra vires*, or where a person is below the age of majority, or is suffering from a mental incapacity, or is drunk, such a party has no capacity to contract.[28] That incapacity might or might not have other consequences in other contexts;[29] a company can consent to an *intra vires* transaction, and a minor can consent to medical treatment,[30] but a person who is suffering from mental incapacity cannot consent to anything. Nevertheless, these categories of incapacity share the similarity that, *as a matter of law*, the incapax cannot consent to the contract in question.[31] In respect of such a transaction, he can say "I did not have the capacity (or ability as a matter of law) to exercise my judgment in this matter". Or, he can say "I could not consent to the enrichment which you, the defendant, received". A mistaken plaintiff makes a bid for restitution based upon the argument in principle that the mistake meant that he could not be said properly to have consented to the defendant's enrichment: "I was mistaken, I did not consent". The plaintiff suffering an incapacity makes a bid for restitution based upon the argument in principle that the incapacity meant that he could not have consented at all to the defendant's enrichment: "I am an incapax, I *could* not consent". Where in mistake the essence of the plea therefore is "I did not

[24] *Kleinwort Benson v Lincoln City Council* [1998] 3 WLR 1095, 1146; [1998] 4 All ER 513, 561 (HL), *per* Lord Hope. *Cf Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] 2 WLR 475, 488; [1998] 1 All ER 737, 750, *per* Lord Clyde.

[25] Birks and Chambers, *Restitution Research Resource*, 2nd ed (Mansfield Press, 1997), 2.

[26] Birks, *An Introduction to the Law of Restitution* (rev ed, Oxford, 1989), 140.

[27] Or other legal person whose capacity is defined by a constituent document, *eg* a statutory corporation.

[28] GH Treitel, *The Law of Contract*, 9th ed (Stevens / Sweet & Maxwell, London, 1995), (hereafter "Treitel"), ch 13.

[29] "In determining the capacity of a person whose act is in question, regard must be had to the precise nature of the transaction involved": GH Fridman "Mental Incompetency" (1963) 79 LQR 502, 506; *cf* 519. And see *Re Beaney* [1978] 1 WLR 770 (ChD; Nourse QC); *Scott v Wise* [1986] 2 NZLR 484 (NZ CA).

[30] Treitel, 497; Kennedy and Grubb, *Medical Law: Text with Materials*, 2nd ed (Butterworths, London, 1994), 104–149, 252–276; Tomkin and Hanafin, *Irish Medical Law* (Round Hall, Dublin, 1995), ch 3.

[31] Subject to the discussion *infra*, in text with and in nn 67, 226–229, in the context of minors' gifts, such a party also cannot consent to the making of gifts. Where the incapacity affects gifts, that similarity is sufficient to treat these categories together for the purposes of determining the consequences of the inability of such parties to consent to the making of the gift.

consent", with incapacity it is "I *could* not consent". Incapacity is thus seen to be *a fortiori* from mistake.[32]

Consequently, at a high level of abstraction, we can say that an enrichment will be unjust if the plaintiff did not have the capacity to exercise his judgment, or did not properly exercise it, or did not exercise it at all, in the matter of the defendant's enrichment. One step below this level of generality, there are various identifiably different versions of this same bid for restitution: (a) "I did not know", (b) "I could not know", (c) "I was mistaken", (d) "I was compelled",[33] and so on.

In sum, if the unjust factors[34] are based upon impairment of consent, logic dictates that they ought to include the ultimate impairment of consent: incapacity, where the law provides that the incapax cannot consent. This path is not entirely novel; much of it has already been travelled by Dr Chambers, who argues that in "cases of ignorance, the plaintiff has no intention to benefit the recipient because he or she is unaware of the transfer. There is a similar absence of intention to benefit the recipient when the provider lacks the legal or mental capacity to consent to the transfer".[35] For him, in such cases, the plaintiff's consent is absent as opposed to vitiated,[36] and plaintiffs "in the former category do not intend to benefit the recipients at all".[37]

[32] Indeed, it is *a fortiori* from mistake in much the same way as Professor Birks argues that ignorance is *a fortiori* from mistake (see *eg* Birks, *Introduction*, 142; *cf* Burrows *The Law of Restitution* (Butterworths, London, 1993), 139) and O'Dell, "Restitution" in Byrne and Binchy (eds), *Annual Review of Irish Law 1997* (Round Hall Sweet & Maxwell, Dublin, 1998) 607, 625–646; but these views have not met with universal favour (*eg* Goff and Jones, *The Law of Restitution*, 4th ed (Sweet & Maxwell, London, 1998), 175–176). Though the arguments in relation to ignorance and incapacity are similar, nevertheless, they stand or fall independently.

[33] This paragraph reworks Birks, *Introduction*, 140, to include incapacity (based upon the claim of the *incapax* that "I could not know") in his classic statement of unjust factors based upon impaired consent. Following that lead, the text might continue: "(e) 'I was unequal'. . . . general principles of safety in classification suggest that the possibility should at least be admitted that a sixth miscellaneous category might be needed."

[34] Or at least that family of unjust factors based upon impairment of consent. I leave aside for present purposes the families of unjust factors based upon unconscientious receipt or policy (on this division and these families, see Birks, *Introduction*, 140, 219, 265, 294, where this division is implicit; Birks and Chambers, 2–3, where it is explicit), though the issue of policy motivated restitution does surface in the discussion of policy *infra*, in Part VI, esp text with and in nn 261–265.

[35] R Chambers, *Resulting Trusts* (Oxford, 1996) (hereafter "Chambers"), 23. His overall thesis is that resulting trusts are restitutionary since they respond to the impairment of the plaintiff's consent, that is, they are based upon the unjust factors of the law of restitution. His argument in this context is that incapacity is one such unjust factor; see Chambers, 23, 27, 118–125. Each argument is independent of the other, so that, if this argument about incapacity does not succeed, that will not impugn the general argument as to the restitutionary nature of resulting trusts (*cf* Chambers, 112); and *vice versa*.

[36] Chambers, 111–113. There are traces of this argument in Birks, *Introduction*, 310; in Birks, "No Consideration: Restitution After Void Contracts" (1993) 23 UWALR 195, 207, 223; and in Burrows, 322: "the closest analogy to incapacity should lie with mistake and ignorance[,] for the plaintiff who lacks capacity does not truly intend to benefit the defendant". See also Virgo *Principles of the Law of Restitution* (OUP, 1999) (hereafter: Virgo *Principles*), ch 13.

[37] *Ibid*, 111. In the *Restitution Research Resource*, 2, Birks and Chambers demonstrate that

Thus, the argument from the principle against unjust enrichment in favour of incapacity as an unjust factor is strong. One family of unjust factors is based upon impairment of consent – the plaintiff's consent being impaired, he did not consent to the enrichment of the defendant, who must therefore make restitution. Incapacity means that the plaintiff could not consent; it is therefore the strongest form of impairment: the plaintiff – who, by virtue of the incapacity, was unable to consent – did not consent to the defendant's enrichment, and the defendant must therefore make restitution. In principle, therefore, incapacity must be admitted as an unjust factor.

III. PREPARING THE GROUND FOR THE ARGUMENT FROM PRECEDENT

1. Introduction

The argument so far has been that, as a matter of principle, the very incapacity itself is an unjust factor justifying restitution. The next Part is concerned with those cases in which judicial statements to that effect are to be found, or from which such an assumption might fairly be inferred. However, prior to that analysis of the authorities, and to provide the proper location for it, four important preliminary matters must be clarified. First, when a contract goes off, there are two enquiries: the first goes to the validity of the impugned transaction; the second goes to whether restitution follows; the focus of the present analysis is upon the second of those enquiries. Second, the relevant disability will render the contract void in some cases, voidable in others; in the context of some void contracts and most voidable contracts, courts have conducted the restitutionary enquiry under the rubric of *restitutio in integrum*, which should obscure neither the need to identify the relevant unjust factor in those cases nor the fact that it turns out to be incapacity. Third, some care is needed when approaching the cases on incapacity as an unjust factor allowing restitution in the context of gifts. Fourth, there has been much subsequent statutory reform of the contexts of many of the cases in the next Part; that reform is sketched so that it is clear that the authorities are dealt with in that

one family of unjust factors – the one under discussion here – encompasses unjust factors which all "entitle the plaintiff to say, in effect 'I did not mean the defendant to have this value' ". They further subdivide that family into segments: no intention, vitiated intention and qualified intention (which Dr Chambers elsewhere describes as "an order which roughly corresponds to a "sliding scale" of defective intention . . ." (Chambers, 113)). Mistake and duress are examples of vitiated intention, and failure of consideration is the main example of qualified intention. As to no intention, the overarching claim of ""I didn't mean it' is true because the plaintiff "had no intent at all that value should pass from him to the defendant" (p 3). Ignorance, if it exists, is plainly one unjust factor in that category; incapacity, if it exists, must surely be another.

section not on the basis that they state the current law on their facts, but on the basis that what they have to say or imply or disclose on restitution is still relevant in contexts and juridisctions where there has not been similar or any statutory reform.

2. Separating the contract and restitution enquiries

There is an important structural separation between determining the validity of a contract and determining appropriate remedial responses where the contract is invalid. For example, when the doctrine of frustration says that a contract has been discharged, and the rules on failure of consideration say that there may consequently be restitution,[38] it is quite clear that there are two separate doctrines in play: frustation in the law of contract, and failure of consideration in the law of restitution for unjust enrichment. That separation makes it clear that, when a contract goes off and restitution follows, there are two separate enquiries: first, whether the contract is invalid, and second, whether restitution follows (by the application of the four enquiries). The implications of the swaps litigation are many, but this separation is a pre-eminent lesson of that litigation and the enormous torrent of commentary upon it. In rejecting absence of contract as an unjust factor, the commentators[39] have made it clear that the absence of the contract may be the occasion for restitution, but it is not the ground for restitution. Thus, when a contract goes off – for any reason of contract law, company law, public law, equity, and so on – there is then the occasion for possible restitution by the application of the four enquiries mandated by the principle against unjust enrichment.

In the context of incapacity, this separation must be insisted upon, as it often has been,[40] even if it has more often been missed. Thus, when a contract

[38] As in *Fibrosa v Fairbairn* [1943] AC 32 (HL); on the present law, see *infra*, nn 88–89.

[39] See, especially, Birks "No Consideration: Restitution After Void Contracts" (1993) 23 UWALR 195 and, *supra*, ch 4 McKendrick; though *cf* the views of Professor Sir Guenter Treitel, *infra*, n 106 below.

[40] See, for example, in the context of an avoided minor's contract, *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452: "I think the argument for the respondent has rather proceeded upon the assumption that the question whether she can rescind and the question whether she can recover her money back are the same. *They are two quite different questions . . .*": *ibid*, 458, *per* Lord Sterndale MR (emphasis added), citing *Ex p Taylor* (1856) 8 DeGM&G 254, 257–258; 44 ER 388, 389, *per* Turner LJ; and followed in *Fannon v Dobranski* (1970) 73 WWR 371, 373, *per* Belzil DCJ. *Cf Phillips v Greater Ottawa Development Co* (1916) 38 OLR 315 (Ont CA), 317, *per* Meredith CJCP. In *Steinberg*, the Court of Appeal held that a minor who had bought, paid for and received shares, could rescind the contract of purchase, and would not therefore be liable on future calls on the shares (this was the first enquiry: holding that the contract had been rescinded) but, having received and had the benefit of the shares, consideration had not wholly failed and she could not recover the purchase price (this was the second enquiry: holding that restitution did not follow). On such failure of consideration, *cf* the cases cited *infra*, in nn 56, 112, 142, 145, 156 and 216–225. See generally Meier, *infra*, ch 6, pp. 187–193.

goes off by virtue of the doctrine of *ultra vires* or other relevant legal disability, that is the relevant contract doctrine at work. When restitution follows, that is because the four enquries of the principle against unjust enrichment – especially the test for an unjust factor – are independently satisfied. In the swaps saga, this was crystal clear, since the contract and restitution enquiries were undertaken in separate cases: *Hazell*[41] decided that the contracts were invalid; *Westdeutsche*[42] decided that restitution could in principle follow. But, even where the two issues fall to be decided in the same case, the separation (between the reason why the contract goes off and the consequent ground for restitution) ought to be maintained.

In *Hart v O'Connor*,[43] a vendor[44] of property, who was of unsound mind at the time when he purported to enter into the contract of sale, argued that the contract was invalid both at law, for the incapacity, and in equity, by reason of unconscionability. The Privy Council rejected both arguments. On the incapacity argument,[45] Lord Brightman made it clear that for the plaintiff *incapax* to set aside the contract, he must demonstrate not only his incapacity, but also that the defendant purchaser knew of it,[46] and not merely that the transaction was unfair.[47] Like *Hazell*, the issue in *Hart v O'Connor* was whether the relevant contract was valid. It is therefore, a case on the first

[41] *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 (HL).

[42] And other subsequent swaps cases.

[43] [1985] AC 1000 (PC).

[44] More precisely, the property was an estate farmed by three elderly brothers. The estate was the subject matter of a testamentary settlement, of which one of the brothers was sole trustee. He sold the farm to a neighbour. The plaintiffs (one of the vendor's brothers, and two of that brother's sons) were the vendor's successors as trustee.

[45] On the unconscionability argument, *cf Grealish v Murphy* [1946] IR 35 (Irish HC, Gavan Duffy J); *Blomley v Ryan* (1956) 99 CLR 362 (HCA).

[46] The plaintiff must prove that the defendant "knew of or ought to have appreciated such incapacity": [1985] AC 1000, 1014, *per* Lord Brightman. *Cf Elliot v Ince* (1857) 7 DeGM&G 475, 487–488; 44 ER 186, 191–192, *per* Cranworth LC; *Hassard v Smith* (1872) 6 IR Eq 429, 433–435, *per* Chatterton V-C; *Imperial Loan Co v Stone* [1892] 1 QB 599 (CA); *Gibbons v Wright* (1954) 91 CLR 423, 440–444 (HCA); *McCrystal v O'Kane* [1986] NI 123, 133, *per* Murray J (NI ChD); *Nichols v Jessup* [1986] 1 NZLR 226 (NZCA); *Nicholls v Jessup (No 2)* [1986] 1 NZLR 237 (HC, Prichard J) (agreement to grant mutual rights of way set aside); *Hill v Chevron* [1993] 2 WWR 545 (Man CA). On the facts before the Privy Council in *Hart v O'Connor*, the purchaser had not known of the vendor's disability, and so the vendor could not rescind the contract.

[47] Overruling on this point the earlier New Zealand case of *Archer v Cutler* [1980] 1 NZLR 386. On whether this aspect of *Hart v O'Connor* is correct, see Hudson "Mental Incapacity Revisited" [1986] Conv 178; on the issue of the contractual consequences of mental incapacity generally, see also Hudson "Some Problems of Mental Incapacity in the Law of Contract and Property" (1961) 25 Conv (ns) 319; Fridman "Mental Incompetency" (1963) 79 LQR 502 (Part I); Matthews "Contracts for Necessaries and Mental Incapacity" (1982) 33 NILQ 148; Hudson "Mental Incapacity in the Law of Contract and Property" [1984] Conv 32.

enquiry.[48] In such cases, on the enquiry as to the validity of the contract, many matters are balanced; in particular, the pull against validity on the ground of incapacity is balanced by the pull in favour of validity on the basis of the general policy in contract to keep parties to apparent bargains.[49] This general policy may be supplemented by context-specific policies: thus, in the context of mental incapacity, the general contract policy of keeping parties to apparent bargains may be supplemented by the specific policy of not infantilising the elderly.[50] Both such policies pull in the same direction, in favour of upholding the contract. There is, therefore, a tension between incapacity on the one hand pulling against the validity of the contract, and the countervailing policies on the other pulling in favour of its validity. This tension is often resolved by rules such as that in *Hart v O'Connor* which require that a plaintiff incapax demonstrate not only the incapacity, but also that the defendant knew of it, since such knowledge is regarded as sufficient to displace the policies pulling in favour of the validity of the contract.[51] In these cases, the knowledge requirement is an element of the law of contract,[52] allowing a defendant to maintain the validity of a contract upon which he had relied without knowledge of the plaintiff's incapacity. Given the many policies in play, it is, therefore, perfectly rational for the law of contract to require factors other than incapacity also to be demonstrated before a contract will be held to be invalid.

[48] It is not, therefore, a case on the subsequent enquiry as to whether, if the contract was indeed invalid on the basis of the test stated in it, there could be restitution. The two separate questions were obvious in the shape of the case in the New Zealand courts: they held first that the contract could be set aside (*Hart v O'Connor* [1983] NZLR 280 (CA)) and then second, in a subsequent case, that upon that rescission, the plaintiff had to make counter-restitution to the defendant for the value of the improvements made by the defendant to the farm (*O'Connor v Hart* [1984] 1 NZLR 754 (CA)). The Privy Council reversed on the first issue so the second no longer arose.

[49] See *eg Scott v Wise* [1986] 2 NZLR 484 (NZ CA), 492–493, *per* Somers J. Thus, for Burrows, 107, the courts are unwilling "to allow an escape from a contract [on the grounds of mistake in contract], thereby disappointing bargained-for expectations". Again, for Palmer, such a mistake "must be basic enough to overcome the pressures favouring finality of contract": *Mistake and Unjust Enrichment* (Ohio State UP, 1962; reprinted Hein, NY, 1993), 25. Consequently, Cheshire, Fifoot and Furmston, *The Law of Contract*, 13th ed (Butterworths, London, 1996), 235 argue that the "narrow scope allowed to mistake [in the law of contract] . . . is a fact not only to be noticed but welcomed". Nolan, "The Classical Legacy and Modern English Contract Law" (1996) 59 MLR 603 likewise argues that the law of contract keeps relatively narrow those doctrines which invalidate contracts so as to protect the reliance (pp 604–605) of the other party upon the contract, often doing so by means of "fault" requirements (*eg* p 610; *cf* Smith [1996] RLR 261, 262–263).

[50] See *eg* Birks and Chin, "On The Nature of Undue Influence", ch 3 of Beatson and Friedmann (eds), *Good Faith and Fault in Contract Law* (Oxford, 1995) 57, 91.

[51] This supplies an example of "fault" for Nolan's argument in n 49 above. Furthermore, the position is similar in those jurisdictions which, unlike the UK, have not fully abolished the *ultra vires* rule in company law, but which instead still retain rules to the effect that an outsider who does not have actual knowledge of the company's incapacity can enforce the *ultra vires* contract; on these provisions, see *infra*, Part III (5).

[52] And therefore not of the law of restitution of unjust enrichment.

That knowledge requirement is merely an example of the kinds of matters relevant on the first enquiry as to the validity of the contract. The reasons for the invalidity of the contract can vary from disability to disability: thus the principles of invalidity of contracts may be different in cases of *ultra vires*, minority, and mental incapacity,[53] according to the substantive requirements of the area of the law which invalidates the contract (for example, contract law, company law, public law, equity, and so on), areas where any relevant principle of common law is often altered by various layers of statutory reform. All of this is of no direct[54] relevance on the second enquiry as to the availability of restitution.

On that subsequent enquiry whether there can be a cause of action for restitution of an unjust enrichment, the argument in principle set out above allows the plaintiff to rely upon the incapacity as the unjust factor justifying restitution, on the basis that the plaintiff could not consent to the transfer of the enrichment in question. On the first phase of the enquiry, to have the contract declared invalid, the plaintiff must demonstrate both the relevant incapacity and any other substantive factors which the law might require – such as the defendant's knowledge of the incapacity. On the second phase of the enquiry, to obtain restitution, the plaintiff merely has to demonstrate that the incapacity precluded consent to the enrichment. The focus of the present analysis is solely upon the second of those enquiries, and upon whether incapacity is an unjust factor which so justifies restitution. Consequently, the analysis of the cases conducted in Part IV below concentrates only on those *dicta* and holdings which are relevant to the second – restitution – enquiry.

