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The Present Situation in Australia Regarding Recovery of Payments Made Pursuant to Ultra Vires Demands

Abstract

The general law in Australia is that in the absence of any statutory provision money paid under a mistake of law (as opposed to a mistake of fact) is irrecoverable. There are however a number of 'exceptions' to the rule that are particularly relevant when discussing exactions by public officials. If the payer was acting under duress or any form of compulsion or, coercion or undue influence, those factors vitiate the payment and the payment is therefore recoverable regardless of the mistake.

Keywords

recovery of payments, ultra vires

THE PRESENT SITUATION IN AUSTRALIA REGARDING RECOVERY OF PAYMENTS MADE PURSUANT TO ULTRA VIRES DEMANDS



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Introduction

The general law in Australia is that in the absence of any statutory provision money paid under a mistake of law (as opposed to a mistake of fact) is irrecoverable.¹ There are however a number of 'exceptions' to the rule that are particularly relevant when discussing exactions by public officials. If the payer was acting under duress or any form of compulsion or, coercion or undue influence, those factors vitiate the payment and the payment is therefore recoverable regardless of the mistake.²

* Since submission of this paper for publication, the Court of Appeal decision in *Woolwich Building Society v Inland Revenue Commissioners (No 2)* has been upheld on appeal to the House of Lords, 3:2 ([1992] STC 657). The majority reasons in the House of Lords in allowing recovery of taxes paid pursuant to an ultra vires demand, proceeded more on the basis of a reformulation of the law particularly in light of acceptance of the principle of unjust enrichment, as opposed to 'reinterpreting' the old authorities in such a manner as to provide the legal principle, which was the approach of the majority in the Court of Appeal. The Lords were all agreed that at the level of the Court of Appeal, as the law stood before *Woolwich*, the authorities proceeded on the basis that money paid under a mistake of fact or compulsion (including duress 'colore officii') was recoverable but money paid voluntarily under mistake of law or to 'close the transaction' (including in response to a threat of legal proceedings) was not. *Woolwich* did not fit into the duress category as no compulsion sufficient to found recovery was exerted by the Inland Revenue. Also there was no mistake of law. Lord Goff took the lead in restating the law relying on past dicta and academic writings. See *Woolwich* (HL). Lord Goff at pp 674, 678-681, Lord Browne-Wilkinson at p 696 and Lord Slynn at p 699. In this paper I have amended the footnotes where relevant to take the decision into account. Dicta in both the Court of Appeal and the House of Lords will remain relevant when the question as to whether there should be any limitations on recovery under the *Woolwich* principle subsequently arises for determination.

In *David Securities Pty Ltd v Commonwealth Bank* (1992) 66 ALJR 768, the High Court recognised that if a mistake of law causes a payment, the mistake will *prima facie* found recovery. The court considered the nature of voluntary payments at 775 and the application of possible defences.

1 For recent statement, see *J&S Holdings v NRMA Insurance* (1982) 41 ALR 539 at 551; approved in *David Securities v Commonwealth Bank* (1990) 93 ALR 271 at 305-306.

2 New South Wales Law Reform Commission Report *Restitution of Benefits Conferred Under Mistake of Law*, July, 1987 at 24-25.

One special category of duress relates to money exacted under colour of office ('colore officii'). Where a public official refuses to grant some right, service or privilege to which the payee is entitled (either free of charge or for a lesser sum of money than the amount claimed) unless the latter complies with the official's requirements, then the payment or excessive payment will be regarded as exacted under duress and recoverable.³

Where a payment is made solely in submission to actual or threatened legal process, the payer will not be able to assert compulsion.⁴ Similarly, monies paid to settle an honest claim, whether or not the claim can be sustained in law, is irrecoverable, where the payer accepts the risk of mistake intending the payee to have the money at all events.⁵

Normally, then, in the absence of a statutory provision or some vitiating factor such as duress or compulsion, if a subject pays a tax or fees in response to what later turns out to be an ultra vires demand, and then seeks to recover that payment, he is successfully countered by the public official's defence of 'mistake of law'.

Peter Birks, in his essay 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights',⁶ queries whether restitutionary rights to recover payments from government and other public bodies made under *ultra vires* demands should be decided under the ordinary private law principles relating to mistaken payments.⁷

He, together with a number of other authors,⁸ have recently reminded us

3 *Sargood Brothers v The Commonwealth* (1910) 11 CLR 258, per Isaacs J at 301; *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* (1969) 121 CLR 137 per Kitto J at 146.

4 *Mason v New South Wales* (1959) 102 CLR 108 at 144 per Windeyer J.

5 *Kelly v Solari* 152 ER 24 at 26; *South Australian Cold Stores Ltd v Electricity Trust of South Australia* (1957) 98 CLR 65 at 74-75; *Mason's case* see above n 4 at 143 per Windeyer J. It will shortly become necessary to define what is meant by 'submission to an honest claim' in this area of the law, ie whether Goff and Jones' principle can be applied, (See Lord Goff of Chieveley and Gareth Jones *The Law of Restitution*, 3rd ed, Sweet and Maxwell, London at 119-135) or whether one is looking more at a 'close the transaction' principle as referred to by Windeyer J in *Mason's case*. In this paper I refrain from using the Goff and Jones statement of the principle. Sue Arrowsmith in her 'Mistake and the Role of the Submission to an Honest Claim', Burrows (ed), *Essays on the Law of Restitution*, Clarendon Press Oxford 1991 17 at 19-24 considers that the payer should be precluded from recovering only when the 'submission' amounts to a waiver in circumstances where the payer would still have paid knowing the true legal position. Finn PD (ed), *Essays on Restitution*, ch 6, Law Book Co, 1990.

6 *Ibid* at 191 and 204.

7 Hogg PW, *Liability of the Crown* The Carswell Company 2nd ed (1989) 181-186; Stoljar

8 SJ, *The Law of Quasi-Contract* 2nd ed Law Book Company (1989) 67; Birks P, 'An Introduction to the Law of Restitution' Clarendon Press (1989); Birks P, 'Restitution from Public Authorities' (1980) 33 CLP 191; McCamus JD, 'Restitutionary Recovery of Moneys Paid to a Public Authority under a Mistake of Law' (1983) 17 U Brit Col LR 233. However for a different point of view see Burrows A, 'Public Authorities, Ultra Vires and Restitution', *Essays on the Law of Restitution*, above n 5 at 39. The main thesis of his paper is that it is not the ultra vires nature of the demand that should found recovery, but that the principles of economic duress can. He considers the voluntary submission principle may preclude recovery where payment is made to obtain an advantage.

that where a tax is imposed and recovered without lawful authority by a public body, it should be recoverable on the basis that the demand was beyond the public authority's power ie, ultra vires.

The recent English Court of Appeal decision, *Woolwich Building Society v Inland Revenue Commissioners (No 2)*,⁹ has decided that recovery should be allowed on this basis but dicta suggests the application of such a general restitutionary principle should be limited to strictly ultra vires enactments. The case is discussed later in this paper.

McCamus states that, from the restitutionary point of view, the public body, in retaining the payment that has been exacted pursuant to an ultra vires demand, receives a windfall at the expense of the taxpayer. This windfall is not only unearned but also extracted by an illegitimate or unlawful exercise of statutory power by the public body.¹⁰

Birks argues that restitutionary rights where there are ultra vires exactions should fall somewhere between modified private law and absolute recovery, preferring the latter.¹¹ In reaching this point, Birks argues that a particular line of English cases, namely, *Slater v Mayor of Burnley*,¹² *William Whiteley Ltd v The King*¹³ and *Twynford v Manchester Corporation*¹⁴ have a malign influence in this area of the law and should be rejected.¹⁵ He considers that an earlier line of cases, the colore officii cases, commencing with *Morgan v Palmer*¹⁶ support an automatic right to restitution based on the illegality of the exaction.¹⁷

There is an inherent attractiveness in Birks' view that ultra vires exactions by public officials should be recoverable on the basis of the illegality of the exaction. Clearly, the duress principle is an unsatisfactory device for imposing liability on public authorities.¹⁸ The purpose of this paper is not to debate these propositions but to show that:

- (i) the earlier line of cases, whilst they can be argued in support thereof are not currently in Australia regarded as authority to support a general principle of an automatic right to restitution *based on the*

9 [1991] 4 All ER 577 discussed below. On appeal to the House of Lords, four out of five Lords said there should be no distinction between strictly ultra vires enactments and an intra vires enactment that is misconstrued. *Woolwich* [1992] STC 657 (HL) Lords Goff and Slynn in the majority at 681-682 and 702 respectively, and Lords Keith and Jauncey, dissenting at 669 and 696 respectively.

10 McCamus above n 8 at 235.

11 Birks above n 8 at 191, 195.

12 (1888) 59 LT 636.

13 (1909) 101 LT 741.

14 [1946] Ch 236.

15 Birks above n 8 at 183-184 and 191. This line of argument has received some support from the majority in *Woolwich (CA)*. See further below.

16 (1824) 2 B & C 729; 107 ER 554.

17 Birks above n 8 at 178.

18 McCamus above n 5 at 247. See Burrows above n 8 for contrary view.

illegality of the exaction. Further, there is some judicial dicta in Australian law to the effect that to class an exaction of a payment 'colore officii' as in the *Morgan v Palmer* line of cases may not of itself establish the involuntariness of the payment;

- (ii) the *William Whiteley* line of cases, which Birks argues applies a narrow private common law concept of what constitutes 'compulsion', is in Australia used to support the voluntary submission principle¹⁹ which includes the denial of recovery where the payment has been made in response to a threat of legal proceedings;
- (iii) the voluntary submission principle exemplified in the *William Whiteley* line of cases and the result of the case itself are firmly entrenched in Australian common law in spite of the view expressed by Birks that on a close reading *Mason's* case does not support the *William Whiteley* line of cases. It is this principle as opposed to any test as to what constitutes compulsion that the line of cases is used to support;²⁰
- (iv) even if the distinction between mistake of law and fact is abolished by statute or the common law, this, without more, will not affect the principle embodied in the *William Whiteley* case or line of cases. A separate question is raised as to whether the principles relating to irrecoverability of payments in response to a threat of legal proceedings or in compromise of a bona fide claim (generally referred to in this paper as the voluntary submission principle) should continue to play a part in that part of the law of restitution concerning ultra vires exactions by public officials.

I wish to emphasise that the voluntary submission principle under discussion is not that advocated by Goff and Jones but is narrower, being confined to that as defined by Windeyer J in *Mason's* case as discussed later in this paper.

Two lines of English cases

First line

In *Morgan v Palmer*, the plaintiff publican had paid a fee to the borough mayor to obtain his publican's license. The mayor was able to grant a licence but there was no statute or immemorial usage which enabled him to charge a fee in connection with the grant. All four judges held that the plaintiff publican could recover the money paid for the fee in an action for money had

¹⁹ Refer below n 80 and 81.

²⁰ Birks above n 8 at 190. What Birks means when he says this is that the private common law of duress has a narrower test of 'compulsion' but that this is not the test applied in *Mason's* case as an apprehended as opposed to an actual threat was sufficient. Refer also below n 41.

and received. All judges agreed that:

- (i) the mayor had no legal authority to demand the money in dispute; and
- (ii) since the parties were not on an equal footing, in that one party had the power of saying to the other,

'[t]hat which you require shall not be done except upon the conditions which I choose to impose'²¹ that is, only on payment of the sum could the publican obtain his license, recovery should be allowed. If the parties had been on equal terms the question would have been was the payment free and voluntary. The judges did not, for technical reasons, treat the case as one of *colore officii*.²²

A distinction appears to have been made between cases where the parties are not on an equal footing (where there is no question of voluntariness, it being presumed that the payment is involuntary) and those where they are on an equal footing (voluntariness relevant).

In *Steele v Williams*,²³ the defendant, prior to the plaintiff's clerk searching the church's Register Book of Burials and Baptisms in the parish, told the clerk that fees were to be charged for all searches and extracts from records taken. The relevant statute only allowed the defendant fees for searches and certificates. The plaintiff's clerk paid the fees after he obtained the extracts and the plaintiff sought to recover these. The court allowed recovery on the basis that the payment was not voluntary, it being immaterial whether the payment was made before or after the service was rendered.²⁴ All members accepted that the taking of the fee was illegal. Parke B considered that the payment was not voluntary because the defendant told the plaintiff's clerk 'that if he did not pay for the certificates when he wanted to make extracts, he should not be permitted to search.'²⁵ He considered the payment was necessary for the exercise of a legal right.

However Martin B considered that:

Whether the payment is voluntary has in truth nothing to do with the case. It is the duty of a person to whom an Act of Parliament gives fees, to receive what is allowed, and nothing more....more like a case of money paid without consideration to call it a voluntary payment is an abuse of language....if he is

21 *Morgan v Palmer* above n 16 at 556 per Abbott CJ. See also Bayley J at 556 and Holroyd and Littledale JJ at 557.

22 *Ibid.* Littledale at 557, Abbott CJ (with whom Bayley J agreed) at 556. See Goff and Jones, *The Law of Restitution* above n 5 at 218. The authors agree that the case is not strictly *colore officii*. See also Windeyer J in *Mason v New South Wales* above n 4 at 141.

23 (1853) 8 Exch 625; 155 E R 1502

24 Similarly in *Brocklebank Ltd v The King* [1925] 1 KB 52 where money paid after license obtained and *Bell Bros v Shire of Serpentine-Jarrahdale* above n 3.

25 *Steele v Williams* above 23 at 1504 and Platt at 1505, where he says the extracts were paid for under pressure because the defendant told the clerk the charge would be the same whether he made extracts or had certified copies.

not entitled to claim it, the money may be recovered back.²⁶

His statement can only be considered as dicta as the other two members of the court based their reasons on the involuntariness of the payments based on what the defendant said. *Morgan v Palmer* was not referred to, nor was there any discussion with respect to the necessity or otherwise for a separate finding of involuntariness in cases where exactions are made *colore officii*.²⁷

In *Hooper v Mayor of Exeter*,²⁸ the corporation of Exeter was empowered under a private Act to charge dues on the landing of limestone. An exception was made in favour of limestone landed for the purpose of being burnt into lime. The Act contained a power of distress in the case of non payment. The plaintiff builder sought to recover the dues paid, having been unaware of the exemption which applied to his lime at the time of payment.

The plaintiff's counsel argued that even though the payments were made by mistake due to the plaintiff's ignorance of the exemption, the payment was not voluntary as the collector receiving it was acting under statute, one section of which gave a power of absolute and immediate distress. He further argued that the parties were not on an equal footing and in such a case, the payment could be recovered back. After quoting *Morgan v Palmer* in support he was stopped by the court.²⁹

The judgments of Lord Coleridge CJ and Smith J are very short and as Ralph Gibson LJ observes in *Woolwich*, unsatisfactory.³⁰ Smith J stated that 'the defendants demand and receive a toll they are not entitled to',³¹ and upon the authority of *Morgan v Palmer*, and *Steele v Williams*, he allowed recovery of the erroneously paid dues which he did not consider to be voluntary payments.

Lord Coleridge CJ stated that the payment was involuntary. He appeared to consider the case as an example of a *colore officii* exaction in that he equated the payments to tolls, but based recovery on the illegality of the exaction.³²

Steele's case, then, stands in the way of this line of cases supporting recovery based on the illegality *per se* of the exaction although, unsatisfactory as the report may appear, *Hooper v Mayor of Exeter* supports it.

26 Ibid at 1505.

27 See also *Brocklebank* above n 24 where similarly no distinction is drawn. Banks LJ at 61 and Scrutton LJ at 67 both proceed on the basis of establishing involuntariness and Sargant LJ at 72 states that payment is *prima facie* recoverable.

28 (1887) 56 LJQB 457.

29 Ibid at 457.

30 *Woolwich* (CA) above n 9 at 624.

31 *Hooper* above n 28 at 458.

32 Ibid at 457-458. Goff and Jones above n 5 at 217 regard the case as an example of *colore officii*. Birks above n 8 at 198 regards case as one where recovery is based on the illegality of the exaction. See also Menzies' view in *Mason's* case above 4 at 135 demand made 'under colour of Act of Parliament'. See also the opinion of all members of the Court of Appeal in *Woolwich* above n 9 that the case does not fit into the *colore officii* category, Glidewell LJ at 588, Butler-Sloss LJ at 635 and Ralph Gibson LJ at 625.