[53] Though the majority view is that the principles of mental incapacity apply also to the context of intoxication: Burrows, 328; Fridman, *Restitution*, 2nd ed (Ontario, 1992), 175–176; Goff & Jones, 637; Maddaugh and McCamus, *The Law of Restitution* (Ontario, 1990) (hereafter "Maddaugh & McCamus"), 344; Matthews (1982) 33 NILQ 148, 148; Treitel, 515. In *White v McCooey* [1976–1977] ILRM 72 (Irish HC), 80, Gannon J, on an application by the plaintiff for specific performance of a contract for the sale of a public house resisted by the defendant on the grounds of his intoxication, held that the onus was on the defendant to prove that he was sufficiently intoxicated as to be incapable and that this was known to the plaintiff at the time (*cf McCrystal v O'Kane* [1986] NI 123), which burden the defendant failed on the facts to discharge. On the test as stated, *cf Hart v O'Connor* [1985] AC 1000 (PC). See also *Barclays Bank v Schwartz* [1995] TLR 452 (CA), plaintiff – illiterate and unfamiliar with English – failed to satisfy the Court that he did not understand guarantees signed by him; but such matters were not to be equated with mental incapacity and intoxication: *ibid*, 453 *per* Millett LJ; compare his reasons to those given in *Gibbons v Wright* (1954) 91 CLR 423 (HCA), 440–444). Finally, one party's intoxication could make it unconscionable for the other to enforce the contract: *Blomely v Ryan* (1956) 99 CLR 362 (HCA).

[54] More accurately, they are of no direct relevant to the question of the availability of an unjust factor, though they may shape a policy bar (on which see *infra*, text with and in nn 267–269) or other defence. Thus, for example, the defendant's knowledge of the plaintiff's incapacity – far from being irrelevant in the law of restitution, may be crucial as an element of the defences of change of position, *bona fide* purchase, and good faith exchange. See *infra*, text with and in nn 69–75.

In summary, then, if there is one lesson from the swaps saga, it is that when a contract goes off, there are two enquiries: the first goes to the validity of the impugned transaction; the second goes to whether restitution follows. The focus of the present analysis is upon the second of those enquiries, and upon whether, on that enquiry, incapacity is an unjust factor which justifies restitution.

3. Void and voidable contracts

The second important preliminary point arises from the fact that in some cases the disability will render the prior transaction void, in some cases merely voidable. Where a contract is void, a plaintiff seeking restitution must simply satisfy the four essential enquiries premised upon the principle against unjust enrichment, including of course the unjust factor enquiry.[55] And though there are many cases in which the judges have conducted this enquiry solely by reference to whether there has been a total failure of consideration, nonetheless, in some, the issue of restitution simply for the incapacity was contemplated. In other cases, the availability of restitution to the plaintiff incapax was assumed, and the courts conducted an enquiry as to whether there might be *restitutio in integrum* by counter-restitution from the plaintiff incapax to the defendant, rather than an enquiry into failure of consideration.[56]

The issue of *restitutio in integrum* also arises in cases where the contracts are not void but voidable. Where they are voidable, and thus liable to be set aside unless there is a bar to rescission, a similar restitutionary enquiry seems to be conducted under the rubric of the question whether *restitutio in integrum* is possible, and whilst most of the attention is concentrated in such cases upon whether the plaintiff can make counter-restitution and thus bring about

[55] The doctrine which removes the contract may bear no connection with the unjust factor which ultimately justifies the restitution: for example the contract might be discharged by frustration, and the unjust factor might be failure of consideration. Or the same facts may both remove the contract and then go on to justify restitution, as where mistake in contract renders it void, and mistake in restitution justifies restitution (where the tests in contract and restitution are different). Thus, here, the contract might be invalid for incapacity, and the ground for restitution might be any of those canvassed by Professor McKendrick, *supra*, ch 4: mistake, failure of consideration, absence of consideration (if it exists) and incapacity.

[56] It may be that the function served by this *restitutio in integrum* analysis and the requirement that failure of consideration be total in the context of void contracts is the same, so that recent suggestions elsewhere (*eg* McKendrick, "Total Failure of Consideration and Counter-Restitution" in Birks (ed), *Laundering and Tracing* (Oxford, 1995), 217; Birks, "Failure of Consideration" in Rose (ed), *Consensus ad Idem* (Sweet & Maxwell, London, 1996), 179) that they be rationalised into a single requirement of counter-restitution as a pre-condition for restitution ought also to be hearkened to here. In this regard, consider the Canadian authorities discussed below text to nn 142–163, and note the remarkable *Everett v Wilkins* (1874) 29 LT 846, which held that there was a total failure of consideration, but made restitution to the minor of money paid to the defendant subject to counter-restitution by the minor to the defendant of almost one sixth of the amount claimed for the ancilliary receipt of board and lodgings.

restitutio in integrum,[57] nonetheless, a plaintiff who seeks restitution through rescission[58] must in that context satisfy the four essential enquiries, including of course the unjust factor enquiry.

In many of these cases – whether on void or on voidable contracts – where the analysis proceeds quickly to the issue of *restitutio in integrum*, it seems clear that the incapacity itself is what the judges have in mind to justify holding the contract void or setting it aside and conducting the analysis of whether *restitutio in integrum* is possible. The focus of the analysis of the *restitutio in integrum* authorities conducted in Part IV below is, therefore, to demonstrate that those cases fairly bear the inference that the incapacity itself is the unjust factor which the judges have in mind to justify restitution.

4. Incapacity and gifts

The third important point preliminary to the analysis of the authorities arises in cases where the incapax seeks restitution of benefits transferred pursuant to a non-contractual transfer, such as a gift. On the analysis so far in Part III, the incapacity – with other factors – has, on the contract enquiry, had the effect of invalidating the contract; it then has had the subsequent effect, on the restitution enquiry, of allowing restitution. On that subsequent restitution enquiry, according to the analysis in Part II, above, the incapacity itself – on its own and without more – means that the plaintiff could not consent, the defendant's enrichment is unjust, and the plaintiff can have restitution; it follows that in the case of a non-contractual transfer – in effect, in the case of a gift – the incapacity itself is enough to justify restitution.[59]

There is authority that an incapax may recover back such a gift. For example, in jurisdictions where the *ultra vires* doctrine at company has not been abolished,[60] on one view of the law, a company cannot make a *gratuitous* disposition of company assets;[61] thus, if a gift is not to the company's

[57] The point in the previous footnote about *restitutio in integrum* in the context of void contracts applies also here to *restitutio in integrum* in the context of voidable contracts.

[58] On restitution through rescission, see generally, Burrows, 31–35, 190–192; Mason and Carter, ch 13; McMeel, *Casebook on Restitution* (Blackstone Press, 1996), 95–111; Nahan, "Rescission: A Case for Rejecting the Classical Model?" (1997) 27 UWALR 66.

[59] Subject to fulfilling the terms of the other three enquiries; in particular, subject to the fourth: defences.

[60] On which see *infra*, Part III (5).

[61] *Eg* Murray, "Gratuitous Dispositions of Company Assets" (1990) 12 DULJ (ns) 26; Prentice, *Reform of the Ultra Vires Rule* (DTI, 1986), ch VI. Of course, the objects of the company may so permit – many charitable companies have as one of their objects the making of gifts – in which case, the statement in the text is inapplicable: "the objects of a company do not need to be commercial; they can be charitable or philanthropic; indeed, they can be whatever the original corporators wish, provided that they are legal. Nor is there any reason why a company

benefit,[62] it is gratuitous and *ultra vires*, and may be recovered back.[63] This restitution is often achieved by means of statutory provisions dealing with directors' "misfeasance".[64] However, it is clear that such sections presuppose an existing cause of action,[65] and merely provide a summary and efficient mechanism to vindicate that subsisting cause of action which might otherwise have been enforced by the ordinary procedure of the courts.[66] Though there

should not part with its funds gratuitously or for non-commercial reasons if to do so is within its declared objects": *Re Horsley & Weight* [1982] 1 Ch 443 (CA), 450, *per* Buckley LJ. And in the US, such gifts are invalid only if they are not within reasonable limits as to both amount and purpose: see *eg Smith v Barlow* (1953) 98 A2d 581 (SCt NJ); *affd* (1953) 346 US 861; *Theodora Holding Corp v Henderson* (1969) 257 A2d 398 (Del).

[62] *Hutton v West Cork Railway Co* (1883) 23 ChD 654 (CA); *Re Lee Behrens* [1932] 2 Ch 46 (Exc J); *Parke v Daily News* [1962] 1 Ch 927 (Plowman J) (the effect of which on its facts was reversed in England by the Companies Act 1985, ss 309 and 719). In such cases, the question of benefit is treated as determinative of *vires*: that is, if the company gains a benefit, it has the *vires* to make a gift; if it does not gain a benefit, then it does not have the *vires* to make a gift. However, it has been argued that what was properly in issue in such cases was not so much a question of *vires* as one of the protection of minorities from abuse of power or breach of directors' duties (see *eg Re Halt Garage* [1982] 3 All ER 1016, 1029–1030, 1035, *per* Oliver J; *Rolled Steel Products Holdings Ltd v BSC* [1982] Ch 478, 497–498, *per* Vinelott J; [1986] Ch 246, 286–289, *per* Slade LJ, 302–304, *per* Browne-Wilkinson LJ) and that a test of benefit to the company should not therefore have been determinative of *vires* (see *eg Re Horsley & Weight* [1982] 1 Ch 442 (CA), 450–452, *per* Buckley LJ). In those jurisdictions in which this issue has not been foreclosed by the statutory reform outlined in Part III (5) below, such views may prevail. Until they do, however, the cases stand as examples of *ultra vires* gifts. And it may be instructive to note that the Irish Supreme Court has recently taken the former line rather than the latter: *Re Greendale Developments Ltd (No 2)* [1998] 1 IR 8 (Irish SC), 20–21, *per* Keane J.

[63] *Eg International Sales v Marcus* [1982] 3 All ER 551 (QBD, Lawson J); *Re Frederick Inns* [1991] ILRM 582, 591–592; [1988–1993] 4 ITR 247, 256 (HC, Lardner J), varied [1994] 1 ILRM 387; [1988–1993] 4 ITR 258 (SC); see *infra*, Part IV (3).

[64] *Eg* the Insolvency Act 1986, s 212; see *eg Re Halt Garage* [1982] 3 All ER 1016 (ChD, Oliver J) (some director's remuneration in reality an *ultra vires* gratuitous disposition of capital dressed up as remuneration; claim based on the Companies Act 1948, s 333 successful to that extent); *Re Horsley & Weight* [1982] 3 All ER 1045 (CA) (pension payments *intra vires*; claim based on same section unsuccessful); *Re Greendale Developments Ltd* [1998] 1 IR 8 (Irish SC) (claim based upon the Companies Act 1963, s 298(2), (as substituted by the Companies Act 1990, s142) successful). Such summary mechanisms can only be employed against present or former directors, so that actions against other recipients not interested in the management of the company proceed in the ordinary way.

[65] *Coventy and Dixon's Case* (1880) 14 ChD 660, 670, *per* James LJ, 673, *per* Bramwell LJ; *Cavendish-Bentick v Fenn* (1887) 12 AC 652 (HL), 661, *per* Lord Herschell, 669, *per* Lord Macnaghten (Companies Act 1862, s 165); *Re David Ireland & Co* [1905] 1 IR 133, 142, *per* Walker LJ, 144, *per* Holmes LJ (same); *Re Irish Provident Assurance Co* [1913] 1 IR 352, 373–375, 378, *per* Cherry LJ, Holmes LJ concurring (Companies (Consolidation) Act 1908, s 215); *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634, 648, *per* Evershed MR (Companies Act 1948, s 333); *Re Greendale Developments Ltd* [1998] 1 IR 8 (Irish SC), 25, *per* Keane J (Companies Act 1963, s 298(2) (as substituted by Companies Act 1990, s142)).

[66] It is, therefore, still necessary to identify the relevant basis for the action in restitution being conducted on foot of that statutory mechanism, and that examination is conducted below, text with and in nn 171–182, in respect of *Re Irish Provident Assurance Co* and, text with and in nn 201–202m in respect of *Re Greendale Developments Ltd*. This is not to say that incapacity is the only cause of action vindicated by means of such sections (plainly, it is not, many of the cases in the previous footnote are examples of claims based upon the errant director's breach of trust or

are many causes of action vindicated by means of such sections, the cases establish that one of them is an action for restitution of an *ultra vires* gift. Again, gifts by minors[67] and by those suffering the disability of insanity[68] or intoxication may also be recovered. On the approach developed in Part II, once it is determined that the gift is *ultra vires* or that the incapax suffers from the relevant disability, that is sufficient for incapacity as an unjust factor to justify restitution. The unjust factor as the cause of action in restitution is complete simply on the ground of the incapacity. There is no room to apply the contract cases by analogy and require that the defendant have known of the plaintiff's incapacity. The contrary never seems to have been asserted in the cases on the recovery of gifts *ultra vires* companies; and the rule is the same in the context of mental incapacity. For example, in *Scott v Wise*,[69] Somers J in the New Zealand Court of Appeal held that, whilst the knowledge requirement fulfilled important contractual policies, these "have little or nothing to do with the case of voluntary transactions";[70] so that in the context of restitution of gifts on the grounds of incapacity, once that incapacity was made out, it was not necessary to demonstrate further that the defendant knew of the plaintiff's incapacity.[71] On the facts, a plaintiff suffering from a

of fiduciary duty), the claim is merely that incapacity is one of many causes of action vindicated by means of such sections.

[67] At least as a matter of Irish law: "Gifts made by infants are . . . voidable": *Lloyd v Sullivan* (6 March 1981) Unreported (Irish High Court), Transcript, 3, *per* McWilliam J. See the Law Reform Commission, *Report on Minors' Contracts* (LRC, Dublin, 1985), 29. English law is not clear on this point: Burrows records the view of the Latey Committee that there is "no legal restriction upon the power of infants to make a gift . . ." (Burrows, 325–326, citing *Report of the Committee on the Age of Majority* (Cmnd 3342, 1967) 98) but is critical of it: "If correct, this is surprising" (Burrows, 326; see generally *ibid*, 326–327, 328; and note "all gifts . . . made by infants . . . are voidable . . ." *Gibbons v Wright* (1954) 91 CLR 423 (HCA), 447, citing *Zouch d Abbott v Parsons* (1765) 3 Burr 1794, 1804; 97 ER 1103, 1109; to similar effect, though less clear, *sub nom Zouch v Parsons* (1765) 1 Black 575, 577; 96 ER 332, 333; but the *Gibbons v Wright* reading of that case in turn is doubtful having regard to the authorities cited *infra*, in nn 227–228. See also *Sturgeon v Starr* (1911) 17 WLR 402; discussed *infra*, text to nn 144–146. In any event, if a minor cannot recover a gift, as Burrows suggests the present English law to be, no question of restitution arises. If, however, a minor may, as in Irish law and as Burrows suggests ought to be the case in English law, then the argument here suggests that incapacity is a possible ground for that restitution.

[68] The point is settled for gifts by deeds in writing: *Gibbons v Wright* (1954) 91 CLR 423 (HCA); *Re Beaney* [1978] 1 WLR 770 (ChD, Nourse QC) (gift of house by deed void for donor's senile dementia); *Simpson v Simpson* [1992] 1 FLR 601 (Morritt J held that several transfers had been made by the husband after he had lost capacity, and that the sums therefore reverted to his estate). Presumably, the case of a gift by delivery is *a fortiori*: *Rourke v Halford* (1916) 31 DLR 371 (Ont SC). And a gift by a lunatic so found is absolutely void: *Re Walker* [1905] 1 Ch 160 (CA).

[69] [1986] 2 NZLR 484 (CA); followed in *Boock v Dark* [1991] 1 NZLR 496 (HC); affd (1993) 2 NZConvC 191,694 (CA); [1994] RLR § 203.

[70] [1986] 2 NZLR 484, 493.

[71] *Cf Re Beaney* [1978] 1 WLR 770 (ChD; Nourse QC) (gift of house by deed void for donor's senile dementia; *semble* the donee's knowledge of the donor's state of mind was irrelevant to the decision; it may be that the donee—the daughter of the donor—believed that the donor had the requisite capacity: see [1978] 1 WLR 770, 777).

mental disability sought a declaration that a series of transactions entered into by him were invalid on the grounds of his incapacity. Since all of the transactions were connected and basically contractual, the plaintiff had to show that the defendant knew of his incapacity, which he failed to do.

That is not to say, however, that a focus on the defendant's knowledge of the plaintiff's incapacity is entirely absent from the law of restitution. That requirement in contract is an element of the contractual policy of keeping parties to apparent bargains. In restitution, the equivalent policy of security of receipt is worked out not by denying a cause of action but by providing appropriate defences: the quality of the defendant's knowledge is relevant both to change of position[72] and to *bona fide* purchase[73] (or good faith exchange[74]). Thus, an incapax would have a cause of action in restitution to recover a gift simply by virtue of the incapacity; but the defendant's lack of knowledge of that incapacity might help to generate one of those defences, – though, since it is necessary but not a sufficient element of them, it need not.[75]

In summary, then, the argument developed here justifies restitution of gifts made by an incapax solely on the grounds of the incapacity; knowledge (on the part of the defendant of the plaintiff's incapacity) is not relevant to that cause of action, though it may be relevant to defences. That matter to one side, the cases on restitution of gifts in Part IV below are analysed to demonsrate that those cases fairly bear the inference from *obiter dicta* and assumption that the incapacity itself is the unjust factor which the judges have in mind to justify restitution. As with the contract cases, the cases on restitution of gifts divide between those which hold the gift void and those which treat it as voidable. Again, in some of the cases where restitution follows a void gift, it seems to have been granted simply for the incapacity. Again, where rescission follows a voidable gift, the incapacity itself seems to be what justifies restitution through rescission where *restitutio in integrum* is possible.

[72] *Eg* Nolan, "Change of Position" in Birks (ed), *Laundering and Tracing* (Oxford, 1995), 135; Jewell, *infra*, ch 10.

[73] *Eg* Barker, "After Change of Position: Good Faith Exchange in the Modern Law of Restitution" in Birks (ed), *Laundering and Tracing* (Oxford, 1995), 191. See also O'Dell, "Restitution, Coercion by a Third Party, and the Proper Role of Notice" [1997] CLJ 71.

[74] See *eg* Chambers, 120: "The knowledge requirement is simply an element of the defence of good faith exchange . . .".

[75] Though the defendant's lack of knowledge of the plaintiff's incapacity would make that receipt *bona fide* for the purposes of the various defences, there are other elements of the defences to be satisfied, such as a sufficient consequent change of position; further, where there is a gift, it is unlikely that there was a transaction with a third party or an exchange necessary for a *bona fide* purchase or a good faith exchange.

5. Statutory reform

Most of the cases in Part IV below deal with restitution for incapacity in contexts which have seen much subsequent statutory reform. For example, in the case of a company acting *ultra vires*, the position at common law was that such a contract was void;[76] most statutory amendments of this position give an outsider, who does not have notice of the incapacity or otherwise deals in good faith with the company, a right to enforce a contract *ultra vires* the company; this is the position in Ireland[77] and Canada,[78] and it used to be the position in the United Kingdon[79] until the introduction of a more far reaching reform which substantially abolished the *ultra vires* doctrine as it affects companies.[80] However, *Hazell*[81] demonstrated that the common law position persisted for statutory corporations and local authorities, and substantial[82] statutory reform in this context has been achieved only in England by the Local Government (Contracts) Act 1997.[83]

[76] *Ashbury Railway Carriage and Iron Co v Riche* (1875) LR 7 HL 653.

[77] See the Companies Act 1963, s 8 and the European Communities (Companies) Regulations 1973 (SI 1973 No 163), reg 6; together, they achieve much the same position as the former position at English law cogently criticised in Prentice *Reform of the Ultra Vires Rule* (DTI, 1986).

[78] *Communities Economic Development Fund v Canadian Pickles Corpn* (1992) 85 DLR (4th) 88 (SCC), 110, *per* Iacobucci J.

[79] Under the terms of the Companies Act 1985, s 35.

[80] See the Companies Act 1989, ss 108 and 110, amending the 1985 Act. In the US, such statutory modification is of much longer vintage (see Prentice, 20), and in any event, a case like *Ashbury Railway* would be "unlikely to arise under a general 'all lawful business' purposes clause" (Hamilton, *Cases and Materials on Corporations*, 6th ed (West, St Paul, 1998), 214); on such clauses outside the US, *cf Bell Houses v City Wall Properties* [1966] 2 QB 656 (CA).