It will be shown that the above three cases, whilst later to be accepted by the Australian authorities as examples of demands made under colour of office,³³ also have been accepted as supporting the general principle that even though a payment be made under a mistake of law it will be recoverable if it can be shown that the payment was made involuntarily eg under compulsion. If an exaction of a payment can be brought within the 'colore officii' head then the evidentiary onus of proof of involuntariness is easier.³⁴

Second line

In *Slater v Mayor of Burnley*, the plaintiff ratepayer paid water rates to the sanitary authority of the borough of Burnley. The authority was entitled by private Acts to charge a water rent at the rate of 5% per annum on the 'annual value' of the premises. The authority charged the defendant water rates at 5% on the 'gross rental' of the premises for the quarter ending 25th December, 1887. After this time, the authority altered their rating basis of 'annual value' from 'gross rental' to 'rateable value'. On this basis the plaintiff would have paid less rates for the December quarter. He brought an action to recover the 'overcharge' on the basis that it was money paid under compulsion, relying in this argument on the fact that the sanitary authority had the power to stop the water supply for non payment of the water rates. This power was not exercised nor was any threat made to exercise it.³⁵

Counsel for the sanitary authority raised the point that:

there was a question whether 'annual value' meant 'gross' or 'rateable value', but we did not go into the question whether our demand was made on the true principle or not.³⁶

It is clear that the question was not determined whether 'gross value' was an incorrect rating basis as the question never went for determination before the justices. The sanitary authority merely changed its 'annual value' for base rating assessment from 'gross rental' to 'rateable value' although it appeared to regard the latter as the proper one. Both Cave J and Wills J clearly stated that the payment was voluntary. Cave J considered that the existence of a power in an Act to cut off water did not make it a compulsory payment.³⁷

I submit that in the absence of any claim that the original rating basis was

33 For an early example see *Sargood Bros* above n 3 at 267-277 per O'Connor J. He considered the first line of cases as clearly establishing the recoverability of payments demanded colore officii as being made under duress and therefore recoverable.

34 See below where in Australia the position may very well be that even in colore officii cases, the question of voluntariness is a question of fact.

35 *Slater* above n 12 at 637.

36 *Ibid* at 638.

37 *Ibid* at 639, plaintiff had elected in court below not to give evidence as to what took place, but to rely on statutory power and could not in the Queens Bench Division take the point.

illegal, it is possible to explain the case as one where there was a *change in the law* after a payment was made.³⁸

In *William Whiteley Ltd v The King*, Whiteley employed men to serve meals to other employees in its trade. In 1906 it sought to recover back from Inland Revenue as moneys had and received, the tax paid over the previous six years with respect to these men being classed as waiters and therefore requiring licenses under the *Customs and Inland Revenue Act 1869* ('Act'). Briefly, the history of payments had been that the company's secretary had, in 1900, when returning the requisite declaration, queried with Inland Revenue whether the men needed to be licensed. The Inland Revenue Office informed the company that the men were waiters within the meaning of the Act and if the declaration was not made Whiteley would be liable for penalties. Whiteley paid for three years and queried the position again in 1903. After a similar response from Inland Revenue, Whiteley paid under protest from 1904 to 1905 (inc) but in 1906 refused to pay whereupon Whiteley was prosecuted. The men were subsequently held not to be waiters within the terms of the Act.³⁹

After accepting that monies paid under mistake of law were irrecoverable if they were paid voluntarily, Walton J examined whether the monies had been so paid. Whiteley had admitted that if the monies had been paid without any communication with Inland Revenue, the monies *could not* be recovered back. Walton J considered that the question for the Court to determine was, whether the advice of the Inland Revenue Commission that in its opinion the monies were payable and if they were not paid, proceedings would be taken for penalties, amounted to duress or compulsion. His decision clearly turned on this point. He held there was no duress or compulsion in these circumstances. *Whiteley knew all the facts* and could have resisted payment, which it did in fact do in 1906.⁴⁰ Any statement by Walton J with respect to the types of duress that may vitiate a payment were dicta⁴¹

Walton J then considered the question of whether the demand was illegally made under colour of an office, and decided not, as there was nothing in the nature of a demand for an illegal payment to perform a duty as

³⁸ The Court in *South Australian Cold Stores Ltd* above n 5 at 74 considered it a simple case of voluntary payment in that there was a simple bona fide assertion which was acceded to without any inquiry or investigation. Stoljar above n 8 at 70-71 considers the case in the same light and not as a change in the law

³⁹ *William Whiteley Ltd v Burns* [1908] 1 KB 705.

⁴⁰ *Ibid* at 745.

⁴¹ See South Australian Law Reform Committee Report Relating to the irrecoverability of Benefits obtained by reason of mistake of Law, 1984, at 9-10. where it is stated that Walton J takes a limited view of 'extortion' ie no action lies unless some right has been withheld until payment is made (I submit that Walton J at no point says this), whereas *Mason's* case takes a more lenient view as to what constitutes involuntariness. As stated previously this is part of what Birks means when he says that *Mason's case rejects the William Whiteley line*. See Windeyer J in *Mason's case* above n 4 at 141. In any event after *Bell Bros* an exaction can be colore officii if payment is made after the event has occurred for which payment was made.

in true *colore officii* cases. He clearly distinguished between payments exacted *colore officii* and other types of compulsory payments.

The case has been accepted in Australia as an example of a payment made in response to a bona fide threat to take legal proceedings, a situation which is categorised as a voluntary payment as opposed to a payment made under compulsion.

In *Twyford v Manchester Corporation* it was held that the cemetery owner, the Manchester Corporation, had wrongly charged fees from the plaintiff mason for re-cutting, re-painting and re-gilding inscriptions as this work did not fall within the term 'monumental inscription' for which a charge could be made under Section 34 of the *Burial Act 1852*. At the time of payments of the charges, the plaintiff mason protested but nevertheless paid them even though he believed himself not liable. No evidence was led that if the fees were not paid an unpleasant consequence eg exclusion from the burial ground would follow.⁴²

Romer J found that *on the evidence* there was no compulsion. He followed *Whiteley's* and *Slater's* cases. He doubted whether *Whiteley* was a true mistake of law case in view of the fact *Whiteley* on its view of the law was not liable to pay.⁴³ Romer J regarded *Slater's* case as one of a person raising a contention when a sum was demanded of him. He agreed with Walton J's statement in *Whiteley's* case:

a general rule applies, if money is paid voluntarily, without compulsion, extortion, or undue influence, without fraud by the person to whom it is paid and with full knowledge of all the facts, it cannot be recovered, although paid without consideration, or in discharge of a claim which was not due or which might have been successfully resisted.⁴⁴

Romer J considered that the plaintiff should have tested the validity of the corporation's demand by refusing to pay.

As the Australian common law now stands, apart from the reservation that an Australian court may have found there was sufficient compulsion or duress in *Twyford's* case if more evidence had been led,⁴⁵ these last three

42 *Twyford* see above n 14 per Romer J at 241.

43 'Mistake of Law' tag has traditionally encompassed ignorance of the law, mistake as to statutory construction and application and ultra vires exactions. See comments of Ralph Gibson LJ in *Woolwich* above n 9 at 626.

44 *Twyford* see above n 14 at 241 (quoted from Walton J in *Whiteley's* case at 745). The situation where money is paid 'without consideration' will come under closer scrutiny as the dicta here is at odds with the majority view in *Woolwich* (CA) above n 9. See Glidewell LJ at 583 and Butler-Sloss LJ at 633 referred to later in this paper and in the House of Lords, Lord Goff 673 and Lord Browne-Wilkinson at 697.

45 Goff and Jones above n 5 at 242-243 criticise the decision as taking too far their principle of submission to an honest claim. They consider that the necessary element of duress was present in that more than likely the mason would have been excluded from the grounds if he didn't pay the fee. Apparently no evidence was led on this point.

cases, are, despite Birk's assertion with respect to them, used in Australia to support other restitutionary principles. In *Slater's* case, there was a subsequent change in the law or as the Australian courts have described it a voluntary payment without proper enquiry into the facts. To use a phrase borrowed from the New South Wales Law Reform Commission Report the cases can be justified as representing:

really a misjudgment as to the expediency of risking the outcome of a lawsuit. Payment made with this chance element in mind is in the nature of a compromise or voluntary payment and established considerations of policy prevent relief⁴⁶

In *Whiteley's* case there was a payment following a bona fide threat of legal proceedings. Such a threat does not in law amount to compulsion.

Prior to *Mason v New South Wales*, the High Court appears to have accepted that the first line of cases are examples of payments exacted *colore officii*, one type of compulsion, and the latter, examples of voluntary payments.

In *Werrin v The Commonwealth*,⁴⁷ the plaintiff had paid sales tax on the sale of second hand goods. He had contested the Commissioner's claim to tax but ultimately paid. After a subsequent decision affirming sales tax was not payable on second hand goods he sought to recover the payment. Latham CJ described *Morgan v Palmer* and *Steele v Williams* as being cases where a person is entitled to the performance of a duty by a public officer and where the public officer insists upon receiving an additional payment as the price of performing his duty, whereas *Whiteley* supports the principle:

that if a person instead of contesting a claim, elects to pay money in order to discharge it, he cannot thereafter, because he finds out that he might have successfully contested the claim, recover the money which he so paid merely on the ground that he made a mistake of law...

He considered the facts in *Werrin* as indistinguishable from *Whiteley* and refused recovery.⁴⁸

Glidewell and Butler-Sloss L JJ, the majority in the Court of Appeal in *Woolwich*, doubt the correctness of the *Whiteley* line. Butler-Sloss LJ regards the three cases as wrongly decided,⁴⁹ whereas Glidewell LJ considers that if they are correct they can only be supported on the voluntary submission

46 New South Wales Law Reform Commission Report above n 2 at 53, or as Lowe J said in *Deacon v Transport Regulation Board* [1958] VR 458 at 460: 'The person from whom the sum is so demanded may pay the sum to avoid the inconvenience attendant on disputing the demand and to put an end to the matter'.

47 (1938) 59 CLR 150.

48 *Ibid* at 158-9. See also McTiernan J at 168. He regarded the payment as voluntary and agreed with Latham CJ's view. The other members of the Court found the action statute barred.

49 *Woolwich* above n 9 at 637.

they are correct they can only be supported on the voluntary submission principle relating to payments made 'to close the transaction'.⁵⁰

The dissenting judge, Ralph Gibson LJ sees no reason to overturn the *Whiteley* line, considering that there are the same policy reasons then as now for retaining the rules as they are.⁵¹ I submit that the Court of Appeal decision, though casting some doubt on the *Whiteley* line, does not overturn any of the decisions⁵², particularly in view of the fact that it has not yet been determined whether 'close the transaction' payments preclude recovery where the basis rests on the *Woolwich* principle.

Mason v New South Wales⁵³

The plaintiffs sued the state of New South Wales for money had and received, being the fees that the plaintiffs had paid for permits to carry their goods by motor vehicle on journeys from Victoria to New South Wales over specified routes. The state act made the carrying of goods without a permit an offence and purported to extend the particular licensing provisions to inter-state transport carriers, including the Masons. Those particular provisions of the Act were subsequently held not to apply to interstate carriers of goods as the application to them would be incompatible with the full freedom of inter-state trade, commerce and intercourse among the states guaranteed by Section 92 of the *Commonwealth Constitution*.⁵⁴

The majority of the High Court held that the payments were recoverable in an action for money had and received as being payments not voluntarily made, but under compulsion.

Dixon CJ, alone in the majority, whilst accepting the English authority, queried

that money paid to the Crown as and for taxes cannot be recovered from the Crown upon its turning out that the moneys were not exigible notwithstanding that they were demanded by the Crown, unless the circumstances were such that they would be recoverable as between subject and subject, *exemplia gratia* as involuntary payments or payments made

50 Ibid at 599-602. He relies on Lord Reading's statement in *Maskell v Horner* [1915] KB 106, at 118 to support part of his limitation to his general restitution principle as well as Windeyer J's statement in *Mason's case*. He proceeds in his judgement to use the cases to illustrate that payments made to 'close a transaction' are to be one of the exceptions to the generalised right to restitution but doubts the application of the limitation to ultra vires exactions. See below n 102. See also Butler-Sloss LJ at 636-7, who relies on Lord Reading's statement. Lord Slynn in the House of Lords considered *Twyford and Whiteley* as cases where payment was made to close the transaction at 702 (HL).

51 Ibid at 631-2.

52 For further comments concerning the voluntary submission principle see later. Obviously, with the Court of Appeal decision confirmed in the House of Lords, the *Whiteley* line of cases would now be decided differently as the ultra vires nature of the demand would provide the basis for recovery.

53 Above n 4.

54 *Hughes and Vale Pty Ltd v State of New South Wales* (1954) 93 CLR 1 (PC) reversing decision of the High Court (1953) 87 CLR 49.

*Werrin v The Commonwealth...and McTieman J.*⁵⁵

was the proper law to be applied in the case in view of the fact that the money demand was incompatible with Section 92.

Notwithstanding his view, he decided the plaintiffs must recover, as there were just and reasonable grounds for apprehending that unless payment were made their vehicle would be seized, which grounds amounted to compulsion.

Kitto J stated at the outset of his judgement that the case was a question to be resolved 'according to the same body of law as would govern the case if the parties were subject and subject',⁵⁶ ie whether the Masons had a free choice to give their money away, uninfluenced by compulsion of any sort. Kitto J rejected the proposition that the invalidity of the request for payment could be raised as a defence to the payment, and was, without more, sufficient to show that the payment was involuntary.⁵⁷ However, he considered that the plaintiffs had quite enough compulsion from the terms of the Act itself, for example

- penalty provisions
- provisions of imprisonment in default of payment
- provisions for seizure and detention of vehicles,

apart from anything that may have been done by the officers of the government. His judgement rests on this basis: the compulsion upon the plaintiffs came from the Act itself.⁵⁸ This view is contrary to that expressed by Cave J in *Slater's* case where he found there was no compulsion despite the existence of the statutory power to cut off the water, as no threat to cut off the water had been made.

Menzies J, after discussing *Morgan v Palmer*, *Steele v Williams* and *Hooper v Exeter Corporation* and several other cases, came to the conclusion that the first two were examples of payments demanded colore officii and the last a demand under colour of a private Act. He then said that:

the ultimate question in each case is whether the payment was made voluntarily or under compulsion,' and that 'Morgan's and Hooper's cases

⁵⁵ *Mason's* case above n 4 at 117. See generally at 116-7.

⁵⁶ *Ibid* at 125.

⁵⁷ *Ibid* at 126. For similar statement see Connolly J in *Bayview Gardens Pty Ltd v Muirgrave Shire Council* (1987) 65 LGRA 123, 124.

⁵⁸ *Mason's* case above n 4 at 128-9. In his judgement he is clearly of the view that less evidence of compulsion is required when the duress has been exerted by a person exercising a public employment. For similar sentiments see Nolan J's decision at first instance in *Woolwich Building Society v Inland Revenue Commissioners (No2)* [1989] 1 WLR 137 at 144: the ability of Crown or public authority to apply duress to subject is greater than that as between subject and subject, though he found none.

could be cited for this general proposition.⁵⁹

Birks asserts that Menzies 'fended off' the *William Whiteley* line of cases.⁶⁰ Menzies distinguishes:

- (i) *Slater's* case—the payment was made voluntarily and not under compulsion. Here, compulsion went much further than mere existence of seizure and detention.
- (ii) *Whiteley*, as is *Werrin*, is distinguishable as the compulsion did not proceed beyond the threat of legal proceedings.
- (iii) In *Twyford* there was no duress in the sense that the plaintiff was led to apprehend exclusion from the cemetery unless payments were made.

Menzies J cited with approval Lowe J in *Deacon's* case to the effect that the question whether a particular payment was made voluntarily or under compulsion is one of fact.⁶¹ He does, in the writer's opinion, regard the two lines of English cases as consistent in principle, in that the general principle is that the involuntariness of the payment must be established to found recovery.

Because Menzies J was satisfied, inter alia, that the plaintiffs believed that the Act would be enforced against them, in that their vehicle would be seized, and the defendant was in fact enforcing the provision of the Act, he found there was compulsion.⁶²

Windeyer J stated that the plaintiffs' right to recover depended upon proof that the moneys were paid involuntarily, ie, as a result of some extortion, coercion or compulsion in the legal sense.⁶³ Being of the opinion that this was not a true *colore officii* case, he said that whether there was compulsion was a question of fact. He too agreed with Lowe J:

In my view, a payment may be said to be voluntary in this context and for the present purposes, when the payer makes it deliberately with a knowledge of all relevant facts, and being indifferent to whether or not he be liable in law, or knowing or having reason to think himself not liable, yet intending finally to close the transaction⁶⁴... It seems plain that a man *compelled by pressure colore officii or any other form of duress* may yet say 'well I have really no

59 Ibid at 135. This is different from Birks' analysis of Menzies J's judgement. See Birks above n 8 at 189 and below n 129 where he interprets Menzies' analysis as saying the position is the same whether it is colour of office or colour of Act of Parliament. With respect I disagree. His position is as stated in this paragraph.

60 Birks n 8 at 189.

61 *Mason's* case above n 4 at 135-6. See below n 65.