[81] [1992] 2 AC 1 (HL); see also *Crédit Suisse v Allerdale BC* [1997] QB 306 (CA), 336–344 *per* Neill LJ, 349–357, *per* Hobhouse LJ; similar conclusions as to the capacity of statutory corporations have been reached in Canada (*Communities Economic Development Fund v Canadian Pickles Corpn* (1992) 85 DLR (4th) 88 (SCC)), Australia (*Humphries v The Proprietors "Surfers Palms North" Group Titles Plan 1955* (1994) 179 CLR 59 (HCA)) and Ireland (*Cullinan v VHI* [1994] 3 CMLR 796 (Irish HC; Keane J); *Huntsgrove Developments v Meath Co Co* [1994] 2 ILRM 36 (Irish HC, Lardner J); *Keane v An Bord Pleanâla* [1997] 1 IR 184 (Irish HC, Murphy J; affd Irish SC)).

[82] Though there has been some piecemeal statutory reform in Ireland: see the Financial Transactions of Certain Companies and Other Bodies Act 1992 (a direct response to *Hazell*, confirming that certain State bodies have and always have had the power to enter into swaps transactions); Netting of Financial Contracts Act 1995; [1997] RLR § 157 (allowing the enforceability of the provisions governing the termination – and calculation of sums due upon such termination – of certain financial contracts otherwise void, voidable or unenforceable); Borrowing Powers of Certain Bodies Act 1996 (confirming that certain State bodies have and always have had the power to borrow by means of certain capital financing transactions).

[83] See Bamforth, *supra*, ch 2, Part III. Section 1 of the Act provides that a statutory function conferred upon a local authority confers power upon the authority to enter into contracts "with another person for the provision or making available of assets or services, or both, . . . for the purposes of, or in connection with, the discharge the function by the local authority". Sections 2 and 3 allow the local authority to certify any such contract to ensure that it has "effect (and be deemed always to have had effect) as if the local authority had had power to enter into it (and had exercised

Again, in the case of minors, the position at common law was that some minors' contracts were void, others were voidable;[84] and this is still the law in Canada (except British Columbia).[85] The common law was partially amended by by the Infants' Relief Act 1874, which still applies in Ireland,[86] and it used to be the position in the United Kingdom until the introduction of the more far-reaching Minors Contracts Act 1987, which nevertheless still contemplates the voidability of many minors' contracts. Hence, in most common law jurisdictions, whether governed by the common law or by a statutory modification of the common law rules, minority can render minors' contracts unenforceable. Many other aspects of incapacity remain in this context substantially untouched by statute.

Where there has been such statutory amendment, its effect is largely to allow enforcement of the contract, and the question of restitution (consequent upon unenforceability) in those contexts does not arise. Many of the cases in the next Part predate such statutory reform. However, although they have been overtaken on their facts by statute, collectively they demonstrate the commitment of the common law to incapacity as an unjust factor grounding restitution. Indeed, it may be that the piecemeal statutory reform has served to obscure the fact that this unjust factor was at least latent in the law before such reform. The cases are therefore analysed, not because they represent the current law on their facts, but because of what they demonstrate about the principles of restitution for incapacity.[87] For example, we still read

that power properly in entering into it)" (s 2(1)). The impetus for this Act seems to have been provided by the fallout from *Hazell*, not only in the swaps cases but also in the *Crédit Suisse* cases (see *infra*, n 131), though only time – and litigation – will tell how effectively the Act will meet the concerns generated by these cases.

[84] See *eg* Percy, "The Present Law on Infants Contracts" (1975) 53 Can Bar Rev 1, 32–34. In the context of minors' contracts, the term "voidable" covers contracts valid subject to disaffirmance on majority, and contracts unenforceable subject to ratification on majority.

[85] See generally Percy, *ibid*; Fridman, *The Law of Contract*, 3rd ed (Ontario, 1994), 140–158; Fridman, *Restitution*, 2nd ed (Ontario, 1992), 167–174; Maddaugh and McCamus, 337–340. In British Columbia, following the Law Reform Commission of British Columbia *Report on Minors' Contracts* (LRC BC, 1976) the position was altered by the Law Reform Amendment Act 1985, amending the Infants Act 1979, but not to the extent of giving a minor full contractual capacity.

[86] Clark, *Contract Law in Ireland*, 4th ed (Round Hall Sweet & Maxwell, 1998), 373–388. This is so despite a comprehensive reform proposal: see the Law Reform Commission, *Report on Minors' Contracts* (LRC, Dublin, 1985). In Australia, the "common law rules as to minors' contracts are, subject to some statutory modification, in force in all Australian jurisdictions other than New South Wales" (Carter and Harland, *Cases and Materials on Contract Law in Australia*, 2nd ed (Butterworths, 1993), para 8.4, p 347); the statutory modifications relate to ratification (*ibid*, para 8.11, p 349) and to the adoption in Tasmania and Victoria of legislation similar to the 1874 Act (*ibid*, para 8.14, pp 350–351); in New South Wales, the Minors (Property and Contracts) Act 1970 substantially altered the law, but again not to the extent of giving a minor full contractual capacity.

[87] Lawyers still read *Donoghue v Stevenson* [1932] AC 562 (HL). In so far as its principles of a manufacturer's duty of care in negligence to the ultimate consumer have in many jurisdictions been progressively refined and then substantially displaced by statute, it is no longer good law on its facts. But it is the leading case on the nature of liability in negligence, and it is read for that reason. Examples are legion of less dramatic examples of cases which contain issues or principles worthy of study or discussion, even though the net point on the facts has been reversed or displaced by subsequent, often legislative, developments. So is it here.

the *Fibrosa*[88] case for what it tells us about the restitution doctrine of failure of consideration, even though there has been much statutory amendment of the area of remedies for frustration[89] which formed the context of that decision. Furthermore, since much of the law on incapacity remains unreformed (in whole or in part), important cases can drop through the cracks in the piecemeal statutory framework. This is what happened in the swaps cases. There is still large scope for the invalidity of contracts, and thus for a consequent restitutionary enquiry. For these reasons, the cases in the next Part are still relevant: indirectly, for what they demonstrate about incapacity as an unjust factor, and directly, since they can be applied in the large cracks between statutory reforms.

6. Conclusion: the context of argument from the authorities

Many things should therefore by now be clear. First, where there is restitution when a contract has gone off, there are two enquiries: the contract enquiry as to whether the contract is invalid, and if so, the restitution enquiry as to whether the terms of the principle of unjust enrichment are satisfied. Second, restitution of gifts on the grounds of incapacity occurs simply for that incapacity; the infiltration from contract of further requirements ought to be resisted on the grounds that they belong – if at all – to the question of defences. Third, this restitution enquiry (both consequent upon the invalidity of the contract and *simpliciter* in the context of a gift) is often conducted under the rubric of *restitutio in integrum* (for some void, and all voidable, contracts and gifts). Fourth, statutory reform will have robbed many of the cases of their former prominence, but they still possess continuing relevance as examples of the unjust factor of incapacity, which will justify restitution in other situations where such statutory reform has been partial or non-existent. Those preliminary matters once dealt with, the focus of the analysis in the

[88] *Fibrosa Spolka Ackyjna v Fairbairn Lawson Combe Barbour* [1943] AC 32 (HL).

[89] See, for example, in England, the Law Reform (Frustrated Contracts) Act 1943, on which see McKendrick, "Frustration, Restitution, and Loss Apportionment" in Burrows (ed), *Essays on the Law of Restitution* (Oxford, 1991), 147; on other similar statutory regimes elsewhere in the common law world, see Stewart and Carter, "Frustrated Contracts and Statutory Adjustment" (1992) 51 CLJ 66; there has been no equivalent statutory modification of the common law in Ireland.

context of each individual case will then be clear: it is simply upon the unjust factor grounding restitution.[90]

IV. THE ARGUMENT FOR INCAPACITY FROM PRECEDENT

1. Introduction

The argument for incapacity from the principle of unjust enrichment set out in Part II is to the effect that, as a matter of principle, the very incapacity itself means that, as a matter of law in this context, the incapax could not consent, to the transaction, and is therefore capable of constituting an unjust factor justifying restitution. This argument from principle is lent some support by precedent, by cases in which the incapax sought restitution.[91] In some of them, the court seemed prepared to accept, *obiter*, that the incapacity was a sufficient reason for restitution. From many others, it might be inferred that the judges made that assumption, though without articulating it very clearly. If the cases in the first category accept that point, or those in the latter category fairly bear that inference, then they lend support to the argument developed here in favour of incapacity as an unjust factor.[92] Whether they do is the subject of this section.[93]

The cases are of four types. First, there are those which expressly embody statements to the effect that a company, having entered into an *ultra vires* contract and then transferred a benefit pursuant to it, can have restitution of the benefit so transferred. Second are the cases in which it has been expressly

[90] Thus, the analysis here needs not – and does not – pause to take any position on the proper interpretation of the cases on the issue of whether any relevant contract ought to have been held void or rescinded. Restitution is agnostic as to the reasons why the contract has gone off; and that prior contract enquiry is irrelevant to the subsequent restitution enquiry conducted here.

[91] As opposed to the situation in most of the well-known case law, which has to do with enforcement of contracts *against*, or restitution *from*, the incapax; see text with n 250.

[92] In respect of many of the leading cases, Chambers points out that incapacity could equally well have served; see *eg* Chambers, 124, making this point about *Brougham v Dwyer* (1913) 108 LT 504 (a failure of consideration case; and *cf* the interpretation of the case offered by Hobhouse J in *Westdeutsche*, discussed in n 245 below), and Chambers, 125 making the point about *El Ajou v Dollar Land Holdings* [1993] 3 All ER 717; rvsd [1994] 2 All ER 685, that "it could well be viewed as a case of incapacity: the agent exceeded his authority . . ." (even though it is more likely to be viewed as a case of ignorance, as he himself earlier did, at pp 22–23). Similarly, when Dr Charles Mitchell brought to my attention *Rochester upon Medway City Council v Kent County Council* (1998) 96 LGR 697 (Sullivan J) [1998] RLR § 106, a case decided on the basis of absence of consideration, he commented that it "should have been decided on basis of incapacity". (And see also the cases *infra*, n 242). The point here is different: it is not that incapacity could equally well have served with another unjust factor – or even replaced it; rather it is that the cases discussed immediately below (to a greater or lesser extent) actually do exemplify incapacity as an unjust factor.

[93] Burrows, ch 10, conducts a similar exercise and makes a similar point. See also Virgo *Principles*, ch 13.

held that a company can have restitution of an *ultra vires* gift. Third, though it is not expressly articulated, there are many cases in which the judges have simply *assumed* that benefits transferred pursuant to an *ultra vires* contract can be recovered back, often giving effect to this assumption under the rubric of *restitutio in integrum*. And fourth, there are cases in which it has been assumed that a company can have restitution of an *ultra vires* gift. Other types of incapacity, such as infancy and mental incapacity, follow a similar pattern. That is the pattern by which the cases are arranged in this section.

2. The *dicta* favouring restitution after contracts affected by incapacity

An excellent example of *dicta* in favour of the right of a company to recover benefits transferred pursuant to an *ultra vires* contract is provided by the decision of the High Court of Australia in *Re KL Tractors Ltd.*[94] Three government factories filled orders for KL Tractors. Upon that company's liquidation, the factories sought the value of goods and services provided but upaid for. "It was claimed that the company need not pay for them because the Commonwealth in supplying them exceeded the limits of its constitutional 'powers'. The word 'powers' here really means 'capacity', for we are dealing with the 'capacity' or a 'faculty' of the Crown in right of the Commonwealth. Had the company received the money of the Commonwealth, that would have been considered a reason for paying it back rather than for making it irrecoverable".[95] Similarly for goods and services supplied, and for a company acting *ultra vires*.[96] Hence the factories were entitled to restitution of the value of the goods and services supplied. This judgment thus stands as an excellent example of incapacity as the ground for restitution of a benefit conferred *ultra vires*. So also does the concurring judgment of Fullagar J: "if a corporation made an *ultra vires* loan in terms repayable at the end of three years, it need not wait for the expiration of the three years but could sue for repayment at any time".[97] Quite clearly, for Fullagar J, the contract was void.

[94] (1961) 106 CLR 318 (HCA). Note its treatment at the hands of Murphy J in *Re PMPA Garage (Longmile) Limited (No 2)* [1992] 1 IR 332, 344–348; [1992] ILRM 349, 358–362, discussed on this point in O'Dell, "Estoppel and *Ultra Vires* Contracts" (1992) 14 DULJ (ns) 123, 130–131.

[95] (1961) 106 CLR 318, 334–335, *per* Dixon CJ, McTiernan and Kitto JJ. Fullagar and Windeyer JJ delivered separate concurring judgments.

[96] (1961) 106 CLR 318, 335.

[97] *Ibid*, 338; thus, "if a borrower is bound to repay an *intra vires* loan, he is, in a sense, *a fortiori*, bound to repay an *ultra vires* loan" (*ibid*). The borrower is bound by contract to repay an *intra vires* loan, and bound by an obligation imposed by law to repay an *ultra vires* loan; though, in a sense, the latter obligation is a stronger one than the former, it is hard to see how it can arise *a fortiori* from it.

and the payment recoverable, because the loan was *ultra vires*. In other words, the incapacity of corporation in making the loan is the reason why it is recoverable: from the perspective of recovery in restitution, the very incapacity itself was the relevant unjust factor.

A similarly clear *dictum* to this effect is to be found in *Breckenridge Speedway v The Queen in Right of Alberta*.[98] The plaintiffs had taken a loan from a banking business carried on by the Province of Alberta, and sought a declaration that the business was unconstitutional, that the contract was *ultra vires*, and that the loan was irrecoverable. The majority of the Supreme Court of Alberta held that the plaintiffs were precluded from raising the question of *vires*, and enforced the contract against them.[99] The Supreme Court of Canada dismissed the appeal because, even if the contract were *ultra vires*, "the plaintiffs would have no answer to an action for money had and received. . . . The position was therefore that irrespective of the constitutional validity of the Act, the plaintiffs were under a legal obligation to pay back the funds of the defendant which they had received".[100] In *Breckenridge*, as in later Canadian cases,[101] such an obligation to repay was held to arise simply because the money had been paid *ultra vires*. It arose because of the incapacity of the bank; again, therefore, the very incapacity itself was the relevant unjust factor.

Cases on infancy seem similar.[102] Thus, there is the famous *dictum* of Swift J in *Pearce v Brain*[103] which expressly articulated the impulse to give restitution on the basis of incapacity. He was prepared to hold that, where a plaintiff minor had paid money on foot of a contract void by virtue of s1 the Infants' Relief Act 1874,[104] "[i]f the contract were *void by statute* I should have thought, apart from authority, that money paid could have been recovered as money had and received to the use of the infant plaintiff".[105] What is important here is not so much that the contract was void *per se*,[106] as that it was void by statute for infancy, and hence that the plaintiff minor could have recovered his money on the basis of his incapacity. However, Swift J, having first articulated that impulse to give restitution on the basis of incapacity, then stifled the impulse – and thus weakened the force of the *dictum* – by holding that there was "direct authority"[107] that the only basis upon which restitution might be claimed was failure of consideration. On the facts, since the plaintiff minor had received from the defendant a second-hand car which he had then driven before it had broken down, Swift J held that consideration had not wholly failed.[108]

The "direct authority" by which Swift J felt bound was *Valentini v Canali*,[109] of which Professor Sir Guenter Treitel has said that it was "a somewhat hard case, and the result was very nearly bad law".[110] There, a plaintiff minor had become a tenant of property, the furniture in which he agreed to purchase for £102; he paid £68, went into occupation of the property, and used the furniture. Some months later, the plaintiff sought to recover the money paid. Lord Coleridge CJ held that, when "an infant has paid for

[98] (1967) 64 DLR (2d) 480 (Alberta SC), on appeal (1970) 9 DLR (3d) 142 (SCC). See Maddaugh and McCamus, 334–337. In Canada, *Breckenridge* has been followed in *Provincial Treasurer of Alberta v Long* (1975) 49 DLR (3d) 695, and reaffirmed in *Communities Economic Development Fund v Canadian Pickles Corpn* (1992) 85 DLR (4th) 88 (SCC), 106–107, *per* Iacobucci J for the Court (noted Swann (1992) 21 Can Bus LJ 115). *Breckenridge* has been substantially followed in Ireland in *Re PMPA Garage (Longmile) Ltd (No 2)* [1992] 1 IR 332, 344–348; [1992] ILRM 349, 359–362, *per* Murphy J, discussed on this point in O'Dell, "Estoppel and *Ultra Vires* Contracts" (1992) 14 DULJ (ns) 123, 131–133.

[99] One of the minority, Porter JA, held that the contract was *ultra vires* and, "being non-existent, the law precludes the plaintiffs from keeping the money regarding such conduct as unconscionable that would result in unjust enrichment" ((1967) 64 DLR (2d) 480, 509), a *dictum* which might support a reading either of *ultra vires* as an unjust factor or of void contract/absence of consideration as an unjust factor.

[100] *Ibid*, 146, *per* Martland J; Cartwright CJC, Fauteaux, Abbott, Judson, Ritchie and Pigeon JJ concurring; the minority held the statute unconstitutional, but allowed the action for restitution, subject to counter-restitution: (1970) 9 DLR (3d) 142, 161–162, *per* Hall J, Spense J concurring.

[101] In *Caledonia Community Credit Union v Haldimand Feed Mill* (1974) 45 DLR (3d) 676 (Ontario HC, Van Camp J) it was held that, where a company makes an *ultra vires* loan, "a promise to repay will be imputed to the borrower who is unjustly enriched" (679); again, it seems that the enrichment is unjust because the payment is *ultra vires* the plaintiff. See also *Kindersley District Credit Union v Dahl* [1992] 3 WWR 209 (Noble J and Sask CA), which treated the right of a lender to recover an *ultra vires* loan as "well etablished".

[102] And, as to a possible case from the context of *ultra vires* contracts, see *infra*, n 245.

[103] [1929] 2 KB 310 (KB, Swift J); see also the early 17th century decision of Hobart LCJ in *Austen v Gevras* Hob 77, 77; 80 ER 226, 226–227, where it was argued that "the consideration of the money paid in hand by the plaintiff, being an infant, was void" and it was held that "because it was delivered by his own hands, it was but voidable to be recovered again by an action of account"; this was a case in which it thus seemed that the infancy was the reason for the recovery.

[104] Since repealed in England and replaced by the Minors' Contracts Act 1985; but the 1874 Act is still in force in Ireland, and provides the model for statutes which still apply in other common law jurisdictions.

[105] [1929] 2 KB 310, 314 (emphasis added).

[106] Professor Sir Guenter Treitel clearly favours the right of a minor to recover back money paid pursuant to contracts void for incapacity simply because the contracts are void (see *eg* Treitel, "The Infants Relief Act 1874" (1957) 73 *LQR* 194, 202, 205; Treitel, *Law of Contract*, 950; see the discussion by Professor McKendrick (above)); see also *Phillips v Greater Ottawa Development Co* (1916) 38 OLR 315 (Ont CA), 324, *per* Riddell J, referring to "the rule which applies to adults as well as to infants . . . [that] money paid on a void contract is recoverable back"; *cf Coull v Kolbuc* (1969) 68 WWR 76, 80, *per* Cormack DCJ (*infra*, m n 162). But the view that the absence of the contract is a sufficient ground for restituition has been rejected by the insistence on the fulfillment of the four enquiries of the principle against unjust enrichment, in particular, the enquiry requiring the establishment of a recognised unjust factor (see generally McKendrick, *supra*, ch 4), and the analysis here is directed to the question of whether the cases support incapacity as such a factor.

[107] [1929] 2 KB 310, 314.

[108] On the issue of failure of consideration, see also the authorities discussed in nn 40, 56, 112, 142, 145, 156 and 216–225; see generally Meier, *infra*, ch 6, 187 *et seq*.

[109] (1889) 24 QBD 166; see also *infra*, text after n 139.