62 Ibid at 132.

63 Ibid at 139.

64 This part of Windeyer J's statement is open to criticism as difficult from the evidentiary point of view to determine what is a compromise. See Stoljar above n 8 at 77. However it seems clear from his words that 'to close the transaction' the payer must have either perceived the legal point or been indifferent to it.

option but to pay, nevertheless I will not dispute the matter further. I will pay to put an end to the question.⁶⁵

Windeyer J distinguishes *Whiteley* for the same reason as *Menzies J*.⁶⁶ It is fair to conclude that generally he agreed with *Menzies J* assessment that the six cases were consistent, and with *Lowe J* in *Deacon's* case that it is still a question of fact to be determined in each case. In Windeyer's view the cases establishes the general principle that in order to recover, the plaintiffs had to establish compulsion, which despite the unsatisfactory state of the evidence, they were able to do. He considered the proper inference to be drawn from the evidence was that the vehicle seizure provisions of the Act were vigorously applied. This was well known to the plaintiffs. Their payment was made under this apprehension.⁶⁷

Fullagar and Taylor JJ agreed with both *Menzies* and *Windeyer JJ*.⁶⁸

Apart from the reservations expressed by *Dixon J*, arising from the ultra vires nature of the exactions, all judges accepted that the same body of law as would govern the case if the parties were subject and subject, applied.

Alone of the court, *McTiernan J* found the plaintiffs could not recover. He found there was no satisfactory evidence that any of the sums had been paid under duress or compulsion of any kind. *McTiernan J*⁶⁹ considered the principle of *Henderson v Folkestone Waterworks Co*⁷⁰ to be relevant: that money is irrecoverable where a subsequent judicial decision reverses the former understanding of the law ie the Privy Council decision reversing previous High Court authority in *Hughes and Vale Pty Ltd v State of New South Wales*.

McTiernan also cited with approval *Gibbs J*'s famous statement from *Brisbane v Dacres*⁷¹ to the effect that when a payment has been made under a demand of right and the payee with a full knowledge of the facts upon which

65 *Mason's* case above n 4 at 143, so that *Windeyer J* considers that even in *colore officii* cases the payment may still be voluntary if the payer pays 'to put an end to the matter'. In this respect he agrees with *Lowe J* in *Deacon's* case (See at 460 where *Lowe J* considers the statement attributed to *Platt* and *Martin BB*, in the headnote to *Steele v Williams* to the effect showing *colore officii* relationship in itself establishes the involuntariness of the payment to be incorrect) As referred to in this paper see also *Kitto* and *Menzies JJ* and *Fullagar* and *Taylor JJ* who also agree with this.

66 *Ibid* at 144.

67 *Ibid* at 145-146. Also *Windeyer J* accepted the American Restatement of the Law of Restitution, Paragraph (75) which requires the payer to reasonably believe that if the payment is not made the means taken to enforce collection of the tax or assessment would subject him to serious risk of imprisonment or of the loss of possession of his things or any other substantial loss.

68 *Ibid* at 123-123 and 129-130 respectively.

69 *Ibid* at 122.

70 (1885) 1 TLR 329. *Butler* would consider his view was not apt in view of the ultra vires nature of the exaction before the Court in *Mason's* case. See *Butler PA* 'Mistaken Payments, Change of Position and Restitution' in *Essays on Restitution*, *Finn PD* (ed), Law Book Company 1990, at 105-106.

71 (1813) 5 Taunt 143; 128 ER 641, see *Mason's* case above n 4 at 123.

the demand is founded, pays, he does so voluntarily. By submitting to a demand involving doubtful questions of law in lieu of litigating, he closes the transaction between them. He therefore considered, firstly, the case was a simple change of law, and that in any event, the Masons were fully aware of the legal position, but paid anyway. It is interesting to note that McTiernan J, alone of the Court, heard the evidence at first instance.⁷²

Summary of Mason's case

It seems clear from decisions subsequent to *Mason's* case that Dixon CJ's statement is the relevant law to be applied in Australia where exactions are made by governmental or other public bodies. Further *Mason's* case says that in general, it must be established in order to show that a payment has been made under compulsion that:

- (i) there was a fear that, if it were not paid, the payee would take some step, other than invoking legal process, which would cause harm to the payer; and
- (ii) that this fear was reasonably caused or well founded.⁷³

The compulsion necessary to support an action for money had and received is not that of an urgent and pressing necessity.

Whilst accepting that as a general proposition it is easier from an evidentiary

72 *Mason's* case above n 4 at 109, the action was tried by McTiernan J who directed that the case be argued before the Full Court of the High Court.

73 *Air India v The Commonwealth* [1977] NSWLR 449 at 454-5. The Court here made clear that a distinction must be kept between money exacted under colour of office and principles of general application in this field; See for further confirmation of *Air India's* interpretation of *Mason's* case together with the acceptance of the voluntary submission principle to this area of the law involving exactions by public officials the following, *Cam & Sons Pty Ltd v Ramsay* (1960) 104 CLR 247, particularly McTiernan J at 261 and Menzies J at 271; *Intercontinental Packers Pty Ltd v Harvey* [1969] QdR 159 particularly at 162-3 per Wanstall J and at 174-177 Lucas J with whom Hart and Douglas JJ agreed (no discussion here of *colore officii* cases. *Mason's* case accepted with acknowledgment that there is no compulsion if there is a threat of legal proceedings or a payment to close the transaction. Argument turned on whether protests accompanying payment evidenced in themselves compulsion, payment held to be voluntary 'to close the transaction'); *Initial Constructions v Baulkham Hills* (1973) 27 LGRA 139, at 144-146, *Mason's* case followed to determine if payment involuntary; *J&S Holdings v NRMA Insurance* above n 1 at 551, *Whiteley* decision supported; *David Securities* above n 1 at 305-6 (note that this and previous case from private law of compulsion); *Bayview Gardens Pty Ltd v Mulgrave Shire Council* above n 57 at 126-7, *Whiteley* decision followed; NSW Law Reform Commission Report above n 2 at 18; Goff and Jones above n 5 at 207, 218 accept *Whiteley's* case as supporting 'that to threaten or to institute a civil action in good faith does not constitute duress', but at 242-3 consider *Twyford's* case takes the voluntary submission principle too far. *Royal Insurance Australia Ltd v Comptroller of Stamps* 1991 ACL 6 405 VIC 4 decision of Beach J of Supreme Court. Statute gave discretion to Comptroller whether to allow recovery of overpaid stamp duty and Comptroller refused to exercise discretion in favour of Plaintiff insurance company as a number of policy holders had paid the duty and not the Plaintiff. *Per curiam Werrin* followed and as stamp duty paid voluntarily under a mistake of law it was irrecoverable.

point of view to establish that the payment will be involuntary if the exaction of the payment is *colore officii* the majority of the court do not appear to subscribe to this as an absolute proposition. It is a question of fact in each case.⁷⁴

Mason's case and the subsequent cases show a healthy respect also for the *William Whiteley* line of cases,⁷⁵ none more so than the recent Queensland Full Court decision in *Bayview Gardens Pty Ltd v Mulgrave Shire Council*.

In this case, the developer brought proceedings to recover payments it had made to the Mulgrave Shire Council. It transpired that the council had no authority to require the increased payments as a condition of granting subdivisional approval. What at first appeared to be an example of a *colore officii* case was held not to be, in that the developer was not absolutely entitled to subdivisional approval. The council had power to approve or not to approve subject to conditions and a further right of appeal lay to the Local Government Court.⁷⁶ In any event, Connolly J (with whom Kelly SPJ and Moynihan J agreed) was not of the view that if the payment was *colore officii*, then that, in itself established the involuntariness of the payment:

Voluntariness is, after all, a question of fact: see *Mason's* case (at 136) per Menzies J. and (at 143) per Windeyer J...but it may, nevertheless, appear that, in fact, it suited the applicant very well to make the payment.⁷⁷

He considered the developer:

knew the Council may not have power to require payment of the extra money; and
was aware that the Council may not have approved the subdivision without the extra money;

but in view of the buoyant and competitive real estate market, elected to pay rather than risk not obtaining approval.⁷⁸ Connolly J held *Werrin's* case directly in point, as was *Whiteley's*. In applying them, he expressly approved

⁷⁴ This point was not discussed in *Bell Bros v Shire of Serpentine-Jarrahdale* above n 3 except for McTiernan J quoting Lowe J's dicta in *Deacon's* case, see 142. For discussion of *Bell Bros* see below.

⁷⁵ Refer above n 73.

⁷⁶ It is important to note that in this case, if the condition requiring payment was invalid, it did not necessarily mean that approval stood free of the void condition or that the council was bound to give approval subject to no other condition than that declared invalid: see 125.