[110] Treitel, "The Infants Relief Act 1874" (1957) 73 LQR 194, 202; *cf* Atiyah "The Infants Relief Act 1874 – A Reply" (1958) 74 LQR 97, 101–103.

something and has consumed or used it, it is contrary to natural justice that he should recover back the money which he has paid. Here the infant plaintiff . . . has had the use of a quantity of furniture for some months. He could not give back this benefit or replace the defendant in the position he was in before the contract".[111] Notwithstanding that Swift J in *Pearce v Brain* treated this passage as laying down that the plaintiff can only recover on the grounds of total failure of consideration,[112] it is equally consistent with the general rule the plaintiff can recover in failure of consideration only if the failure is total; but the best view is probably that it says that the plaintiff may have restitution provided *restitutio in integrum* is not impossible.[113] Thus, a close reading of *Valentini v Canali* on the issue of failure of consideration demonstrates that it is authority merely for the proposition that, where the minor seeks restitution on that basis, failure must be total; it is not an authority for the proposition that the only basis upon which the minor might seek restitution is total failure of consideration.[114] Consequently, it was open to Swift J to give effect to the impulse in favour of incapacity *simpliciter* as the basis for the plaintiff's claim to restitution. In such circumstances, the incapacity plea would not fall with the failure of consideration plea, and the intuition in favour of restitution for incapacity might be given expression by recognising incapacity itself as an unjust factor.

Admittedly, the rationes of these infancy cases are notoriously difficult to locate; but, on the readings offered here, the *dictum* of Swift J in *Pearce v Brain* ought therefore to placed alongside those of the High Court of Australia and the Supreme Court of Canada in *KL Tractors* and *Breckenridge*, as express examples of incapacity as an unjust factor.

[111] (1889) 24 QBD 166, 167.

[112] In *Woolf v Associated Finance Pty Ltd* [1956] VLR 51 (Vic SC: Martin J), the plaintiff minor had paid the first hire-purchase payments to the defendant in respect of a car purchased from a garage. The car broke down on the journey from the garage and had to be towed back to the garage. Twice. So the plaintff repudiated the contract, and sought return of payment. Martin J interpreted *Valentini* as Swift J had done in *Pearce* ([1956] VLR 51, 54) and would only grudgingly have held that there had been a total failure of consideration ([1956] VLR 51, 55), though he ultimately held against the plaintiff for other reasons.

[113] Treitel (1957) 73 *LQR* 194, 203: "the passage does not lay down the sweeping principle that the infant can only recover back money paid under an absolutely void contract if there has been a total failure of consideration. . . . The justification of *Valentini v Canali* lies" in the impossibility of *restitutio in integrum*. See also *Goff and Jones*, 528; Birks, *Introduction*, 217; Birks, "No Consideration: Restitution After Void Contracts" (1993) 23 UWALR 195, 222–224. Indeed, on the view of *restitutio in integrum* taken below, it can be seen to lend support to the argument here in favour of incapacity as an unjust factor (see text after n 139).

[114] To take only the most obvious example of such a plea in the alternative, in *Westdeutsche*, Hobhouse J rejected claims based on mistake and failure of consideration, but accepted one based on absence of consideration.

3. The *dicta* favouring restitution of gifts affected by incapacity

In some cases it has been expressly held that a company can have restitution of an *ultra vires* gift. As a matter of English law, an excellent modern example of such a *dictum* expressly articulating the impulse to give restitution on the basis of incapacity is to be found in the decision of Lawson J in *International Sales v Marcus*.[115] A director of the plaintiff companies had used their money to pay off the debts which the estate of another director owed to the defendants. Lawson J held that the payments were made by the director in breach of his duties to the plaintiff companies, so that the defendants held the proceeds on constructive trust for the company.[116] He also held that he "would reach the same conclusion if the plaintiffs' claims were based solely on the defendants' receipt (in the circumstances I find here) of the monies paid *ultra vires*".[117] Of course, one could focus on his previous definition of those circumstances to the effect that "the defendants gave no consideration for these monies and received the monies with notice that they were the company's monies paid over in breach of trust . . ."[118] and spell out from the reference to "no consideration"[119] an unjust factor based upon either absence or failure of consideration to justify the restitution so contemplated. But that reading would misconstrue a passage which seems directed to holding that the recipient could not rely on the defence of *bona fide* purchase, and would ignore the strength of the Lawson J's *dictum* that he would order restitution solely on the defendant's receipt of monies paid *ultra vires*. For Lawson J, it was the simple fact that the payment was *ultra vires* – that is, the simple fact of the payor's incapacity – which in his view justified the restitution. Thus, as Burrows argues, "the most natural and straightforward view is that the *ultra vires* doctrine, which nullified the contract, carried on through to allow the company restitution . . . the ground for restitution was, straightforwardly, the incapacity of the company".[120] That is, the very incapacity itself was the relevant unjust factor.

[115] [1982] 3 All ER 551 (QBD).

[116] *Ibid*, 556–557.

[117] *Ibid*P, 560. He had earlier held that the plaintiff's "handouts" to the defendants were *ultra vires* (see *ibid*, 557, relying on *Re Lee, Behrens* [1932] 2 Ch 46 (Eve J), a leading case on gifts *ultra vires* companies; see generally the cases cited in *supra*, nn 61–66 and *infra*, nn 193–202).

[118] *Ibid*. On the breach of trust in this case, *cf Rolled Steel Products v BSC* [1982] Ch 478 (ChD, Vinelott J); [1985] Ch 246 (CA).

[119] It is submitted that Lawson J's reference to a payment for no consideration, and the reference of Lardner J in the extraordinarily similar Irish case of *Re Frederick Inns* to "voluntary payments made without consideration" ([1991] ILRM 583, 588; [1988–1993] 4 ITR 247, 253 (HC, Lardner J) varied [1994] 1 ILRM 387; [1988–1993] 4 ITR 258 (SC)) are simply references to the fact that the relevant payments were not contractual payments.

[120] Burrows, 330; *cf* Birks, *Introduction*, 309–310.

Similar sentiments have been expressed in Ireland. In *Re Frederick Inns*,[121] payments to the Revenue Commissioners by one member of a group of companies in settlement of tax liabilities owed by various members of that group were held to constitute *ultra vires* dispositions of company assets. In the High Court, Lardner J held that the "the effect of these *ultra vires* payments . . . was . . . unjustly to enrich . . . the Revenue Commissioners who received the payments".[122] As a consequence, in respect of one such payment, he held that "an action for money had and received lies against the Revenue Commissioners on the footing that as between them and the payor company they have become improperly enriched so that the amount received was held by the payor company's use and recoverable as a simple contract debt. . . .".[123] It seems clear that Lardner J, like Lawson J in *International Sales v Marcus*, perceived the fact that the payments were *ultra vires* – the fact of the incapacity itself – as the reason for the unjust enrichment and the basis for the action in restitution (the action for money had and received). However, he went on to hold that the payments were also a breach of directors duties and hence held on constructive trust by the Revenue for the company.[124] In the Supreme Court, Blayney J did likewise,[125] passing from the holding that the payment was *ultra vires* to the analysis of the constructive trust, without pausing to consider whether there was a remedy at common law on the lines canvassed in the court below by Lardner J, who had clearly thought that the ground for restitution at common law was, straightforwardly, the incapacity of the company. Again, the very incapacity itself was the relevant unjust factor.

4. Cases assuming restitution after contracts affected by incapacity

The *dicta* in *Pearce v Brain*, *KL Tractors*, *Breckenridge*, *International Sales v Marcus* and *Re Frederick Inns* expressly articulate the impulse to give restitution simply for the incapacity. There are a great many more cases in which the intuition in favour of restitution for incapacity is not express, but in which the

[121] [1991] ILRM 583; [1988–1993] 4 ITR 247 (Irish HC, Lardner J); varied [1994] 1 ILRM 387; [1988–1993] 4 ITR 258; [1994] RLR § 174 (Irish SC).
[122] [1991] ILRM 583, 591; [1988–1993] 4 ITR 247, 256.
[123] [1991] ILRM 583, 593; [1988–1993] 4 ITR 247, 257.
[124] [1993] ILRM 583, 592; [1988–1993] 4 ITR 247, 256.
[125] [1994] 1 ILRM 387; [1988–1993] 4 ITR 258 (SC), varying the decision of the High Court only on quantum and as to a defence of set-off. On the correctness of the finding of a constructive trust on these facts, *cf Rolled Steel Products v BSC* [1982] Ch 478 (ChD, Vinelott J); [1986] Ch 246 (CA); and see Fealy, "The Role of Equity in the Winding Up of a Company" (1995) 17 DULJ (ns) 18. Note, however, that the decision of the Supreme Court on this point in *Re Frederick Inns* has been followed in *Ulster Factors v Entoglen* (21 February 1997) Unreported (Irish High Court, Laffoy J).

remedies are nevertheless predicated upon it. In some, the court does everything except say it straight out. An excellent example is provided by the Irish case of *O'Hehir v Cahill*.[126] It concerned two (related) societies, which did not have the power to borrow, or to lend, except up to £50 to members. One – the Mountjoy Society – was in need of an injection of funds; the other – the North Dock Society – by cheque, advanced a loan of £100 to a member – Cahill – who endorsed it on to the Mountjoy Society. On the liquidation of the North Dock Society, the liquidator sought to recover the £100 from Cahill. Dodd J held that the loan was *ultra vires*, and that[127]

> "The Mountjoy society, if solvent, could be made to pay . . . [if] sued in money had and received to the use of the North Dock Society by giving the go-by to the document. Those who took part in taking this money can also, in my opinion be sued . . . on the common *indebitatus* count for money had and received by the defendants for the use of the plaintiffs. It is the proper remedy whenever the defendant has received money which in justice and equity belongs to the plaintiff. When the plaintiff's money has been wrongfully obtained by the defendant the plaintiff may recover on such a count. Money even feloniously stolen may be thus recovered . . .".

This was affirmed on appeal. According to Gibson J, Cahill "clearly *ultra vires* [the North Dock Society] got a cheque and endorsed it. This was equivalent to putting the money in his pocket . . . An action for money had and received is the appropriate remedy".[128] It is abundantly clear in this case that the *ultra vires* nature of the loan was the basis of the successful action for money had and received: the very incapacity itself was the relevant unjust factor.

Again, not two years before Hobhouse J came to decide *Westdeutsche* at first instance, similar issues came before the High Court in Ireland, in two of the many cases arising out of the liquidation of the PMPA Group of

[126] (1912) 97 ILTR 274. *Cf* the related *O'Hehir v Kane* (1912) 97 ILTR 277. I am grateful to Mr Daniel Donnelly for bringing these cases to my attention.
[127] (1912) 97 ILTR 274, 276.
[128] *Ibid*, 276; Madden J considered "the judgment of Dodd J to be right in substance" (*ibid*). Boyd J simply concurred. As to whether the endorsement would now be understood to constitute a change of position, it is unlikely, since Gibson and Dodd JJ also made the defendant liable to account as a constructive trustee: for Gibson J, in this context, "*Scienter* is not necessary, but it exists here and makes the case stronger" (*ibid*, 276). This knowledge would probably make the defendant a wrongdoer and exclude the defence (see *eg Lipkin Gorman v Karpnale* [1991] 2 AC 548, 579–580, *per* Lord Goff), but even without it, the mere fact of payment over would probably be insufficient (see *eg ibid*; *Stoarthoaks v Rural Oil* (1975) 55 DLR (3d) 1; *Goss v Chilcott* [1996] AC 788, 799, *per* Lord Goff; *State Bank of New South Wales v Swiss Bank Corp* (1995) 39 NSWLR 350 (NSW CA); *National Bank of New Zealand v Waitaki International Processing* [1999] 2 NZLR 211 (CA); *cf National Provincial Building Society v Ahmed* [1995] 2 EGLR 127 (CA)). Note finally that the equitable liability arose independently of such knowledge: *cf* Birks, *Restitution: The Future* (Sydney, 1992), 2; O'Dell, "Restitution" in Byrne and Binchy (eds), *Annual Review of Irish Law 1997* (Round Hall Sweet & Maxwell, Dublin, 1998) 607, 625–646.

companies. Some companies in the PMPA Group received loans from the PMPS, a provident society which was also a member of the Group. Every company in the Group became party to an agreement to guarantee these loans. The Group collapsed. In the first of the relevant pair of cases, Murphy J held that the loans were *ultra vires* the society.[129] In the second, *Re PMPA Garage (Longmile) Ltd (No 2)*,[130] Murphy J held that the guarantors were nonetheless estopped from denying the validity of the guarantee.[131] That was in an action against a guarantor who had not received any loans from the society; but, in the course of coming to that conclusion, Murphy J held that had there been such loans, the society could recover them. He distinguished *Sinclair v Brougham*,[132] both on the basis that placing the law of restitution on the footing of the principle against unjust enrichment eliminated the need for the fictional implied contract at the heart of *Sinclair*,[133] and because what was at issue in *Sinclair* was enforcing borrowing as against the *ultra vires* borrower, whereas what was at issue in *PMPA* was enforcing *intra vires* borrowing by the *ultra vires* lender.[134] It seems that, once *Sinclair* was out of the way, Murphy J assumed the right to restitution in the context of an *ultra vires* loan; it arose by virtue of the incapacity of the PMPS to make the loan in question; again, the very incapacity itself was the relevant unjust factor. The right to restitution so arising was therefore conceded in subsequent cases in the litigation.[135]

[129] *Re PMPA Garage (Longmile) Ltd (No 1)* [1992] 1 IR 315; [1992] ILRM 337 (HC, Murphy J) but the borrowings and the guarantee were *intra vires* the various members of the Group (*ibid*).

[130] [1992] 1 IR 332, 349–350; [1992] ILRM 349, 363–364.

[131] [1992] 1 IR 332; [1992] ILRM 349 (HC, Murphy J); [1993] RLR § 168; see O'Dell, "Estoppel and *Ultra Vires* Contracts" (1992) 14 DULJ (ns) 123; and see generally Johnston, "Corporate Guarantors – Capacity and Authority" (1997) 4 *Commercial Law Practitioner* 240. On the question of the enforceability of *ultra vires* guarantees, *cf Communities Economic Development Fund v Canadian Pickles Corpn* (1992) 85 DLR (4th) 88 (SCC); *Crédit Suisse v Allerdale BC* [1995] 1 Lloyd's Rep 314 (Colman J); [1997] QB 306 (CA); *Crédit Suisse v Waltham Forest LBC* [1997] QB 363 (CA).

[132] [1914] AC 398 (HL).

[133] [1992] 1 IR 332, 338–340; [1992] ILRM 349, 353–355; *cf Dynevor v The Proprietors, Centre Point Building Units Plan No 4327* (12 May 1995) Unreported (Qld CA), [1996] RLR § 20. I am grateful to Ms Margaret Hoch for procuring a copy of this decision for me.

[134] *Ibid*. *Cf*, with the second reason, a similar *dictum* in the first case: *Re PMPA Garage (Longmile) Ltd (No 1)* [1992] 1 IR 315, 351; [1992] ILRM 337, 349; and *cf*, generally *Westdeutsche* [1994] 4 All ER 890, 917–919, *per* Hobhouse J (distinguishing *Sinclair* for similar reasons); [1996] AC 669, 711–712, *per* Lord Browne-Wilkinson for the majority on this point (overruling *Sinclair*).

[135] "On the basis of earlier decisions given by me in relation to these cases, it is conceded that the defendant had no right to receive or retain the said sum of £450,000 and that the plaintiffs were entitled to restitution thereof": *PMPA v PMPS* (27 June 1994) Unreported (High Court, Murphy J) (Transcript, p 1) [1995] RLR § 217: paintiff – who had made *ultra vires* payment of £450,000 to defendant, who had lodged it into an overdrawn account – could not trace ("in that way and to that extent the monies were dissipated and no longer exist as such and are not traceable into any other asset retained or procured by the defendants" (p 2)) but was entitled to restitution of the amount, plus interest on the basis that the defendants obtained it in a fiduciary capacity (on the issue of interest in such situations, see FD Rose, *infra*, ch 11). *Cf PMPA v PMPS and Primor* (20 Feb 1997) Unreported (High Court, Costello P), where the action for restitution was struck out for delay: see O'Dell, "Restitution" in Byrne and Binchy (eds), *Annual Review of Irish Law 1997* (Round Hall Sweet & Maxwell, Dublin, 1998) 607, 646–655.

The decision of Murphy J has been criticised for failing to articulate clearly the basis for that right to restitution,[136] and, though the decision is consistent with the assumption that the mere fact that any payment would have been *ultra vires* was that basis, it is true that he nowhere expressly articulates an unjust factor. On another reading, the decision seems consistent with the view that the absence of the contract itself was the ground for restitution, but it is submitted that the decision was concerned with remedies for *ultra vires* contracts – all of the cases cited were cases, not of void contracts *per se*, but of *ultra vires* contracts in particular; and Murphy J considered himself, on a search for appropriate remedies in that context. That emerges clearly from his view that there "is no inconsistency between the proper application of the *ultra vires* doctrine and the recovery by means of an action *in rem* or on a quasi-contractual basis of monies or goods in the hands of the party receiving the same in consequence of the transaction. The problem which must be faced is whether there is any other basis on which such goods or monies can be recovered".[137] From this it is clear that Murphy J understood himself to be engaged in a search for remedies in the context of the *ultra vires* doctrine, and that the *in rem* and restitutionary remedies arose as a consequence. In which case, as submitted above, Murphy J seems to have assumed the right to restitution in the context of an *ultra vires* loan and that the incapacity itself was the relevant unjust factor.[138]

In many other cases, the intuition in favour of restitution for incapacity is latent in and fairly to be inferred from the treatment of *restitutio in integrum*. In the context of minors' contracts, one such line of authority has grown up in Canada, on the basis of *Valentini v Canali*,[139] which has come to be understood as an example of the denial of restitution based upon the impossibility

[136] Byrne and Binchy, *Annual Review of Irish Law 1991* (Round Hall, Dublin, 1993) 44–51, esp at 49–50.

[137] [1992] 1 IR 332, 349; [1992] ILRM 349, 363; holding that "the alternative basis is something akin to estoppel" (*ibid*).

[138] Similarly, it is possible to read *dicta* in *Bell Houses v City Wall Properties* [1966] 1 QB 207; [1966] 2 QB 656 (CA) as turning on the assumption that the very fact that the contract was *ultra vires* itself was the reason for restitution, that is, that the very incapacity itself was the relevant unjust factor. *Cf* Burrows, 329–330. At first instance, it seems that Mocatta J thought that restitutionary remedies (money had and received, and *quantum meruit*) were appropriate simply by virtue of the fact that the contract was *ultra vires* ([1966] 1 QB 207, 226) and in a comment after judgment recorded at [1965] 3 All ER 429, 460 but not in [1966] 1 QB 207, he hinted strongly that the plaintiffs should pursue their remedy in *quantum meruit*. The Court of Appeal reversed him on the prior issue of whether the relevant contract was in fact *ultra vires*, and did not reach the remedy point.

[139] (1889) 24 QBD 166.

of counter-restitution.[140] Interestingly, this suggestion *assumes* the availability of restitution[141] unless counter-restitution is impossible. And that assumption seems to be predicated upon the minority of the plaintiff: the assumption in favour of restitution seems to be predicated upon the plaintiff's incapacity; that is, again, the very incapacity itself is the relevant unjust factor.

Though this suggestion seems to have run into the sand at English law,[142] an important line of Canadian authority seems to have been constructed upon it, which treats it as separate from and an alternative to claims based upon failure of consideration.[143] For example, in an early case on the point, *Sturgeon v Starr*,[144] Prendergast J held that "[i]t is settled beyond any dispute that, if an infant pay money without valuable consideration, he can get it back; and if he pay money for valuable consideration, he may also recover it; but subject to the condition that he can restore the other party to his former position".[145] The first half of the quotation stands for the proposition that, if the plaintiff minor pays money away and gets nothing in return, he may have restitution of the money so paid away;[146] it is therefore a straightforward example of restitution of gifts on the grounds of incapacity. The second half

[140] *Supra*, text with and in nn 109–114. Of course, as the Irish Law Reform Commission observes of *Valentini v Canali* and *Pearce v Brain*, "[i]n these two cases, especially the first, the benefit acquired by the minor from the contract was small": Law Reform Commission, *Report on Minors' Contracts* (LRC, Dublin, 1985), 24, n 95. Given the modern flexibility in counter-restitution, the application of that principle to similar facts might now go the other way (*eg* Birks, *Introduction* 415–424; [1990] LMCLQ 330; and *cf* Burrows, 167 n 3 pointing out that rescission at law for duress is similarly flexible, if not more so).

[141] If a plaintiff cannot make counter-restitution, he cannot get restitution. But, even if he can make counter-restitution, he must still establish a ground for restitution. The existence of such a ground is what is assumed in the cases and commentaries favouring the counter-restitution analysis. But analysis which goes straight to the counter-restitution issue misses out on the essential and prior "unjust" enquiry. And analysis which allows restitution simply because counter-restitution is possible, conflates the two separate issues of, first, the ground for restitution and, second, a defence to such a claim or a condition upon which such restitution is granted.

[142] Notwithstanding that it has met with the approval of *Goff and Jones*, 641–642. Note *Everett v Wilkins* (1874) 29 LT 846, making a claim in failure of consideration subject to counter-restitution (and *cf supra*, n 56); *cf Chaplin v Frewin* [1966] Ch 71, in which Lord Denning MR (dissenting) was prepared to set aside a minor's contract and order the return to the plaintiff of a copyright which had been assigned under that contract to the defendants (at 90), though the majority (Dankwerts LJ, Winn LJ concurring) held that the contract was binding, and that had it been revocable, property in the copyright could nevertheless have passed to the defendants (at 94–95).

[143] Percy, "The Present Law on Infants Contracts" (1975) 53 Can Bar Rev 1, 22–26, 32–34; McCamus, "Restitution of Benefits Conferred Under Minors' Contracts" [1979] UNBLJ 89, 99–104; Maddaugh and McCamus, 337–340; Fridman, 167–171.

[144] (1911) 17 WLR 402 (Man).

[145] *Ibid*, 404, citing *inter alia Holmes v Blogg* (1817) 8 Taunt 508; 129 ER 481 and *Corpe v Overton* (1833) 10 Bing 252; 131 ER 901, which however are probably best seen as examples of failure of consideration: see *infra*, text with and in nn 216–225.

[146] Alternatively, it might serve – with the cases in n 106 above – as a Canadian trace of the *Westdeutsche* absence of consideration unjust factor, but its subsequent treatment does not really bear this out.

stands for the proposition that, if he gets something in return, he must pay that back before he can have restitution. In both cases, the infant may *prima facie* have such restitution. There seems to be nothing here to justify that restitution apart from the fact that the plaintiff is a minor; in other words, it seems that the plaintiff's minority or incapacity is the very reason why he can have restitution; that is, the very incapacity itself was the relevant unjust factor. However, on the facts, *restitutio in integrum* to the defendant was impossible, and the plaintiff's claim therefore failed.

In the subsequent case of *Nicklin v Longhurst*,[147] the plaintiff recovered, *inter alia*, a part-payment of the purchase price for goods – including a team of horses – of which he had received neither title nor possession. Thus, according to McClelland DCJ in the later *LaFayette v WW Distributors*,[148] "since the infant [in *Nicklin*] had not affirmed the contract on attaining majority, the money paid was *recoverable* by the infant *as a matter of course*".[149] In *LaFayette*, payments had been made on a contract of purchase, under which goods would not be delivered until after full payment. Upon repudiation of the contract, McClelland DCJ held that the plaintiff minor could recover the payments. In both cases, following *Sturgeon*, though it would not be difficult to hold that there had been a total failure of consideration, the decision that the plaintiffs had not received a benefit[150] counted instead towards the ease of *restitutio in integrum*. Again, in *Bo-Lassen v Josiassen*[151] an infant who had paid for a second-hand motor-cycle, which turned out to be in such bad condition that he could not use it, repudiated the contract of purchase and, following *Sturgeon*, was held entitled to recover the purchase price subject to *restitutio in integrum* achieved by the return of the motor-cycle: the "plaintiff in the present case is able to return to the motor-cycle purchased from him, unused by him and in its condition of purchase".[152] Indeed, according to

[147] [1917] 1 WWR 439 (Man CA). For Richards JA (Holwell CJM, Perdue and Cameron JJA concurring), *Everett v Wilkins* (1874) 29 LT 846 went "further than it is necessary to go in the present one at bar, to hold plaintiff entitled to recover" ([1917] 1 WWR 439, 443).

[148] (1965) 51 WWR 685 (Sask DC)

[149] *Ibid*, 688 emphasis added. Again, this is so, even though *Everett v Wilkins* (1874) 29 LT 846, the authority primarily relied upon in *Nicklin*, mentioned both failure of consideration and *restitutio in integrum* (though, as McCamus has pointed out, analysis based upon *restitutio in integrum* alone would have been a "more straightforward route" to the same result: see McCamus, [1979] UNBLJ 89, 103). Similarly, in *LaFayette* (1995) 51 WWR 685, 686–687, McClelland DCJ commented that the "earlier English decisions held that if an infant had received no substantial benefit or advantage under the contract and was able to restore the subject matter intact, the vendor was liable to refund", *semble* referring to the cases explained below as based on failure of consideration.

[150] *Nicklin v Longhust* [1917] 1 WWR 439, 443; *LaFayette v WW Distributors* (1965) 51 WWR 685, 689.

[151] [1973] 4 WWR 317 (Alb DC).

[152] [1973] 4 WWR 317, 320, *per* Buchanan CDCJ. Likewise, conversely, in *Butterfield v Sibitt and Nipissing Electricity Supply Co Ltd* [1950] OR 504 (Ont HC) it was held that, while there "is

Fridman, failure of consideration "presumably, would not have been a ground upon which recovery could have been allowed in this case",[153] so that *Bo-Lassen* is a secure example[154] of the operation of the rubric of *restitutio in integrum* in this context.

The Canadian cases on failure of consideration are concerned with whether receipt and intermediate user of goods precludes total failure of consideration, usually holding that it does.[155] The failure of consideration approach seems usually to have been taken in respect of land.[156] But, even in respect of land, the *restitutio in integrum* approach has been adopted, often quite creatively. Thus in *Whalls v Learn*[157] Boyd C held that the infant plaintiff could not recover her property "without making complete resoration to the defendants of the specific, or an equivalent, value of that which she has received from the defendants during nonage . . . she will be required to do equity as a condition of getting relief. . . .".[158] Again, according to Ferguson J, when "an infant makes a contract and after he attains full age seeks to avoid it, many, I think all the authorities shew that he must restore the consideration that he received. . . . So far as the disability of infancy is concerned there is no doubt that the plaintiff must restore the consideration she got from the defendants, or its equivalent, when she avoids her conveyance".[159]

no doubt that at law an infant coming of age can repudiate a voidable contract, yet the court exercising its powers in equity always prevented the infant from unjustly retaining in his hands property acquired by such a transaction. For example, if an infant sold a motor car for $1,000 and on becoming of age repudiated the transaction, the court would not let him keep the $1,000 and get the motor car back too": [1950] OR 504, 511, *per* Ferguson J.

[153] Fridman, 170; though the question arises as to why this is so, since the plaintiff got no part of that for which he had bargained, and therefore consideration seems to have wholly failed.

[154] As the other cases may not be since they are substantially founded upon failure of consideration authorities, as discussed in the preceding footnotes.

[155] *McGraw v Fisk* (1908) 38 NBR 354, 357, *per* Barker CJ; *McDonald v Baxter* (1911) 46 NSR 149; *Coull v Kolbuc* (1969) 68 WWR 76; *Fannon v Dobranski* (1970) 73 WWR 371. It is likewise in Australia; *Curruth v Ern Moro and Amoco Enterprises* (1966) 60 QJPR 106 (Qld DCt, Carter DCJ) (voidable contract for the purchase of a surfboard, which, for eight months, the minor used and enjoyed, and even dented, hence no total failure of consideration).

[156] *Short v Field* (1914) 32 OLR 395 (contract void; but no total failure); *Robinson v Moffatt* (1915) 35 OLR 9; *Phillips v Greater Ottawa Development Co* (1916) 38 OLR 315 (Ont CA) (contract void; total failure of consideration; recovery of deposit and installments paid for purchase of land); *Nicklin v Longhurst* [1917] 1 WWR 439.

[157] (1888) 15 OR 481.

[158] *Ibid*, 487; see at 488 for the actual counter-restitution on the facts.

[159] *Ibid*, 491. See also *Phillips v Sunderland* (1910) 15 WLR 594 (Man KB; Macdonald J) (recovery of land sold by infant by contract later avoided subject to repayment of purchase price, since infant would not do so, her claim failed); *Murray v Dean* (1926) 30 OWN 271 (Ont HC) (plaintiffs, infant spouses, repudiated a contract by which they had exchanged a house and lot for a farm; properties swapped back; plaintiffs had derived benefits from their occupation of the farm and the defendants had improved the house; plaintiffs had to compensate defendants for these benefits; *ie*, complex counter-restitution).

The line of authority embodying the *restitutio in integrum* approach is accepted in the Canadian literature[160] as stating a remedy for the plaintiff minor alternative to one based on failure of consideration.[161] That line of authority, applying an approach based upon *restitutio in integrum* and therefore allowing restitution unless counter-restitution is impossible, assumes the availability of restitution for the plaintiff minor. Having so assumed, the cases focus instead on the question whether counter-restitution or *restitutio in integrum* is possible, that is, whether the minor can restore the other party to his former position. The present focus, however, is upon the prior assumption of restitution, and the only fair[162] basis for that assumption is the incapacity of the minor. Thus, these Canadian[163] cases illustrate a strong judicial assumption that incapacity is a sufficient reason for restitution; that is, in the Canadian *restitutio in integrum* cases, the very incapacity itself was the relevant unjust factor.

[160] See *eg supra*, n 119.

[161] It has been suggested that the distinction between the two approaches is that the total failure of consideration approach has been applied where a plaintiff is seeking the recovery of money, while the *restitutio in integrum* approach has been applied where a plaintif is seeking the recovery of property (Percy, 23, who nevertheless sees no reason in principle why this should be so, and prefers the latter as the general test). McCamus goes further, stating that the cases cannot be reconciled in this manner, and the analysis here bears this out, since the former test is often applied in the context of land, and the latter in the context of money (McCamus [1979] UNBLJ 89, 99 n 47). What this demonstrates is that the lines of authority do not necessarily conflict: they state two unjust factors, and are thus complementary, though incapacity with counter-restitution (the *restitutio in integrum* approach) is at present more sensitive than the total failure of consideration approach.

[162] Though even here the spectre of voidness *per se* has been raised to justify restitution: "Thus, on the logical premise that money paid under a void contract is effectively money paid for nothing at all the courts appear to have considered such money recoverable. However equity intervenes to prevent such recovery in a void contract where the infant has had some benefit from the use of the article purchased thereunder." *Coull v Kolbuc* (1969) 68 WWR 76, 80, *per* Cormack DCJ (but *supra*, see n 106). On the facts, a minor got possession, use and title to a vehicle under a voidable and rescinded contract, so a claim for restitution of money paid for the vehicle failed; the case is probably best understood as a case in which failure of consideration was not total.

[163] Restitution to minors of benefits conferred is similarly well settled in US law: see *eg Rice v Butler* (1899) 55 NE 275 (NY); *Petit v Liston* (1920) 191 P 660 (Or); *Carpenter v Grow* (1923) 141 NE 859 (Mass); *Kiefer v Fred Howe Motors* (1968) 158 NW 2d 288 (Wis)). Thus, in *Halbman v Lemke* (1980) 298 NW 2d 562 (Wis), it was held that, as "a general rule a minor who disaffirms a contract is entitled to recover all consideration he has conferred incident to the transaction . . . In return the minor is expected to restore as much of the consideration as . . . remains in the minor's possession . . . [though] disaffirmance is permitted even where such return cannot be made" (*ibid*, 565, *per* Calbur J in the Supreme Court of Wisconsin). And in *Dodson v Shrader* (1992) 824 SW 2d 545 (Tenn), it was held, where "the minor has actually paid money on the purchase price, and taken and used the article purchased, that he ought not to be permitted to recover the amount actually paid, without allowing the vendee of the goods reasonable compensation for the use of, depreciation, and wilful or negligent damage to the article purchased, while in his hands" (*ibid*, 549, *per* O'Brien J in the Supreme Court of Tennessee). Hence, as matter of US law, it seems that a minor can have restitution subject to counter-restitution (limited, under the *Halbman* rule, and expansive under the *Dodson* rule; to the extent that it is properly understood as counter-restitution, the *Dodson* rule seems to go too far).

A similar rule has developed in the context of mental incapacity both in Canada and in Australia.[164] For example, in *McLaughlin v Daily Telegraph Newspaper Co*,[165] the plaintiff, suffering under a mental disability, executed a power of attorney under which the purported attorney sold certain of the plaintiff's shares in the defendant, and applied some of the proceeds to the benefit of the plaintiff. The High Court of Australia held that the power of attorney was absolutely void, and that the plaintiff was entitled to restitution with counter-restitution.[166] Again, in *Wilson v R*,[167] the deceased had paid $10,000 to the Government of Canada for an annuity; having received seven monthly instalments totalling $882.49, he died. The contract of annuity was set aside for mental incapacity, and the Supreme Court of Canada awarded restitution to the deceased's estate of the $10,000 subject to counter-restitution of the $882.49, notwithstanding that the contract was fully performed. And in *Hill v Chevron*,[168] the plaintiff incapax got restitution, though the defendant's counterclaim for counter-restitution based upon the principles stated in *Petrkus v Becker*[169] failed. Here, Mr Hill, suffering from a mental incapacity, executed a power of attorney in favour of his wife, who granted a lease to Troy. Chevron were assignees from Troy, who paid the rent and drilled for oil. Mr Hill's estate sought restitution of the mineral rights and account of the income generated by Chevron's sale of oil. The Manitoba Court of Appeal, following *McLaughlin*, held that the power of attorney was void, so that all done under it was also void,[170] requiring the return by Chevron of the mineral rights and an account to the estate of the income which they had derived from them. Again, these cases seem to have assumed that the very incapacity itself was the relevant unjust factor which justified the award of restitution.

Similarly, in the context of *ultra vires* contracts, there are cases in which restitution to the company is assumed subject to counter-restitution; an excellent example is provided by the Irish case of *Re Irish Provident Assurance Co*.[171] The company had taken over the life assurance business of the Irish Provident Friendly Assurance Society. In a previous action, it had been held that the business of the society was *ultra vires* the company[172] and that policy holders were held entitled to recover premia which they had paid on the grounds of total failure of consideration.[173] The present case concerned the converse: the company sought to recover money which it had paid *ultra vires*.[174] The Society had insured the lives of the appellants and their wives; and the company as successor had subsequently paid out on these policies when they were surrendered. At first instance, Barton J held that such subsequent payments were made on the basis of an *ultra vires* contract, and thus ordered the plaintiffs to repay.[175] The Court of Appeal made this restitution subject to counter-restitution; since that was impossible, restitution was precluded, and the appeal was allowed. For example, Palles CB[176] made the liquidator's claim for restitution from the appellants consequent upon counter-restitution to them of their original premia which had been "wrongly" transferred from the Society to the company, and then held that the amounts so paid "would have been so largely in excess of" the amounts received by the directors "that it would be idle to direct an enquiry" into the matter.[177] And Cherry LJ[178] held that if the appellants

> "repay to the company what they received . . . they are entitled to get back from the company what they gave in consideration of the payment, namely, the old policies created by the Friendly Society. How could the company be listened to in a Court of Equity if it sought to recover all payments made on liabilities to the members of the Friendly Society, and at the same time to keep all the assets

[164] As to the position in the US, see *Hauer v Union State Bank of Wautoma* (1995) 523 NW 2d 486 (Wis App): the plaintiff had her contract of loan from the bank set aside on the grounds of her mental incapacity, and received restitution of her collateral, subject to a *prima facie* duty to make (broad) counter-restitution (rather than the narrow equivalent in minority cases exemplified in *Halbman v Lemke* (above)), which duty to make counter-restitution was displaced on the facts by the bank's lack of good faith.

[165] (1904) 1 CLR 243 (HCA); affd *Daily Telegraph Newspaper Co v McLoughlin* [1904] AC 776 (PC). And see also *Re K* [1988] 1 Ch 310 (Hoffmann J).

[166] Which was effected by the rectification of the defendant's register of shares subject, as offered by the plaintiff, to an indemnity to the defendants to the value of the proceeds of sale received by the attorney, which he would indirectly have had to do in any event.

[167] [1938] 3 DLR 433, 441, *per* Duff CJC (Crocket J concurring).

[168] [1993] 2 WWR 545 (Man CA).

[169] [1980] 2 SCR 834.

[170] [1993] 2 WWR 545 , 553, 556, *per* Huband JA, Lyon and Helper JJA concurring.

[171] [1913] 1 IR 352 (Ir CA). Judgment was handed down in *Re Irish Provident Assurance* on 21 April 1913; *Sinclair v Brougham* was argued from 8 to 15 December 1913, and speeches were delivered on 12 February 1914; but *Re Irish Provident Assurance* does not seem to have been referred to in *Sinclair v Brougham* by the House of Lords or by counsel.

[172] *Flood v Irish Provident Assurance Co* (1912) 46 ILTR 214; [1912] 2 Ch 597n (the former is the full report; the latter is an edited note which does not report the restitution issue in full).

[173] (1912) 46 ILTR 214, 217, *per* Walker LC ("premiums received . . . where the consideration has failed, can be recovered back"), 219, *per* Holmes LJ ("money paid . . . on a consideration that has entirely failed"). Cherry LJ concurred; applying *inter alia Re Phoenix Life Assurance Co, Burges' and Stocks' Case* (1862) 2 J&H 441; 70 ER 1311. The note of *Flood* at [1912] 2 Ch 597n merely records these conclusions (pp 600, 602 respectively) without setting out the reasons.

[174] *Cf* the discussion of *Re Phoenix* in the judgment of Walker LJ in *Guinness Mahon v Chelsea and Kensington LBC* [1998] 3 WLR 829, 842–843; [1998] 2 All ER 272, 286.

[175] More accurately, it seems that, instead of taking the money, the appellants took its value in shares in the company; but the order made was as to the appellants' personal liability to the value rather than a proprietary liability in respect of the shares (on the denial of which, see [1913] 1 IR 352, 364, *per* Palles CB).

[176] *Ibid*, 364–366, *per* Palles CB; *cf Buggy v Maher* [1926] IR 487.

[177] [1913] 1 IR 352, 365; more precisely, he declined "to permit the liquidator, at this stage these lengthened proceedings, to make a new case as to these sums, and to seek an expensive inquiry, which in my opinion can result in nothing but the extinguishment of his claim in respect of them": *ibid*, 365–366.

[178] Holmes LJ concurring.

> it received when the business was taken over, and all contributions subsequently paid in by members of the old Friendly Society? Surely that would be contrary to natural justice".[179]

Thus, since counter-restitution was impossible, restitution would not be ordered. *Re Irish Provident* has been followed on this point in Canada. In *Machray's Department Store v Zionist Labour Organisation*,[180] Dickson J cited it in support of the proposition that an *ultra vires* transaction will be set aside "only on terms that both parties will be restored to their original rights".[181] It seems perfectly clear that the Court of Appeal in *Irish Provident* proceeded on the assumption that such restitution was justified simply on the basis that the payments upon the surrenders were *ultra vires*. Thus, Cherry LJ identified the cause of action of the company as against the appellants as a right "to cancel the contracts and restore the parties to position in which they would have been if the surrenders had never been made".[182] Running throughout both his judgment and that of Palles CB on this issue is the assumption that the *ultra vires* nature of the payments – the incapacity of the company to make them – gave rise to this right to restitution; that is, the very incapacity itself was the relevant unjust factor.