⁷⁷ *Bayview Gardens* above n 57 at 128 and see also Lucas J in *Intercontinental Packers* above n 73 at 173.

⁷⁸ Apart from *Bayview Gardens* see also *Rockdale Municipal Council v Tandel Corporation Pty Ltd* (1974) 34 LGRA 196 at 197, per Moffat J where voluntary submission principle could operate where plaintiff submits to gain a commercial advantage. Even Birks above n 8 at 198 appeared to accept this. This approach has also been applied in Canada. See *Foster GG Developments Ltd v Township of Langley* 102 DLR (3d) 730 where payment was made to obtain otherwise unobtainable approval to subdivide in a situation where developer knew of invalidity of bylaw which imposed excessive costs. The decision was followed in *Glidurray Holdings v Qualicum Beach* 129 DLR (3d) 599.

Windeyer J's view of the law as expressed by him in *Mason's* case.

McCamus considers there is room for the voluntary submission principle in the area of exactions by public officials but may limit the range to situations where parties have some awareness of the potential for the legal uncertainties in their positions.⁷⁹ Stoljar considers the voluntary submission principle should have no application.⁸⁰ Ralph Gibson LJ, though dissenting in *Woolwich*, considers that if one accepts the principle of recovery of payments on an ultra vires basis then it is doubtful whether there is room for the operation of a 'close the transaction'⁸¹ principle.⁸²

There is at the local government level, at least, some concern as to the legitimacy from a policy point of view, of the operation of the common law rules as discussed in this paper. Rather than averting any perceived evil of disruption to the public purse, the frequently quoted policy reason for retaining the rules in their present form,⁸³ the rule in this area can be seen to encourage invalid exactions.

Most developers would be sufficiently astute to realise the ultra vires nature of certain exactions, particularly where they are legally represented, but nevertheless as in *Bayview Gardens*, pay to obtain a commercial advantage and thereby preclude themselves under the voluntary submission 'close the transaction' principle from later seeking recovery on the ground of compulsion.

In view of the importance of the 'voluntary submission principle' in this

79 Paper above n 8 at 272. Certainly, Windeyer J in *Mason's* case appeared to place this 'caveat' on the principle at 143. Glidewell J in *Woolwich* (CA), above n 9, agreed with Windeyer J's statement and Lord Jauncey in the House of Lords at 693 considered the payer must be aware of all relevant circumstances including legal. Windeyer J's statement was quoted with approval in the Queensland cases of *Intercontinental Packers Pty Ltd v Harvey* above n 73 at 162 per Wanstall J, as he then was and in *Bayview Gardens* above n 57 at 127 per Connolly J. See also Maddaugh and McCamus, *The Law of Restitution*, Canada Law Book Inc, Ontario, 1990 at 254-5 where the authors consider that the law's policy of encouraging finality should in addition to allowing for compromises, preclude recovery in 'circumstances where it is reasonable to assume that the payment, once made, is intended to be final'.

80 Stoljar above n 8 at 71-74, 90-1. He also refers to overlap in 'payments in response to legal process' and 'compromise of a dispute' and wrongful generalisation of voluntary payments in this area.

81 In respect to this phrase used by the members of the Court, no distinction appears to have been drawn between the situation where a payment is made in response to a threat of legal proceedings as in *Whiteley* or a situation as in *South Australian Cold Stores*. See Glidewell LJ at 599-600, Butler-Sloss LJ at 637 who treats *Whiteley* as an example of a voluntary payment to close the transaction. I submit that Ralph Gibson LJ at 631 more correctly states the position '*Whiteley*.....based on the rule which denies recovery of voluntary payments, and the principle that the threat of bona fide legal proceedings is not in law duress'.

82 *Woolwich* (CA) above n 9 at 619-620. For comments of Glidewell LJ refer to below and n 102. Lord Goff in the House of Lords at 697 considered that where recovery is based on the ultra vires nature of the demand, considerations of voluntariness are irrelevant.

83 For the most recent statement see *Woolwich* (CA) above n 9 per Ralph Gibson LJ at 621-2.

area of the law, more thought needs to be given as to what is meant by a voluntary payment including consideration of whether doubt or uncertainty precludes recovery and whether with ultra vires demands the question of voluntariness should be at all relevant. Of equal importance to determine is whether the receipt of a benefit or advantage to which the payer is not otherwise entitled should similarly preclude recovery.

Bell Bros.

The respondent shire enacted by-laws in purported exercise of statutory powers conferred upon it, to institute a scheme for the licensing of quarrying operations. The by-laws provided that no person could carry on quarrying operations without obtaining a license from the board, and by-law 7 provided that a fee was payable for the grant of the license. By-law 7 was subsequently held by the High Court to be invalid, and the appellant sought to recover fees from the council, paid as money had and received, being monies unlawfully demanded by the defendant *colore officii* or alternatively, being monies paid by mistake.⁸⁴

All members of the court, except for some hesitation by Windeyer J⁸⁵ considered that the case was a true *colore officii* case. The shire council had the power to grant a license and could not use this power of grant to exact a fee. In such cases, it is enough to show the relationship of the parties.⁸⁶ Kitto J expressly agreed with and adopted Dixon CJ's statement of the applicable law from *Mason's* case.⁸⁷

Whilst the legal artificiality of the situation and the possibility of absurd results following can be appreciated,⁸⁸ the result is perfectly consistent with *Mason's* case. It had in fact been accepted in *Mason's* case that if the relationship of the parties was *colore officii* then that was all that was needed to show the involuntariness of the payment (subject to the qualification that the question was one of fact in all cases).⁸⁹

84 Note Section 23(1) *Law Reform Property Perpetuities and Succession Act* 1962 (WA) abolishes the distinction between mistakes of law and fact.

85 *Bell Bros* above n 3 at 147.

86 *Ibid.* McTiernan J 142, Kitto J 145 with whom Barwick J at 140 and Menzies J at 146 agreed, Windeyer at 147. Only McTiernan J at 142 adverted to Lowe J's dicta in *Deacon's* case. Stoljar above n 8 at 70 in discussing Bell's case considers the case by implication overrides any possible suggestion that recovery in such circumstances can be barred by the plea of the payment being voluntary or made under mistake of law.

87 *Ibid* at 145.

88 Birks' *An Introduction of the Law of Restitution* above n 8 at 190-1, and 'Restitution from Public Authorities' above n 8 at 196-198.

89 *Mason* above n 4 see Menzies at 134-5, and Windeyer at 142 who says:

The importance of the matter is that the plaintiffs cannot succeed simply because of the superior position of the defendant. They must go further and establish that there was, in a legal sense, compulsion by something actually done or threatened, something beyond the implication of duress arising from a demand by persons in authority which suffices in a true *colore officii* case. Further the plaintiffs must establish that they actually paid because of this compulsion and not voluntarily despite it.

The difficulty surviving the case is whether if an exaction is *colore officii*, that as Stoljar suggests, overrides any possible plea of mistake or voluntariness to prevent recovery, particularly as existing statements to the contrary eg as in the *Mason and Bayview Gardens* cases are dicta (being cases not directly concerned with *colore officii* exactions) and the *Bell Bros* case is a High Court decision directly concerned with a *colore officii* exaction.

Woolwich Building Society (No 2)

The Court of Appeal decision has many implications, not the least of which is the possible progression (at least in England) towards recognition by the courts of a 'generalised right to restitution'.⁹⁰ However, this paper discusses the decision in so far as it is relevant to the main theses of this paper and in particular the application of the voluntary submission principle in limiting the recovery of payments exacted *ultra vires*.

The facts of the case were briefly as follows. Woolwich had paid to the Inland Revenue by instalments, nearly £57,000,000 representing tax assessed against it on interest and dividends paid to its investors and depositors between the end of September 1985 and the beginning of March 1986. The tax had been demanded by the Inland Revenue under certain 1986 building society tax regulations which were eventually found by the House of Lords to be invalid.⁹¹ Both prior to the payments of the tax and immediately after payments Woolwich disputed the validity of the 1986 regulations.

Immediately after payment of the tax instalments, Woolwich applied for judicial review of the regulations and a month later issued a writ to recover the amount as money had and received together with interest pursuant to Section 35A of the UK *Supreme Court Act*. That section allows the court to award simple interest on the recovery of a judgement debt for all or part of the period between the date when the cause of action arose and in the case of any sum paid before judgement, the date of payment.