There was also in issue a further transaction, by which one of the appellants had received £2000, and the company had received his shares in itself and certain other benefits.[183] As the *ultra vires* purchase by the company of its own shares, the transaction was void,[184] and as a consequence he was under a

[179] *Ibid*, 377. That last sentence recalls Lord Mansfield in *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676. Thus, as with the holding of Palles CB, Cherry LJ held that "the company cannot recover any sums of money paid to members of the Friendly Society on foot of policies, unless they are in a position to segregate the assets of the Friendly Society which the have received, and allow the holders of the policies such rights as against these assets as the policyholders were entitled to before the business was taken over" (*ibid*).

[180] (1966) 53 DLR 2d 657 (Man QB, Dickson J).

[181] *Ibid*, 662–663; though in the Canadian fashion, the counter-restitution ordered was quite creative (see at 663).

[182] [1913] 1 IR 352, 376. Strictly speaking, what was in issue were payments upon surrender of policies rather than the subsequent contracts for the purchase of shares, so what his lordship must have meant was the cancellation – presumably, therefore, the reversal – of those payments.

[183] In return for the £2,000, and in settlement of disputes pending in the Chancery Division of the High Court both in Ireland and in England, including a possible contractual claim for £10,000, that appellant had agreed to resign as director and Managing Director from both the company and the Society, and to transfer to the company all of his shares in the company.

[184] [1913] 1 IR 352, 368–371, *per* Palles CB, 378, *per* Cherry LJ. Such a transaction was then prohibited as *ultra vires* by *Trevor v Whitworth* (1887) 12 AC 438 (HL), and restitution in such circumstances was occasionally ordered: see *eg Great NW Central Rly Co v Charlebois* [1899] AC 114 (*quantum meruit* for a transaction *ultra vires* as partly the purchase by a company of its own shares; see *ibid*, 124–125, *per* Lord Hobhouse, and the order at [1899] AC 114, 131). Such a transaction would now be governed in Ireland by the Companies Act 1990, Part XI, on which see generally, McCormack *The New Companies Legislation* (Round Hall, Dublin, 1991) ch 3; and governed in England by of the Companies Act 1985, Chapter VII. This legislation, like its counterparts in the common law world, imposes criminal sanctions for such sales, and therefore raises

prima facie duty to make restitution to the company in that amount. However, Cherry LJ again emphasised that[185]

> "when a Court of Equity is applied to to declare an agreement void as *ultra vires* the company, if the applicant had received anything under that void agreement, the Court will compel him to do equity, and as far as possible, to bring back all that he has received under that agreement, either *in specie* or by making compensation to the extent of its value. This is not, as has been suggested, by making a new agreement. Such a thing cannot be done by any Court. It is a condition for granting relief".

Not only did the Court recognise that any duty to repay did not depend on a "new agreement" implied by law, but the Court was also not prepared to order restitution without counter-restitution. Palles CB felt that all of the benefits were quantifiable, so that restitution and counter-restitution could occur.[186] But Cherry LJ, with whom Holmes LJ agreed, held that it was not possible to restore the appellant to his original position,[187] leaving the appellant secure in the possession of the £2,000. On this issue, the whole focus is upon the possibility or otherwise of counter-restitution; but even here the duty of the appellant to make restitution of the £2,000 paid *ultra vires* by the company was assumed, and assumed on the basis that the payment of the money was *ultra vires*. In other words, the right to restitution arose by virtue of the incapacity of the company to make the payment and purchase in question; again, the very incapacity itself was the relevant unjust factor.

Re Irish Provident illustrates another matter which, had the authorities gone the other way, might have constituted a good practical justification for incapacity as a cause of action. It had been argued that a closed or fully executed swap precluded a claim based both upon mistake and upon failure of consideration,[188] but the House of Lords rejected this argument in the context of mistake,[189] and the Court of Appeal rejected it in the context of failure of consideration.[190] On other hand, had it been held that, once a swap was

the spectre not merely of the voidness, but also of the illegality, of such transactions; on restitution after such an illegal transaction: see *eg Equiticorp v R* [1996] 3 NZLR 586 (summary) (HC Smellie J).

[185] [1913] 1 IR 352, 370–371, *per* Palles CB.

[186] *Ibid*, 371–372.

[187] *Ibid*, 378–379.

[188] See *eg* Birks, "No Consideration – Restitution After Void Contracts" (1993) 23 UWALR 195. See, generally, Meier, *infra*, ch 6.

[189] *Kleinwort Benson v Lincoln City Council* [1998] 3 WLR 1095; [1998] 4 All ER 513 (HL).

[190] *Guinness Mahon v Kensington and Chelsea LBC* [1998] 3 WLR 829; [1998] 2 All ER 272 (CA). Absence of consideration was used by Hobhouse J in *Westdeutsche* ([1994] 4 All ER 890, 907–908, 923–924, 930 and 936 to justify recovery on a closed swap (the first Sandwell swap)); since failure of consideration also justifies recovery on a closed swap, this issue poses no obstacle to the re-interpretation of *Westdeutsche* as an example of failure of consideration (see *infra*, n 241).

completed, there would have been no relevant failure of consideration, since the plaintiffs would have got all that they had bargained for and the effect of any relevant mistake would have been spent, then incapacity would have been the only candidate unjust factor allowing a local authority to recover on a closed swap.[191] Indeed, the two transactions at issue in *Re Irish Provident Assurance* provide excellent – if simple – examples.[192] First, the insured had paid the lump sum premia, and upon surrender had obtained payments which were *ultra vires* the company. The transaction was thus completely closed. Yet, the liquidator was held entitled to recover the payments, subject to counter-restitution of the premia. Second, as to the *ultra vires* purchase by the company of its own shares, again, the transaction was completely closed; yet, again, the liquidator was held *prima facie* entitled to recover the payment for the shares, subject to counter-restitution of the benefits received. These were completely performed transactions, yet restitution was allowed on the basis of incapacity. It thus provides an unjust factor to a local authority seeking restitution of net payments on a closed swap, and would do so even if mistake and failure of consideration did not.

5. Cases assuming restitution of gifts affected by incapacity

In some cases, it has been assumed, rather than expressly stated, that a company can have restitution of an *ultra vires* gift. *Simmonds v Heffer*[193] is a particluarly clear example. The League Against Cruel Sports Ltd had been incorporated as a company limited by guarantee, and had made two political donations. Mervyn Davies J conducted a detailed analysis of the objects of the company and concluded that, whilst one payment was *intra vires*, another of £50,000 – was *ultra vires*; then, he simply held that "[a]ccordingly the £50,000 is returnable to the League".[194] Clearly, the fact that the donation was *ultra vires* was the reason why the duty to return it arose; hence, the incapacity of the company was the reason for restitution.[195] A further example is

[191] And in *Guinness Mahon v Chelsea and Kensington LBC* [1998] 3 WLR 829, 842–843; [1998] 2 All ER 272, 286–287, Waller LJ observed that, even if the court had held that failure of consideration did not reach a closed swap, other unjust factors nevertheless could.

[192] Contrast Meier, *infra*, ch 6, p 195: "[t]he important question whether a company can recover after a fully executed contract has never been decided". It is submitted that *Re Irish Provident* demonstrates that it has, and in favour of restitution on the ground of incapacity. Similarly, in *Wilson v R* [1938] 3 DLR 433, the Supreme Court of Canada did not consider the fact that the transaction was completed to be a bar to restitution (see *eg* at 441, *per* Duff CJC, Crocket J concurring).

[193] [1983] BCLC 298 (ChD, Marvyn Davies J); see, generally, Ewing, "Company Political Donations and the *Ultra Vires* Rule" (1983) 47 MLR 57.

[194] [1983] BCLC 298, 304.

[195] Many of the cases in this section contain other causes of action such as breaches of fiduciary duty, and so forth, and it might be argued against the interpretations of those cases offered here that the remedy in those cases turned on those other causes of action. No such objection is possible with *Simmonds v Heffer*, since counsel for the plaintiff questioned the payments "on the grounds of *ultra vires* and on those grounds alone": *ibid*, 300.

supplied by the decision of Dillon LJ in *Precision Dippings Ltd v Precision Dippings Marketing Ltd*.[196] The liquidator of the plaintiff company sought the return of a dividend which had been paid to the defendant. Dillon LJ held that the "payment of the dividend of £60,000 was . . . an *ultra vires* act by the company. In those circumstances, can Marketing have any defence to the company's claim for repayment of the £60,000 with interest ? . . .".[197] The structure is such that Dillon LJ assumed the duty to repay, and posed the question whether there could be any defences. That assumption is plainly based on the *ultra vires* nature of the payment, and thus upon the incapacity of the plaintiff. A similar assumption seems to have been made in *Rolled Steel Products v BSC*,[198] where money paid on foot of an *ultra vires* guarantee was recovered back.[199] The assumption of recovery seemed to go hand in hand with the finding that the guarantee was *ultra vires*.[200] If that is so, then the last leading case at English law before statute removed the final vestiges of the effects of the *ultra vires* rule provides an important example of a case which turned on the assumption that the fact that the payment was *ultra vires* was itself the reason for restitution; in other words, *Rolled Steel* turned on the assumption that the very incapacity itself was the relevant unjust factor.

In Ireland, where the *ultra vires* rule has not been fully abrogated, a similar assumption has also been made. For example, in *In re Greendale Developments Ltd*[201] the appellant had caused the company to make payments both to himself and to third parties for his benefit; the Irish High Court gave judgment against him, and the Supreme Court affirmed. The case seems to be

[196] [1986] 1 Ch 447 (CA).

[197] *Ibid*, 457. In the event, he held that the defendant held the dividents so received on constructive trust: *ibid*, 458, applying *Rolled Steel Products v BSC* [1982] Ch 478 (ChD, Vinelott J); [1986] Ch 246 (CA). *Cf Re George Newman & Co* [1895] 1 Ch 674 (CA).

[198] [1982] Ch 478 (ChD, Vinelott J); [1986] Ch 246 (CA).

[199] [1982] Ch 478, 510H, *per* Vinelott J; [1986] Ch 246 (CA), 298–302, *per* Slade LJ; subject to a possible defence canvassed by Slade CJ at 289.

[200] A similar assumption seems to have been made in *Parke v Daily News* [1962] 1 Ch 927 and *Re Halt Garage* [1982] 3 All ER 1016 (ChD, Oliver J). In *Parke*, Plowman J restrained the making of an *ultra vires* gift; *quaere* whether, by requiring that such a payment be justified (*eg* [1962] 1 Ch 927, 960–961), Plowman J made a similar assumption that if it were unjustified and thus *ultra vires*, it could be recovered back, thereby justifying restraining the payment in the first place? In *Re Halt Garage*, money had been paid as remuneration to two directors; the liquidator sought to recover it on the basis of the Companies Act, 1948, s 333; and Oliver J held that, "in so far as remuneration has been drawn without the proper authority, they [the directors] are bound to account to the company for it or to pay damages": [1982] 3 All ER 1016, 1023. Given that the statute assumes a pre-existing common law or equitable cause of action (see *supra*, n 65), this passage seems to assume that, simply because the remuneration was *ultra vires*, the directors came under a duty to make restitution.

[201] [1998] 1 IR 8 (Irish SC).

entirely based on the assumption that, if the company derived no benefit from the payments, they were *ultra vires* and thus irrecoverable.[202] Hence, again, the fact that the payment was *ultra vires* the company was assumed to be sufficient for recovery: incapacity was assumed as the ground for restitution.

Similarly, the right of an incapax to restitution of a gift on the grounds of incapacity has been assumed in the context of mental incapacity. The New Zealand Court of Appeal has carefully distinguished the right to restitution in such a situation from that arising after a contract has gone off for mental incapcity.[203] But the assumption of restitution has a longer pedigree. For example, in *Rourke v Halford*,[204] the Ontario Supreme Court ordered restitution of two gifts of money made by a person suffering from mental incapacity. It seems that Garrow JA[205] assumed that, if such disability were found, restitution would be automatic.[206] However, an excellent example of the general point made here is provided by the similar and earlier, but very important, Canadian decision of *Goodfellow v Robertson*.[207] On the administration of Goodfellow's estate, Robertson claimed that, when suffering from a mental disability, he had paid $1,200 to the testator, who then used it to purchase property. In Robertson's claim for the return of his money, Spragge C admirably summed up the case for restitution on the basis of the unjust factor of incapacity:[208]

> "If Robertson was at that time a lunatic, he could not have assented to the advance and application of the money, and so the testator had in his hands $1,200 of the moneys of the lunatic, and used it in a way which did not relieve him from his liability to account for it, and that money is still due from his estate. . . . If this be a correct view, Robertson is a creditor of the testator's estate for the amount in question, being for so much money received to his use . . .".

The essence of the argument of this paper is here: that an incapax cannot consent to the defendant's enrichment, and as a consequence of the plaintiff's inability to consent, the defendant's enrichment is unjust, and he must make restitution.

[202] On foot of expeditious statutory misfeasance proceedings which presuppose the cause of action; see also the cases in *supra*, nn 64–66.
[203] See the discussion of *Scott v Wise* [1986] 2 NZLR 484 (NZ CA) above, text with nn 69–71.
[204] (1916) 31 DLR 371 (Ont SC).
[205] Maclaren and Magee JJA concurring; Hodgins JA delivered a judgment to like effect.
[206] Indeed, since the money could be traced into land, he would have ordered a lien over the land had he been so asked: *ibid*, 376.
[207] (1871) 18 Gr 572 (Ont, Spragge C).
[208] *Ibid*, 576, upon which ground Spragge C rested his judgment; on Robertson's claim to a resulting trust over the land purchased wtih his money, entertained but not granted by Spragge C, see Chambers, 23, 27, 118–119. See also *Lench v Lench* (1805) 10 Ves 511; 32 ER 943 (a wife's incapacity as *femme covert* meant that she could not consent to the transfer ((1805) 10 Ves 511, 517; 32 ER 943, 946, *per* Grant MR) but the claim failed on the facts).

6. Conclusion of the argument from the authorities

There is therefore a considerable body of *dicta* stating the right to restitution of the incapax; they are to be found in cases across many jurisdictions dealing with all forms of incapacity, and with both contractual payments and gifts. The argument is clearest, and in fact *ratio*, in *Goodfellow v Robertson* and *KL Tractors*, and it appears in strong *dicta* in *Breckenridge*, *Pearce v Brain*, *International Sales v Marcus*, and *Re Frederick Inns*, all of which expressly articulate the impulse to give restitution simply for the incapacity. That impulse is assumed in an even wider range of cases, again found in many jurisdictions, dispersed across all forms incapacity, and dealing with both contractual and non-contractual enrichments. This is clearest in the *restitutio in integrum* cases, which assume restitution unless counter-restitution is impossible, and which therefore also embody the impulse to give restitution simply for the incapacity. Such cases are exemplified both by the Canadian infancy line of authority built upon *Sturgeon v Starr* and by the similar mental incapacity cases such as *McLaughlin*, *Wilson*, and *Hill v Chevron*. These cases have, in *Re Irish Provident Assurance*, a counterpart in Irish company law which which reflects a strong judicial assumption in Ireland in favour of restitution of payments made pursuant to *ultra vires* contracts which is also to be found in cases such as *O'Hehir v Cahill* and *PMPA*. There is a similarly strong assumption in favour of restitution of *ultra vires* gifts in Ireland in *Greendale* and in England in *Simmonds v Heffer*, *Precision Dippings*, and *Rolled Steel*, an assumption shared further abroad in the context of other incapacities in *Scott v Wise* and *Rourke v Halford*.

In all, these cases constitute a strong body of authority in which the right to restitution on the basis of the unjust factor of incapacity has been stated or assumed and given effect. There are doubtless other examples. It is time to recognise the essential unity of these dispersed cases, and to accept that they state an unjust factor of incapacity. The argument from the principle against unjust enrichment in Part II justifies accepting incapacity as an unjust factor. Cases such as those in this section ought now to be treated as examples of that unjust factor of incapacity.

On the other hand, it may be argued that many of these examples are not necessarily of the strongest, comprised as they are of *dicta*, inference and assumption. But they are nonetheless there, and consistent with the principle argued for above. Even if they are not strong enough to compel its recognition, nevertheless that recognition would confer upon them a rational and principled explanation. If, furthermore, those cases, properly analysed, turn out to be examples of failure of consideration or some other unjust factor, this

does not impugn the argument from principle about incapacity; it simply means that these cases are not examples of it. But if, nevertheless, those cases properly analysed do turn on incapacity, then they support the argument from precedent in favour of incapacity as an unjust factor in law of restitution.

V. DISTINGUISHING THE UNJUST FACTOR OF INCAPACITY FROM RELATED ISSUES

The position argued for in this paper, that incapacity is of itself a ground for restitution, seems to be similar to that adopted in Scots[209] and South African[210] law; but, notwithstanding the authorities discussed in the previous Part, there are – inevitably – some contrary *dicta*. If they do not prevail, three lines of authority which might be thought to be relevant, and three futher matters, must then be carefully distinguished from the unjust factor of incapacity argued for here.

First, as to the contrary *dicta*. They come mainly from the older minority cases, where courts used to refuse restitution of benefits transferred under minors' contracts, and where they may still do so in respect of gifts made by minors. As to minors' contracts, in *Wilson v Kearse*[211] the infant plaintiff paid a deposit on the purchase of a tavern, but failed to complete, and sought the return of the deposit. It is reported that "Lord Kenyon was of the opinion that though an infant was not compellable to complete a contract, yet that when he had paid money under it, he could not recover it back unless he could shew that fraud had been practised on him. If an infant was to buy a thing not being necessaries, he could not be compelled to pay for it; but having done so,

[209] At least in the context of mental incapacity (*John Loudon v Elder's Curator Bonis* 1923 SLT 226, as explained by Burrows and McKendrick, 538) and *semble* in the context of companies acting *ultra vires* (see *Magistrates of Stonehaven v Kincardineshire Co Co* 1939 SC 760 (recompense), discussed in McKendrick, *supra*, ch 4). See also *Glenrothes Development Corp v Bannerman* 1996 GWD 1614; [1997] RLR §193 (recovery of *ultra vires* severance payment). *Cf* WJ Stewart, *The Law of Restitution in Scotland* (Green Sweet & Maxwell, Edinburgh, 1992), 88–89.

[210] *Eg Rulten NO v Hearld Industries (Pty) Ltd* 1982 3 SA 600 (D) ("where a payment is made . . . *ultra vires*, then such payment is recoverable . . ." on a *conditio indebiti*; see Eiselen and Pienaar *Unjustified Enrichment: A Casebook* (Butterworths, Durban, 1993), 48–51, 189–192); *WP Koöperatief Bpk v Louw* 1995 (4) SA 978 (C); [1996] RLR § 287 (statutory body paying *ultra vires* has an enrichment claim against the recipient; see Visser "Unjustified Enrichment", in *Annual Review of South African Law 1995*, 225, 233); *Bowman, De Wet and Du Plessis NNO v Fidelity Bank Ltd* 1997 (2) SA 35 (A); [1997] RLR § 212 (*ultra vires* payments recoverable as "a prime example" of the *condictio indebiti*).

[211] (1800) Peake Add Case 196; 170 ER 243.

he could not recover back the money";[212] and in *Holmes v Blogg*[213] Gibbs CJ also thought – *obiter* – that, in principle, such an action could not be maintained.[214] However, although *Wilson v Kearse* has been followed in Canada,[215] it "has been the subject of criticism by both the courts and the textbook writers",[216] and it is "probably incorrectly reported; but at all events it is over-ruled by the more recent decision in *Corpe v Overton*",[217] which rejected the position of Gibbs CJ in *Holmes v Blogg*.[218] In *Holmes*, a minor paid for a lease, but upon majority disaffirmed it[219] and brought an action for money had and received seeking to recover the money paid for the lease. Despite his wide *dictum*, Gibbs CJ seemed to put his judgment on the ground that the infant had indeed "partially enjoyed the consideration",[220] and that is the sense in which it seems subsequently to have been understood. Hence, in *Corpe v Overton*,[221] the members of the court were clearly not attracted to Gibbs CJ's wide *dictum*; and Tindal CJ held that the "ground . . . of the judgment in *Holmes v Blogg* was, that the minor had received something of value for the money he had paid, and he could not put the defendant in the same position as before",[222] so that, where a minor had paid a deposit on the

[212] (1800) Peake Add Case 196, 196–197; 170 ER 243, 243. *Ex p Taylor* (1856) 8 DeGM&G 254, 258; 44 ER 388, 389, *per* Turner LJ, followed *Wilson v Kearse* on this point denying the infant his claim to recover a sum paid upon entering partnership.

[213] (1817) 8 Taunt 508; 129 ER 481.

[214] (1817) 8 Taunt 508, 510; 129 ER 481, 482; pointing to the *dictum* of Lord Mansfield set out *infra*, in n 227. *Cf National Provincial Building Society v Ahmed* [1995] 2 EGLR 127 (CA): if the local authority had granted an *ultra vires* lease, Millett LJ (at 130) saw "no ground" on the facts on which a claim to restitution could be based, there being no mistake, and consideration not having wholly failed; neither absence of consideration nor incapacity was argued.

[215] *Short v Field* (1914) 32 OLR 395 (Boyd C and Ont CA); *Robinson v Moffatt* (1915) 35 OLR 9 (Sutherland J and Ont CA).

[216] *LaFayette v WW Distributors* (1965) 51 WWR 685, 689, *per* McClelland DCJ.

[217] *English v Gibbs* (1889) 9 LR (NSW) 455, 457, *per* Darley CJ. Though now it is now overtaken on the issue of ministerial receipt by *ANZ v Westpac* (1988) 164 CLR 662 (HC A), and perhaps it overstated the effect of *Corpe v Overton* (1833) 10 Bing 252; 131 ER 901 on *Wilson*, since the latter case is not expressly dealt with in former, *English v Gibbs* is nonetheless an example of an infant having paid a deposit and then rescinding, recovering the deposit on the basis of failure of consideration.

[218] (1817) 8 Taunt 508; 129 ER 481.

[219] Which formed the basis of the earlier *Holmes v Blogg* (1817) 8 Taunt 35; 129 ER 294 (holding that a minor must disaffirm within a *reasonable* time of attaining majority).

[220] (1817) 8 Taunt 508, 511; 129 ER 481, 482.

[221] (1833) 10 Bing 252; 131 ER 901.

[222] (1833) 10 Bing 252, 256; 131 ER 901, 902; *cf* 10 Bing 252, 257; 131 ER 901, 903, *per* Gaslee J (*Holmes v Blogg* "clearly distinguishable"); Alderson and Bosanquet JJ delivered a judgment stongly to the same effect as that of Tindal CJ. They were followed in this in *Everett v Wilkins* (1874) 29 LT 846 (similar, subject to counter-restitution) and by Stirling J in *Hamilton v Vaughan-Sherrin Electrical Engineering Co* [1894] 3 Ch 589 (minor's purchase of allotment of shares rescinded, had obtained no advantage, hence a total failure of consideration, and therefore got the payment back). On the question of whether there had in fact been such a total failure, *Hamilton* has been doubted in *Steinberg v Scala (Leeds) Ltd* [1923] 2 Ch 452, (see 460, *per* Lord Sterndale MR, 462, *per* Warrington LJ, *semble* 465, *per* Younger LJ); indeed, in the view

purchase of a share in the defendant's trade, but withdrew before the partnership deed had been executed, there had been a total failure of consideration and the minor could recover his deposit.[223] Thus, Gibbs CJ's wide *dictum* contrary to the position taken in this paper seems not to have prospered,[224] and its demise has also seen that of *Wilson v Kearse*. In the event, the common law was settled at least since *Corpe v Overton* that a minor could recover benefits transferred under a void or disaffirmed contract, which position largely persisted when the common law was modified by statute.[225] The point of the present analysis is that some of the cases on such restitution to the minor embody incapacity as the relevant unjust factor.

As to minors' gifts, the position is less clear.[226] Lord Mansfield was of the view that a minor could not recover back a gift.[227] In fact, he was also of the view that a minor could not recover back benefits transferred under a void or disaffirmed contract,[228] a view which strongly influenced Gibb CJ's *dictum* in *Holmes v Blogg*. But, it might be thought that, simply because the law has allowed restitution of benefits transferred under a void or disaffirmed contract, it need not necessarily follow that it should allow restitution of a

of one Canadian judge, *Steinberg* "may be considered to have overruled" *Hamilton (LaFayette v WW Distributors* (1965) 51 WWR 685, 687, *per* McClelland DCJ). Nevertheless, this was as to the application of the rule, not as to the rule itself, and in *Steinberg* [1923] 2 Ch 452, 460–461, 464 respectively, Lord Sterndale MR and Younger LJ both affirmed the correctness of *Corpe v Overton*. Again, the *Corpe v Overton* intepretation of *Holmes v Blogg* was followed in *Bo-Lassen v Josiassen* [1973] 4 WWR 317 (Alb DC), 319–320, *per* Buchanan CDCJ.

[223] *Cf Stapleton v Prudential Assurance Co Ltd* (1928) 62 ILTR 56: a minor entered into a life assurance contract, and made payments; well after attaining majority, she sought to repudiate and to recover back the payments; she succeeded in the Circuit Court, in the High Court, the cause of action was not denied; instead, Sullivan P (O'Byrne J concurring) held that, since she had the benefit of life assurance cover until the repudiation, failure of consideration had not therefore been total ("If she had died . . . the company would have been bound to pay, so it could not be held that no consideration had passed during those years" (*ibid*, 56) and she could not now recover back the premia). *Cf Re Phoenix Life Assurance Co, Burges' and Stocks' Case* (1862) 2 J&H 441; 70 ER 1311; *Flood v Irish Provident Assurance Co* (1912) 46 ILTR 214, [1912] 2 Ch 597n, where the absence of a similar risk to the insurance company when the contract was void meant that there had been a total failure of consideration.

[224] Apart from *Fannon v Dobranski* (1970) 73 WWR 371, where Belzil DCJ held that "the old cases in the common law all seem to me abundantly clear that an infant who has purchased and paid for goods cannot recover his money" (at 374) but nevertheless denied recovery not on this broad ground but on the ground that there had not been a total failure of consideration on the facts (at 377).

[225] See text *supra*, with and in nn 84–86.

[226] See *supra*, n 67.

[227] "If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again": *The Earl of Buckinghamshire v Drury* (1761) 2 Eden 60, 72; 28 ER 818, 823; (1761) Wilm 177, 226n; 97 ER 69, 88.

[228] The action for money had and received "does not lie for money paid by the plaintiff . . . as in payment of a debt. . . contracted during his infancy": *Moses v Macferlan* (1760) 2 Burr 1005, 1012; 97 ER 676, 680–681. *Cf* his more general "the privilege of infants is a shield, and not a sword": *Zouch v Parsons* (1765) 1 Black 575, 577; 96 ER 332, 333; to similar effect *sub nom Zouch d Abbott v Parsons* (1765) 3 Burr 1794, 1802; 97 ER 1103, 1107.

minor's gift: after all, why should a child who gives a birthday present to a friend be entitled to get it back. However, minor's gifts, where they have been impugned, have been held not void but voidable.[229] If the gift is avoided or disaffirmed because there is no bar or impediment to rescission or disaffirmance, then restitution follows; if it is not avoided, no question of restitution arises. The child who has given a birthday present would find that, even if the gift were *prima facie* voidable, rescission or disaffirmance would be barred. The point of the present analysis is not, however, to consider whether the law should regard minors' gifts as voidable, but instead to argue that, if it does, incapacity can be one ground for consequent restitution.

The contrary *dicta* may therefore be dismissed as no longer representing the law; or they might be confined to minors' contracts or even minors' gifts. But they might be lighted upon as having rejected incapacity as an unjust factor, not least because they derive from the high authority of the views of Lord Mansfield. Nevertheless, the law evolves.[230] Later cases refine earlier.[231] Former immunities cede to evolved causes of action. For example, in *White v Jones* [232] the House of Lords held that a solicitor could owe a duty of care in tort to an intended but disappointed legatee, notwithstanding that the old case of *Robertson v Fleming*,[233] on appeal to the House of Lords from Scotland, contained strong contrary *dicta*, in particular in the speech of Lord Campbell LC. Lord Goff of Chieveley, who delivered the majority speech in *White v Jones*,[234] did "not consider that the existence of such a duty of care can simply be dismissed by reference to the sweeping statements made in *Robertson v Fleming*. For the law has moved on from those days. Nowadays questions such as that in the present case have to be considered anew, and

[229] Recall, for example, the Irish position that "[g]ifts made by infants are . . . voidable" *Lloyd v Sullivan* (6 March 1981), Unreported, (Irish High Court), Transcript, 3, *per* McWilliam J (see *supra*, n 61; though *cf supra*, text with n 146).

[230] The process of evolution, and the question of whether in so doing, judges are making or merely declaring the law, was a central question in *Kleinwort Benson v Lincoln City Council* [1998] 3 WLR 1095; [1998] 4 All ER 513 (HL); see *eg* [1998] 3 WLR 1095, 1100; [1998] 4 All ER 513, 518, *per* Lord Browne-Wilkinson; [1998] 3 WLR 1095, 1117–1119; [1998] 4 All ER 513, 534–536, *per* Lord Goff; [1998] 3 WLR 1095, 1131–1133; [1998] 4 All ER 513, 547–549, *per* Lord Lloyd; [1998] 3 WLR 1095, 1139; [1998] 4 All ER 513, 554, *per* Lord Hoffmann; [1998] 3 WLR 1095, 1148–1149; [1998] 4 All ER 513, 563–564, *per* Lord Hope.

[231] *State (Lynch) v Cooney* [1982] IR 337 (Irish SC) 360, *per* O'Higgins CJ, 380, *per* Henchy J.

[232] [1995] 2 AC 207 (HL). On restitutionary liability on the facts of *White v Jones*, see Matthews, "Round and Round the Bramble Bush" [1996] LMCLQ 460; O'Dell, "Insurance Payments (Mis)Directed, Equitable Maxims (Mis)Used, and Restitution Doctrine Missed" [1997] LMCLQ 197. However, *cf Hill v Van Erp* (1997) 188 CLR 159 (HCA), 225–227, *per* Gummow J (plaintiff "correct" in not framing such a claim in restitution); this aspect of *Hill* is discussed in Tapsell, "The Negligence Juggernaut and Unjust Enrichment" (1997) 16 Aus Bar Rev 79.

[233] (1861) 4 Macq 167.

[234] [1995] 2 AC 207, 259.

statements of the law such as that of Lord Campbell, cannot be allowed to foreclose the argument of the plaintiff in the present case . . .". Likewise, it is submitted, here: statements such as those of Lord Kenyon, Gibbs CJ and Lord Mansfield should not be allowed to foreclose the argument that incapacity should now be recognised as constituting a cause of action in restitution. The acceptance of the principle against unjust enrichment justifies such an unjust factor to unite many other *dicta* and cases to give proper effect to the policy underlying the various heads of incapacity. It is submitted, therefore, that this view of Lord Mansfield ought not now to prevail.

If the contrary authorities do not prevail, and the argument here in favour incapacity as an unjust factor is accepted, then, three lines of authority which might be thought to be relevant must be carefully distinguished. The first arises in the context of payments made *ultra vires* as a matter of public law. In cases such as *Re KL Tractors* and *Breckenridge*, the relevant contracts were *ultra vires* because the statutes incorporating the companies were unconstitutional. The contracts were then *ultra vires* for non-incorporation in much the same way as were the relevant pre-incorporation contracts in *Rover International v Cannon Film Sales (No 3)*.[235] And this is how they were treated in the cases. In other words, the cases are examples of *ultra vires* at private law, even though the reasons why the contracts were *ultra vires* were public law reasons. In this, they are like *Westdeutsche*, which is also an example of *ultra vires* at private law, even though the reason why the swaps contracts were *ultra vires*, as decided in *Hazell*, is strictly speaking a matter of public law. Such private law *ultra vires* must be carefully distinguished from the cases where the public law *ultra vires* as a matter of policy, of itself and without more, supplies a policy-motivated unjust factor. For example, in the *Auckland Harbour Board v R*[236] line of authority discussed by Professor McKendrick, the public law context supplies the strong policy justification for such policy-motivated restitution.[237] This is not to say that restitution in such a context cannot be had on the basis of incapacity (*Breckenridge* and *Re KL Tractors* illustrate that it can[238]), only that the *Auckland* line of authority

[235] [1989] 1 WLR 912; [1989] 3 All ER 423 (CA).

[236] [1924] AC 318 (PC). See also *AG v Great Southern and Western Co of Ireland* [1925] AC 754, 772, *per* Viscount Haldane.

[237] Thus, in *Woolwich* [1993] 1 AC 70, 177, Lord Goff justified the citizen's claim of right as against the state (clearly a policy-motivated unjust factor), *inter alia*, on the basis that it represented the converse of the state's claim of right as against the citizen.

[238] See also *La Caisse Populaire Notre Dame Limitée v Moyen*(1967) 61 DLR (2d) 118 (Sask QB); explicitly applied in the private law context in *Caledonia Community Credit Union Ltd v Haldimand Feed Mill* (1974) 45 DLR (3d) 676 (Ont HC).

probably turns on the public law considerations behind the incapacity rather than on the incapacity itself.[239]

The second is the *Westdeutsche* case itself. At first instance, Hobhouse J suggested that where "a contract . . . is *void ab initio* in the way that an *ultra vires* contract is void",[240] then absence of consideration is the unjust factor which justifies restitution of benefits transferred pursuant to that *ultra vires* contract. As Professors Birks and McKendrick have demonstrated above, this innovation has not prospered; and a consensus seems to be emerging that it may be right to regard the unjust factor in *Westdeutsche* as failure of consideration.[241] If the argument advanced here is accepted, then, where a contract is *ultra vires* and thus void for incapacity, it is by definition "void in the way that an *ultra vires* contract is void", and that incapacity may thus provide the relevant unjust factor. In the swaps cases, the local authorities are affected by the incapacity. Thus, in those cases in which the local authority is the plaintiff,[242] incapacity would be available as an unjust factor.

[239] These public law considerations are clearest when they compel the denial of ordinary restitution defences: see *eg Commonwealth v Burns* [1971] VR 825 (Newton J) (overpaid pension recovered); *A-G v Gray* [1977] 1 NSWLR 406 (NSW CA) (overpaid salary recovered); *Sandvik v Commonwealth of Australia* (1989) 89 ALR 213 (FCA) (import-duty refunds paid on foot of invalid Ministerial Order recovered); *cf Commonwealth v Hamilton* [1992] 2 Qd R 257 (overpaid benefits recovered on foot of statute).

[240] [1994] 4 All ER 890, 929.

[241] *Westdeutsche* [1996] AC 669, 683, *per* Lord Goff; [1996] AC 669, 710–711, *per* Lord Browne-Wilkinson; *Guinness Mahon v Chelsea and Kensington LBC* [1998] 3 WLR 829, 835, 838, 841; [1998] 2 All ER 272, 279, 282, 284–285, *per* Morritt LJ; [1998] 3 WLR 829, 850; [1998] 2 All ER 272, 294, *per* Robert Walker LJ; *Goff & Jones*, 541; though *cf Guinness Mahon* [1998] 3 WLR 829, 841; [1998] 2 All ER 272, 285, *per* Waller LJ, critical of the unjust factor of absence of consideration but doubtful that it is properly capable of reinterpretation as an application of failure of consideration.

[242] *Eg Westdeutsche* [1994] 4 All ER 890 (in the second Sandwell swap, the net payor is the local authority ([1994] 4 All ER 890, 908), which could rely on absence of consideration to recover ([1994] 4 All ER 890, 936)); *South Tyneside BC v Svenska* [1995] 1 All ER 545 (Clarke J) (plaintiff local authority's claim to restitution of net payments on a void swap for absence of consideration unsuccessfully met with the defence of change of position); *TSB Bank of Scotland v Welwyn Hatfield DC* [1993] 2 Bank LR 267 (Hobhouse J) (swap between two local authorities (*) Welwyn Hatfield DC (as to which see *infra*, n 277) and Brent LBC; plaintiff local authority's claim for net payments of £1.8m successfully met with defence of acceptance of payment of debt). See also *Rochester City Council v Kent County Council* (1998) 96 LGR 697 (Sullivan J) [1998] *RLR* § 106. *Pace National Provincial Building Soc v Ahmed* [1995] 2 EGLR 127, 130 (CA), *per* Millett LJ, who could think of no appropriate unjust factor to ground the local authority's claim: incapacity would have done so, though it would still have failed for the other reasons which Millett LJ gave. And it might have justified the *quantum meruit* refused in *Crone v Dublin CC* (1961) 95 ILTR 79 (Irish SC) (in the supply of water, the rate as set was *ultra vires* the local authority, and the Supreme Court (Maguire and Lavery JJ, Maguire CJ dissenting) denied a claim for a *quantum meruit* for the water supplied and used). It might also have supplied another unjust factor in favour of restitution in the cases *supra*, in n 92.

Of course, only the party affected by the incapacity can claim that as a consequence he could not consent to the enrichment.[243] Thus, in the swaps cases, it is open only to the local authorities to rely on incapacity. In those cases in which the banks are the plaintiffs,[244] incapacity would not be available as an unjust factor. This includes *Westdeutsche* itself.[245] Since Hobhouse J held that the plaintiff bank could have restitution based upon absence of consideration, that troublesome unjust factor cannot, unfortunately, be reinterpreted as stating or embodying incapacity as an unjust factor. Thus, if absence of consideration is to be rejected, and even if incapacity is to be accepted, the banks would still have to rely on mistake or failure of consideration.

The third matter to be distinguished is this. Apart from the unjust factor of incapacity suggested here, there is another cause of action in restitution – that of inequality from personal disadvantage – upon which the incapax might seek to rely: as Professor Birks puts it, "[i]n situations in which it is doubtful whether a minor or a person of unsound mind has restitutionary rights emanating from his own particular disadvantage, his proper tactic will be to present himself in this larger category of personally disadvantaged people".[246] The cases on such inequality constitute the third line of authority from which the unjust factor of incapacity suggested here must be distinguished. Such cases of personal inequality, according to Professor Birks, are contained within "a category of incapacity, extending beyond minority and mental illness, arising because the person in question is easily exploited by reason of lacking, to a marked degree, the social and intellectual advantages of the average citizen".[247] Even if this were to be accepted, incapacity as an unjust factor will not displace it as unjust factor in this context; it will be merely a further string to the plaintiff's bow. Indeed, more generally, it will not displace any other unjust factor in this context; rather, it will supplement them.

[243] *Dynevor v The Proprietors, Centre Point Building Units Plan No 4327* (12 May 1995) Unreported, (Qld CA), [1996] RLR § 20 (only the company (or its members by a derivative action) can assert the *ultra vires*, *per* Macrosson CJA and McPherson JA; Pincus JA concurring).

[244] As in *Westdeutsche* itself, and most of the other swaps cases.

[245] Even though at least some elements of his lordship's argument there could be deployed in favour of the argument made here. For example, in his view, the decision of Lush J in *Brougham v Dwyer* (1913) 108 LT 504 confirms "the basic proposition that in the absence of some special factor money paid under an *ultra vires* contract can be recovered as money had and received in the same manner as can money paid for a consideration that has wholly failed. This is so even though no question of mistake of fact arises and there were mutual dealings under the supposed contract which would preclude the application of . . . the ordinary contractual principle of" total failure of consideration ([1994] 4 All ER 890, 926). Although he uses that description of *Brougham v Dwyer* as authority for his unjust factor of absence of consideration, nevertheless on that reading, the case is equally consistent with the view that it was not the voidness of the contract *per se* so much as the fact that the contract was *ultra vires* which justified the action for money had and received; that is, that it was the incapacity itself which justified restitution.

[246] Birks, *Introduction*, 218.

[247] *Ibid*, 216.

Thus, in the context of *ultra vires* contracts, a plaintiff can seek to rely not only on mistake, failure of consideration and (if it exists) absence of consideration, but also upon incapacity. Again, in the context of minority, by analogy, not only can the plaintiff – who traditionally relied upon failure of consideration – rely upon mistake or absence of consideration, or even inequality, but he can also rely upon incapacity. As to the context of mental incapacity, take the example of *Hart v O'Connor*:[248] there the plaintiff had argued that the contract was invalid both at law for the incapacity and in equity by reason of unconscionability. The Privy Council rejected both arguments. Assume for present purposes that they had done precisely the reverse and accepted both, so that the contract was therefore twice invalid. The argument here is that the incapacity itself would have generated a cause of action in restitution; the unconscionability would no doubt also have generated a cause of action in restitution based upon inequality from personal disadvantage.[249] However, there, as in all of the other examples where there are other possible causes of action, incapacity nevertheless provides a further cause of action.