Pursuant to the judicial review proceedings, the Inland Revenue repaid to Woolwich the £57,000,000 together with interest from the date of the judgment. Woolwich pursued the question of recovery of the interest from the dates of payment before Nolan J at first instance. Nolan J found that the repayment had been made by the Inland Revenue under an implied agreement that repayment would be dependent on the outcome of the judicial proceedings (under the principle enunciated by Vaisey J in *Sebel Products Ltd v Customs and Excise Comrs*).⁹² Hence no interest could be awarded in respect to any period before that date.⁹³

90 *Woolwich* above n 9. See Butler-Sloss LJ at 634.

91 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1991] 4 All ER 92.

92 [1949] 1 All ER 729 at 731

93 [1989] 1 WLR 137.

In order to claim interest from the actual dates of payment under section 35A, Woolwich needed to show that a cause of action arose as at the dates of payment. In this respect, as before Nolan J, Woolwich, in the Court of Appeal contended that a cause of action arose at 'payment' because inter alia, either:

- (i) the tax payments were recoverable under a general restitutionary principle that if a subject makes a payment in response to an unlawful demand by or on behalf of the Crown for tax, there is a presumption that he immediately acquires a right to be repaid; or alternatively
- (ii) that Woolwich had paid under duress and thus had an immediate right to claim repayment.

The contentions of the Crown were that:

- (i) there was no such general restitutionary principle; and
- (ii) the facts did not come within established principles of restitution of sums paid under duress.

Both Nolan J at first instance, and Butler-Sloss and Ralph Gibson L JJ in the Court of Appeal found that there was no duress though it was noted that in the circumstances Woolwich had little choice but to pay.⁹⁴ The Court of Appeal by a 2:1 majority found for Woolwich. The Court decided that both in principle and from the decided cases there is a general restitutionary principle of repayment of tax unlawfully demanded which can be recovered in an action for money had been received.

In finding 'in principle', apart from relying on the fourth paragraph of section 1 of the *Bill of Rights* (1688), which makes illegal levying money for use of the Crown without taxation, both Glidewell and Butler-Sloss L JJ relied on Lord Mansfield CJ's description of the basis of the action for money had and received, ie for restitution:

it 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; or an undue advantage taken of the plaintiffs' situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.⁹⁵

Butler-Sloss LJ emphasised the point made by Glidewell LJ:

that a distinction should be drawn between public and private law. In the category of public law, someone with actual or ostensible authority to require

94 *Woolwich* per Ralph Gibson LJ at 617 and Butler-Sloss LJ at 637.

95 *Moses v Macferlan* [1558-1774] All ER 581 at 585, quoted in *Woolwich* above n 9 by Glidewell LJ at 583. See Butler-Sloss LJ at 633.

payment in respect of tax, duty, licence fee or other payment on behalf of central or local government makes the demand for payment by a private individual or company or other organisation. In respect of such a demand no question of consideration arises. If demanded unlawfully, however, is it, to use Lord Mansfield CJ's phrase, money obtained by imposition, express or implied, which the authority is obliged by the ties of natural justice and equity to repay to the payer?⁹⁶

It is obvious that the Inland Revenue had not given, offered or purported to give any consideration for the payment from Woolwich in the sense that the demand was without legal foundation, and in that respect fell within one of the categories whereby 'the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money'. Both found further support for recognition of the general principle in the speeches of Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*⁹⁷ and Lord Bridge in *Tower Hamlets London BC v Chetnik Developments Ltd*,⁹⁸ who used a different tack, ie that Inland Revenue authorities should behave in the same high minded way expected by the Courts of their own officers and therefore could not retain taxes paid under a mistake of law.

As far as the first line of cases referred to above were concerned, both judges considered that the line supported the general principle and considered that *Hooper v Mayor of Exeter* was not a *colore officii* case and 'going beyond the boundaries' therefore supported *Woolwich's* contention.⁹⁹ Their consideration of the *Whiteley* line has already been mentioned.¹⁰⁰

Despite deciding that there was a generalised right of recovery, Glidewell and Butler-Sloss LJ in holding the court bound by the decisions in *Maskell v Horner* and *National Pari-Mutuel v R*,¹⁰¹ excepted from its ambit voluntary payments 'to close the transaction' and mistake of law (the latter qualified by Glidewell LJ to cover only misinterpretation by the payer of statutory provisions). In fact Glidewell LJ went further. Though not deciding, he felt that it was arguable that a general restitutionary right should not be subject to either limitation but that these two limitations would only apply in a situation where what is in issue is the proper interpretation of a statute, not an *ultra vires* regulation.¹⁰² Such statements are of course *dicta* as neither principle

96 *Woolwich* above n 9 at 634.

97 [1943] AC 32 at 61. See Glidewell LJ at 584 and Butler-Sloss LJ at 633.

98 [1988] AC 858 at 876-877. See Glidewell LJ at 591 and Butler-Sloss LJ at 635.

99 *Woolwich* above n 9. Glidewell LJ at 588 and Butler-Sloss LJ at 635. Both judges also rely on *Campbell v Hall* [1558-1774] All ER 252. However see Ralph Gibson LJ at 624-5, *Hooper* treated in many cases subsequent to it as *colore officii*. (Similar comments in House of Lords).

100 See above n 21 et seq.

101 (1930) 47 TLR 110.

102 *Woolwich* above n 9 at 599-602. See also Butler-Sloss LJ at 636 who considered that a plaintiff cannot succeed where there is a payment made to close the transaction or a mistake of law. Glidewell LJ queries as does Ralph Gibson LJ at 620 whether if recovery were to be based on the illegality of the demand recovery would be lost because the

was held applicable in the case. Presumably what he meant by such a statement is that if for example the question of compulsion arose where parties have misinterpreted the law, then it is still open to the recipient to argue that the payment was not made under compulsion but to close the transaction.

The dissenting judge, Ralph Gibson LJ, while acknowledging that support by way of dicta could be found in the decided cases for the application of a general restitutionary principle for repayment of tax unlawfully demanded, declined to upset the policy based rules that have long been part of the law and 'a central part of the law of restitution',¹⁰³ including those in the *Whiteley* line. He found unpalatable the making of a decision that would have the consequence that the mistake of law rule would be set aside in cases of ultra vires demands if *National Pari-Mutuel Association Ltd v R*, was to be distinguished in the way suggested by Glidewell LJ,¹⁰⁴ but would be applicable in cases of mere misconstruction by reason of the decision in *National Pari-Mutuel* ie he saw no relevant difference between honest misconstruction of a statutory provision and honest assertion of the validity of an invalid statutory provision. Ralph Gibson LJ thought it should be left to the legislature to intervene if long standing authorities were to be overruled.

Conclusion on relevant Australian law

In conclusion I submit, then, that in Australia the private common law rules as to mistaken payments that apply between subject and subject, as summarised in the introduction to this paper, have been transplanted into the realm of public and constitutional law and that these common law rules are firmly entrenched.

The test as to what constitutes compulsion so as to enable a payer to recover is that enunciated in *Mason's* case and is, as argued by Birks, more lenient than the test of compulsion applied between subject and subject.

In spite of the more lenient test, the case law, including *Mason's* case, recognises that recovery should not be available if the payment was made in response to a threat to issue legal proceedings (of which *Whiteley* has been, without exception, treated as an example) or that payment was to compromise a disputed bona fide claim. The discussion in this country of the *Whiteley* case and others in the *Whiteley* line has invariably been with

payer paid to close the transaction. Their dicta is contrary to that of Lords Bridge and Goff in House of Lords in *Tower Hamlets BC v Chetnik Developments Ltd* [1988] 1 All ER 961 at 972 and 974 respectively although it should be noted that the dicta in the House of Lords concerned a statutory discretion where the Court would have disallowed recovery where mistake of fact and law were placed on an equal footing as opposed to recovery of payments on the basis that the demand was ultra vires as in *Woolwich*. Refer above n 9 and n 82 for views in the House of Lords.

103 Ibid at 631.

104 Ibid at 600-1.

reference to these principles (often referred to generally as the voluntary submission principle) and not in relation to any:

perceived test as to what, in law, constitutes compulsion;¹⁰⁵ or requirement as to when a payment must be made in response to a demand to render an exaction *colore officii*.

It follows that since at least *Werrin's* case in 1942 to the present¹⁰⁶ *Whiteley's* case and others in the *Whiteley* line have been supported as an example of a voluntary payment and not one made under compulsion and this line of demarcation has been maintained.