Three further issues must be briefly raised and distinguished. First, since this paper is concerned with claims in restitution *by* the incapax (such as the minor, the company acting *ultra vires*, the party suffering from mental incapacity, and so on), it is not concerned with claims *against* the incapax. Thus, in the context of incapacity, many of the cases in the books seem to be concerned with claims in restitution *against* the minors or other incapax; *Westdeutsche* and *Kleinwort Benson v Lincoln* are just such cases; but they are not the focus of this chapter. Second, where a defendant incapax has been enriched, that incapacity might state a policy-based defence to an action in restitution. Again, in those cases, it is the incapacity of the defendant which is in issue (as the discussion of policy in the next Part makes explicit[250]) whereas the unjust factor of incapacity is a plaintiff-sided matter. This makes the policy-based defence largely irrelevant to the cause of action. Third, just as there are two separate questions whether a contract is invalid for incapacity, and whether, if so, the incapax may have personal restitution, there are likewise separate questions whether a contract is invalid for incapacity, and whether property passed from the incapax to the recipient in goods

[248] [1985] AC 1000 (PC); see *supra*, Part III (2).

[249] See Birks, *Introduction*, 204–205, 216–218 (inequality as the unjust factor); *cf* Burrows, 189–193, 199–204 (exploitation as the unjust factor); *cf* N Bamforth, "Unconscionability as a Vitiating Factor" [1995] LMCLQ 538 (unconscientious receipt as the unjust factor). *Quaere* whether, although the incapacity is an alternative cause of action to the unjust factors stated in these treatments, some of the cases therein used might be better seen as examples of incapacity?

[250] Text with and in notes 267–269.

transferred under the contract.[251] Such questions of title are separate from and irrelevant to the analysis of an unjust factor in restitution. All these matters to one side, the proper scope of the unjust factor of incapacity therefore becomes clear.

VI. POLICY

The argument so far has been that the principle of unjust enrichment justifies the recognition of incapacity as an unjust factor, and that this is borne out to a greater or lesser extent by the authorities which so hold in *dicta* or make that assumption. All of this is further justified as a matter of legal policy. Quite simply, restitution for incapacity would uphold the policy of incapacity. By allowing restitution, and unravelling of the transaction, it *emphasises* the void nature of the transaction by removing its effects, and thus furthers the policy of the *ultra vires* rule.[252]

For example, in company law,[253] the aim of the *ultra vires* rule is the maintenance of capital for the protection of the shareholders and *intra vires* creditors.[254] Thus, "the object of the doctrine of *ultra vires* is . . . the protection of the public. In relation to a company, it protected subscribers to the company and those who were relying on the credit of the company. In the case of local authorities, it exists . . . for the protection of their rate-payers. . . .".[255] Hence, the "concern of the law is that the monies or other property of the corporation shall not be transferred into other hands by an unauthorised act of the corporation, and that, if such an unauthorised transfer does take place, the corporation shall, so far as possible, be saved from incurring a loss thereby".[256]

[251] *Eg* Swadling, "Restitution for No Consideration" [1994] RLR 73, 80–84; *cf Chaplin v Frewin* [1966] Ch 71; *National Provincial Building Soc v Ahmed* [1995] 2 EGLR 127 (CA).

[252] Or other similar rule stating an incapacity, such as minority, or mental incapacity.

[253] At least in those jurisdictions which retain signficant vestiges of the *ultra vires* rule; on the statutory reform of the rule, see *supra*, Part III (5).

[254] *Ashbury Railyway Carriage and Iron Co v Riche* (1875) LR 7 HL 653, 667–668, *per* Lord Cairns LC; *Bell Houses v City Wall Properties* [1966] 2 QB 656, 694, *per* Salmon LJ; *Hazell v Hammersmith and Fulham Council* [1992] 2 AC 1, 36–37, *per* Lord Templeman; though it is more than arguable that the rule has failed to meet this purpose: see Prentice, *Reform of the* Ultra Vires *Rule* (IEA, 1986), ch III.

[255] *Westdeutsche* [1994] 4 All ER 890, 915, *per* Hobhouse J; more generally, the "purpose of the *ultra vires* doctrine is to protect the public" *Kleinwort Beson v Lincoln City Council* [1998] 3 WLR 1095, 1152; [1998] 4 All ER 513, 567, *per* Lord Hope; to like effect, see *Crédit Suisse v Allerdale BC* [1997] QB 306, 350, *per* Hobhouse LJ and *Guinness Mahon v Chelsea and Kensington LBC* [1998] 3 WLR 829, 840; [1998] 2 All ER 272, 284, *per* Morritt LJ.

[256] *Re KL Tractors Ltd* (1961) 106 CLR 318, 337, *per* Fullagar J. Hence, the "so-called doctrine of *ultra vires* was evolved for the protection of corporations of limited capacity and of their corporators, not for the advantage of person who deal with corporations of limited capacity . . .": *ibid*, 338, *per* Fullagar J.

Similarly for minors;[257] in *Corpe v Overton*, Tindal CJ held "if we were to determine that he [the minor] has a right to rescind the contract and yet not to recover the money paid in advance, the protection which the law extends to an infant might be altogether eluded by allowing the other party to retain the money so paid in advance".[258] Indeed, the Court of Appeal in *Guinness Mahon*[259] recognised that the policy underlying the *ultra vires* doctrine required restitution of money paid *ultra vires*, and the House of Lords in *Kleinwort Benson v Lincoln City Council*[260] was wary of potential defences which could have subverted that policy.

It is quite clear, therefore, that the policy underlying incapacity strongly favours restitution for that incapacity.[261] That policy might simply be given effect directly, or by means of existing unjust factors such as mistake or failure of consideration. Giving effect directly to the policy itself, as an example of policy-motivated restitution, may have been what Waller LJ had in mind in *Guinness Mahon*;[262] but this sense of unjust enrichment is "slightly different from the unjust enrichment usually relied upon",[263] in that incapacity would then be located not in the family of consent-related unjust factors but in the family of policy-motivated unjust factors.[264] However, there is a danger of palm-tree justice with the family of policy-motivated unjust factors; and, to avoid it, "care must be taken to avoid coming too easily to the conclusion that a particular example of restitution should be explained under this miscellaneous heading rather than as a case of non-voluntariness or free acceptance".[265] Such wise caution suggests that the policy underlying the *ultra vires* doctrine ought to be given effect if possible by means of a consent-related unjust factor such as incapacity; if so, the policy would be given effect in a manner in which neither Waller LJ's concerns nor fears of palm-tree

[257] There is with minors, as with those suffering from a mental incapacity, the further policy of preventing such persons from being unfairly taken advantage of; and in the context of minors, this has also been deployed to justifiy restitution: see *eg* McCamus [1979] UNBLJ 89, 91, 99, 102, 116; *cf* Di Matteo, "Deconstructing the Myth of the Infancy Law Doctrine: From Incapacity to Accountability" (1994) 21 Ohio NULR 481, and see also Fitzgerald, "Maturity, Difference and Mystery: Children, Perspectives and the Law" (1994) 36 Ariz L Rev 11.

[258] (1833) 10 Bing 252, 257; 131 ER 901, 903.

[259] [1998] 3 WLR 829, 840; [1998] 2 All ER 272, 284, *per* Morritt LJ; [1998] 3 WLR 829, 843–844; [1998] 2 All ER 272, 287–288, *per* Waller LJ.

[260] [1998] 3 WLR 1095; [1998] 4 All ER 513 (HL). See *eg* [1998] 3 WLR 1095, 1126–1127; [1998] 4 All ER 513, 543, *per* Lord Goff; [1998] 3 WLR 1095, 1152–1153; [1998] 4 All ER 513, 567, *per* Lord Hope.

[261] Birks, *Introduction*, 308–310 makes a similar argument, but concludes that any such unjust factor is an example of policy-motivated restitution; see also *infra*, n 274. The point here is that the policy justifies such restitution, but that it is given expression through the consent-related unjust factor of incapacity contended for here.

[262] See *supra*, text with and in n 17.

[263] [1998] 3 WLR 829, 844; [1998] 2 All ER 272, 288.

[264] See *supra*, n 34.

[265] Birks, *Introduction*, 294.

justice would arise. The same can also be said of other plaintiff-sided consent-related unjust factors such as mistake or failure of consideration. However, these actions are subject to their own limitations unrelated to issues of incapacity,[266] so that such actions only fortuitously give effect to the policy favouring restitution underlying incapacity. Hence, the problems with giving effect to the policy either directly by means of policy-motivated restitution or indirectly by means of other unjust factors are such that the only sure way in which that policy can be given proper effect is by admitting incapacity as an unjust factor.

Of course, this is not to forget that incapacity might also state a policy-based defence. Such a defence arises where a defendant has received *ultra vires*, so that the relevant contract giving rise to the receipt is void. Where a plaintiff payor can then go on to demonstrate an unjust factor justifying restitution, the incapacity which has removed the contract may also continue on to provide a defence, as where the (usually statutory) policy of incapacity underlying the invalidity of the contract continues on to deny restitution as conflicting with that policy.[267] Two points must be made about this policy-based defence. First, its strength after the swaps cases must be questionable.[268] Second, to the extent that it survives, far from being inconsistent with

[266] As a consequence of *Guinness Mahon* and *Kleinwort Benson*, neither action would now be met with the argument that the fact that the transaction was completed would preclude restitution and a mistake claim would not be met with the argument that it was a mistake of law; but an action in mistake will fail if the mistake did not cause the payment, and an action in failure of consideration can still be met with the requirement that the failure be total.

[267] See the explanation of *Sinclair v Brougham* [1914] AC 398 (HL) given in *Westdeutsche*, at first instance by Hobhouse J ([1994] 4 All ER 890, 930), and in the House of Lords by Lord Goff (dissenting) ([1996] AC 669, 688) following Birks, *Introduction*, 396–397. See also *Cowern v Nield* [1912] 2 KB 419 (restitution to plaintiff of money paid to infant as purchase price for undelivered goods denied); *R Leslie v Sheill* [1914] 3 KB 607 and *Financial Collection Services v Carlsen* (1995) 166 AR 78 (Alb QB) (restitution to plaintiff of money lent to infant student denied since it would amount to enforcing the loan); see also *Thavorn v BCCI* [1985] 1 Lloyds Rep 259. On such policies, see McCamus, "Restitutionary Recovery of Benefits Conferred Under Contracts In Conflict with Statutory Policy – The New Golden Rule" (1987) 25 *Osgoode Hall LJ* 787. See generally Virgo *Principles*, ch 13, s 1(b)(i); and ch 26.

[268] Indeed, even in *Sinclair v Brougham* itself, Lord Dunedin did not conceive of the *ultra vires* doctrine doctrine as allowing an *ultra vires* borrower to retain the borrowing. It would be "to run the doctrine mad. It was a doctrine which was introduced in order to let societies keep their own money, not to appropriate other people's" ([1914 AC 398, 438). Similarly, in *Westdeutsche* in the Court of Appeal ([1994] 4 All ER 890, 967; [1994] 1 WLR 938, 951), Leggatt LJ was scathingly dismissive of the policy: "[i]f that is the best that can be said for refusing restitution, the sooner it [*sc.* the obligation to make restitution] is enforced the better"; (*cf* Burrows, 457–460). He was followed in this by Waller LJ in *Guinness Mahon* [1998] 3 WLR 829, 843–844; [1998] 2 All ER 272, 287–288, who therefore suggested that "there is no injustice in the council [the receiving incapax] being bound to repay". Similarly, the House of Lords in *Kleinwort Benson v Lincoln City Council* (see *supra*, n 260) saw the policy underlying the *ultra vires* rule as favouring restitution (even though, on the facts of the case, the incapax local authority had received rather than payed). *Cf Dynevor v The Proprietors, Centre Point Building Units Plan No 4327* (12 May 1995) Unreported, (Qld CA) [1996] RLR § 20: "since the overthrow . . . of the doctrine of implied

a policy of restitution for incapacity, it pulls in the same direction. Where a plaintiff payor has paid *ultra vires*, the relevant policy argued for above is to regain the the money paid away *ultra vires*. Where a defendant payee has received *ultra vires*, the relevant policy discussed here is to retain the money received *ultra vires*. In both contexts, the policy is to enlarge the fund available for distribution on insolvency to the shareholders and *intra vires* creditors.[269] Thus, the *ultra vires* payor recovers, the *ultra vires* receiver retains; and the policy in favour of restitution to the incapax is seen to be in step with what remains of the policy against restitution from the incapax.

Such issues of policy play an important role in some US cases on the *ultra vires* doctrine. The scope for the doctrine is, of course, very confined in modern US law,[270] but the older cases demonstrate that, even where a court held a contract *ultra vires* and unenforceable, there was no impediment to an action in restitution taken by either party to the contract.[271] However, some of the US cases distinguish between a contract which is void for incapacity and one which is within capacity but where authority is otherwise lacking; hence, in actions against the incapax, for the plaintiff successfully to claim restitution, such courts have required that the defendant must have had the power it sought to exercise but merely have exercised it in an irregular manner or by unauthorised procedural means.[272] The result is that, where a party has received a benefit under a contract which is within its capacity but is otherwise invalid, it has to return it; but, where the party has received a benefit under a contract which is beyond its capacity, it can retain it. In this regard, at least, the US position is similar to that elsewhere in the common law world that the *ultra vires* receiver can retain the enrichment, and is justifiable or

contract as the basis for restitutionary relief, the path of a lender who seeks to recover money lent in the course of *ultra vires* borrowing is in Australia no longer obstructed by the decision in *Sinclair v Brougham*": *per* Macrosson CJA and McPherson JA, Pincus JA concurring. Certainly, in the absence of *Sinclair v Brougham*, a *prima facie* cause of action in restitution arises, but it is a separate question whether the retention policy has declined sufficiently that it no longer answers that *prima facie* claim, though the tenor of the decision is that is has. Such scepticism about the retention policy applies not only in the context of *ultra vires* contracts but also in respect of other species of incapacity; for example, "[t]he case for overruling *Cowern v Nield* and *Leslie v Sheill* is overwhelming" (Burrows, 452). See generally Arrowsmith "Ineffective Transactions, Unjust Enrichment, and Problems of Policy" (1989) 9 LS 307.

[269] *Re KL Tractors Ltd* (1961) 106 CLR 318, 338, *per* Fullagar J; *cf Re Edward Love and Co Pty Ltd* [1969] VR 230.

[270] See *supra*, n 80. Indeed, where the *ultra vires* doctrine might operate, if the contract has been performed, the majority of US states would probably decline to hold that it is unenforceable; see *eg* Hamilton *Cases and Materials on Corporations*, 6th ed (West, St Paul, 1998), 214.

[271] *Ibid.*

[272] *Eg Federal Paving Corp v City of Wauwatosa* (1939) 286 NW 546 (Wis); *Hudson City Contracting Co v Jersey City Incinerator Authority* (1955) 111 A 2d 385 (NY); *Finch v Matthews* (1968) 443 P 2d 833 (Wash); *Edwards v Denton* (1965) 409 P 2d 153 (Wash); *Noel v Cole* (1982) 655 P 2d 245 (Wash).

not[273] – on similar policy grounds. So much for actions *against* an incapax. However, the US cases contain *dicta* that the distinction (between a contract which is void for incapacity and one which is within capacity but where authority is otherwise lacking) applies equally to actions *by* the incapax; so that the incapax could have restitution of benefits transferred under a contract which is within its capacity but is otherwise unauthorised and invalid but not under a contract which is beyond its capacity. To the extent that this is so, it is an error; as the analysis here demonstrates, the relevant policies are different, so that, whilst restitution might properly be refused in actions against the incapax for policy reasons, it ought not to be in actions by the incapax where the policy pulls in favour of restitution.

Furthermore, the fact that policy is capable of pulling in opposite directions, depending on whether the incapax is the plaintiff or the defendant, provides another reason to treat with caution recent suggestions in the commentary upon *Guinness Mâhon* that restitution after a completed swap ought to be understood as policy-motivated.[274] However, these suggestions miss the point that, in that case, the incapax was the defendant, and the policy behind the ultra vires rule would operate, if at all, to justify *retention* rather than restitution.[275] Hence, policy pulls in favour of restitution only where the incapax is the plaintiff, and the best way to give effect to that policy is by means of the unjust factor of incapacity.

The analysis of policy so far has concentrated on cases in which only one of the parties was an incapax. It is, of course, possible to envisage a situation where each party is an incapax: as where there is a contract between two minors, or where a selling company did not have the power to sell and a purchasing company did not have the power to purchase the relevant goods or services, or where a swap was entered into by two local authorities and it was beyond the powers of both. This clash has occurred on at least two reported occasions. In the first, under the shadow of *Sinclair v Brougham*, the policy favouring retention by the defendant won out.[276] In the second, after *Westdeutsche*, the policy favouring restitution to the plaintiff prevailed, subject to other defences.[277] It is quite clear, therefore, that, even in the face of a strong contrary policy, the policy underlying incapacity powerfully favours restitution for that incapacity. And the best way to give effect to that policy is to admit incapacity as an unjust factor.

[273] And since the retention policy has been weakened (perhaps fatally) by the swaps litigation, the question arises as to whether any continued vitality in the US is justified.

[274] Taking up the suggestion of Waller LJ, in that case, set out in n 17 *supra*. See *eg* Birks, ch 1, *supra*, Part III(3); Birks and Swadling [1998] All ER Rev 394–395; White (1999) 115 LQR 380, 383–384. See also *supra*, n 261 and Virgo *Principles*, ch 13, s 1(1)(a)(ii).

[275] Suggestions that "absence of consideration" be understood as "code" for policy-motivated restitution (*eg* Birks, ch 1, *supra*, Part III(4)) similarly founder upon this difficulty.

[276] *Tauranga Borough v Tauranga Electric Power Board* [1944] NZLR 155 (NZ CA) (supply of electricity *ultra vires* the plaintiff Borough receipt *ultra vires* the defendant Board, subject to a tracing order also derived from *Sinclair v Brougham*).

VII. CONCLUSION

Four swaps cases have already reached the House of Lords; a great many others have been decided in the Court of Appeal, the High Court, and the courts in Scotland. The result has been the clarification of a large number of issues in those cases, but the existence of a cause of action in restitution based simply upon incapacity is not numbered among them. Given that many of the potential plaintiffs were local authorities, this is unfortunate. Notwithstanding the large number of *ultra vires* swaps involved in the litigation, cases of incapacity are rare and getting rarer; once this spate of swaps litigation is past, we may have to wait almost a century[278] for the issue of restitution for incapacity once more to present itself. If and when that opportunity arises, it should be recognised that principle, precedent and policy all argue strongly for the recognition of incapacity as an unjust factor. By virtue of the incapacity, the incapax could not consent to the relevant transfer; this is the strongest form of impairment of consent; and ought therefore to be recognised as a consent-related unjust factor, on a continuum just before mistake and duress. This recognition is explicit in some widely scattered *dicta*, and is visible just below the surface as an assumption driving a great many other cases. Such a reading of those cases is in turn justified by the fact that such restitution subserves and emphasises the policy underlying the relevant incapacity. Consequently, it ought therefore to be accepted that incapacity constitutes a factor rendering a defendant's enrichment unjust, thereby justifying restitution to the plaintiff in the amount of that enrichment.

[277] *TSB Bank of Scotland v Welwyn Hatfield DC* [1993] 2 Bank LR 267 (Hobhouse J) (swap between two local authorities). Some local authorities, especially the defendant here, acted as intermediaries for other councils with lower credit ratings; see McKendrick "Local Authorities and Swaps: Undermining the Market?" in Cranston (ed) *Making Commercial Law: Essays In Honour of Roy Goode* (OUP 1997) 201, 205 n 16.

[278] Before the swaps cases, decided as the twentieth century draws to a close, the previous case on restitution in the context of incapacity before the House of Lords seems to have been *Sinclair v Brougham* [1914] AC 398 (HL), decided when the century was still young.