The Australian courts in discussing the principles relating to payments exacted under compulsion have kept a firm distinction between payments exacted *colore officii* and other payments made under duress or compulsion. In the former the payment does not have to precede the grant of the right which has been withheld. There is some judicial dicta to the effect that it will in each case be a question of fact whether the payment was voluntary. Payment exacted *colore officii* seemingly accepted in England¹⁰⁷ prior to *Woolwich*, as in itself sufficient to establish the involuntariness of the payment may in an appropriate case in Australia no longer be applied if it could be shown that the payment was made *despite the relationship* eg to obtain a commercial advantage as in the *Bayview Gardens* case.

I further submit that Birks' assertion with respect to *Mason's* case may be misleading in that a reader may reach the conclusion that *Mason's* case rejected *Whiteley's* case, particularly in view of the fact that Birks does not in his paper discuss the *Whiteley* line with respect to the voluntary submission principle above referred to, this being the basis on which the case has been supported in Australia. In the discussion of any test of compulsion there is an overlap when one talks about voluntary payments in the context of illegal exactions by public officials. The compulsion can simply lie in the fact that the citizen has to pay what is demanded of him¹⁰⁸ and in this context there can be no true voluntary payment, but as stated, this is not the way the Australian courts have proceeded.

It could in any event be argued that Australian law has for some time

105 Any claim that a payment is vitiated by duress or compulsion is in many instances liable to be met by an assertion that the money was paid under threat of legal process or compromise to a disputed claim and of course it will in many instances be a fine line to draw. See eg Beatson J 'Duress as a vitiating factor in Contract' [1974] CLJ 97 particularly at 100-103.

106 *David Securities* above n 1 at 306 (1990) for case between subject and subject and *Bayview Gardens* above n 57 (1987) and *Royal Insurance Australia Ltd v Comptroller of Stamps*, (1991) (see above n 73 at 67) for cases between subject and public body.

107 See *Morgan v Palmer* above n 16 but query *Brocklebank Ltd v The King* above n 24 which does not appear to support this. Involuntariness must still be shown.

108 See *Stoljar* above n 8 at 91; *McCamus* above n 8 at 245; Birks' Essay above n 8 at 178; *Butler* above n 8 at 103; Kitto J in *Mason's* case above n 4 at 128.

adopted a more lenient notion than the English courts of what constitutes compulsion, be it as between subject and subject or a payment exacted by public officials under compulsion.¹⁰⁹ Further Australian law has probably already reached the second modified private law position put forward by Birks. In discussing the possibility of two versions of this position Birks cites Collins for the first. Collins suggests that in illegal exactions by public officials a presumption of involuntariness would be raised including in *colore officii* cases unless the contrary was proved. In the second version the authority, in addition to the ultra vires demand, must be in a position to apply pressure, other than by litigation.¹¹⁰ Birks prefers recovery based on the illegality of the exaction.¹¹¹

In view of the situations that can arise eg *Bayview Gardens*, perhaps more thought needs to be given as to whether the voluntary submission principle should have a role to play where there are ultra vires exactions by public officials, particularly at the local government level where some benefit is often received for the payment.

As the current state of the common law in Australia accepts that when a payment which is illegally exacted is made under a 'mistake of law' the involuntariness of the payment must be established in order to recover it, then only a decision of the High Court or reform by statute could allow recovery based on the illegality per se of the exaction.¹¹²

Should the question arise for reconsideration in the High Court, *Woolwich* would be strong persuasive authority. In as much as the *Woolwich* (CA) decision relied to some extent on the judgement of Kitto J in *Mason's* case for support, it should not be overlooked that the majority view of what was necessary for compulsion to be established differed from Kitto J.

As stated earlier in of this paper, whilst it is clear that Kitto J considered less evidence of compulsion needs to be shown in a claim by a subject against the state, he very clearly stated that he allowed recovery on the basis of compulsion and that recovery could not be based on the invalidity of the

109 See eg Goff and Jones above n 5 at 229-232; *Smith v Charlick Ltd.* (1923) 34 CLR 38 at 56 per Isaacs J inc 'right of a person'; Report of the Law Reform Committee of South Australia above n 44 at 3-4 and 10-11.

110 Essay above n 4 at 191-2. See Collins, 'Restitution from Public Authorities', [1984] 29 McGill LJ 407 at 410-413 and 430-437. Collins considers that where public officials are involved, there should be a presumption of recovery but that is rebutted if the defendant can prove that the payment was voluntary. He rejects Birks' ultra vires theory as a ground for restitution as it would allow recovery of a payment made as a voluntary settlement and this is contrary to the general policy and rules of restitution which at least with respect to payments, concentrates on the payer's voluntariness.

111 Essay above n 8 at p 195.

112 The High Court could adopt Dixon CJ's view in *Mason's* case above n 4 at 117 and Wilson J's dissenting judgement in *Air Canada v British Columbia* [1989] 1 SCR 1161 at 1214-5 or the House of Lords decision in *Woolwich*; See also *David Securities* above n 1 at 305, only the High Court can remove the distinction between fact and law in respect of the common law claims for recovery of money paid by mistake.

exaction alone. The making of this statement does not deny that adopting Kitto J's approach leads to the same result as the *Woolwich* majority. Despite the dicta of Dixon J also referred to, he too based his decision on the presence of compulsion. I submit that it is also questionable whether O'Connor's statement in *Sargood Bros* used by the majority in *Woolwich* represents the accepted view of what constitutes the test of duress 'colore officii' in Australia.¹¹³

Possible judicial or statutory reforms and some defences or restrictions on recovery

As a starting point it is no answer to suggest that the *judicial or statutory abolition* of the distinction between mistakes of law and fact will provide a complete solution to restitutionary claims for invalid exactions from governmental or other public authorities.¹¹⁴ An example from each will suffice.

Judicial abolition

A recent Canadian case, *Air Canada v British Columbia*¹¹⁵ not only illustrates in a unique way the dichotomy in the differing approaches to the law in the area adopted in Australia, England and Canada¹¹⁶, but also indicates that even more intricate problems may arise with a court based abolition of the mistake of law rule. The case involved the attempted recovery by Air Canada of gasoline taxes paid but wrongly levied by British Columbia as being beyond constitutional powers as an indirect tax. The dicta¹¹⁷ of La Forest J whilst

113 *Woolwich* above n 9. See Glidewell LJ at 594 and Butler-Sloss LJ at 636. It should be noted that Kitto J at 146 quoted from Isaacs J's judgement in *Sargood Bros v The Commonwealth* (1910) 11 CLR 258 at 301, and not O'Connor J's at 276-7. Reliance therefore on O'Connor J's statement as the test of duress 'colore officii' in Australia (as advocated by Collins at 432-3) or as a basis for support in Australian case law to support the theory of ultra vires as a ground for recovery (the majority in *Woolwich*), is, I submit, misplaced.

114 In this area McCamus recommends only the abolition of the fact-law distinction, above n 8 at 273.

115 [1989] 1 SCR 1161.

116 The current position would appear to be that in Australia compulsion and duress 'colore officii' are the only practical grounds for recovery. In England there is a general restitutionary right of recovery based on the ultra vires nature of the demand but it is yet to be determined whether this right exists where a payment is made to close the transaction or where there is a mistake of law. If Glidewell LJ's approach is followed, the mistake may be limited to misconstruction of the provisions of an intra vires statute. Present dicta in Canada, in spite of acceptance of the doctrine of unjust enrichment which distinguishes it from the other two jurisdictions, denies recovery at least at the constitutional level but would allow a mistake of law in the misconstruction of an intra vires statute to found recovery.

117 *Air Canada* above n 115 at 1206-7. La Forest J delivered the judgement also on behalf of Lamer and L'Heureux-Dube JJ. Note whilst Beetz and McIntyre JJ agree with La Forest J's reasoning they were of the view that the Gasoline Tax Act in question was constitutionally valid and did not want to express an opinion on the mistake of law defence either in private or public law, 1171 and 1172 respectively. Wilson J alone dissented.

favouring the abolition of the mistake of fact-law distinction, indicates that he considers the policy of non disruption to government finances to be paramount.¹¹⁸ In spite of a preference for abolishing the mistake of law rule he would nevertheless hold that there should generally be a rule against recovery of ultra vires taxes, at least at the constitutional level,¹¹⁹ with an exception created where the tax is misapplied, for example construed in error so as to impose liability on a party not liable on the true construction of the statute. Perhaps, on his view *Whiteley* would fall into this category.¹²⁰ If he favoured retention of a restitutionary cause of action in this field he would have found that none was available as the province had not been enriched at the Airline's expense. In coming to his view, La Forest J seems to have been particularly persuaded by the facts:

- (i) the issue in the case was technical as British Columbia had the power to levy the tax in the province. The statute was not enacted in its proper form.¹²¹
- (ii) the airline passed the tax on to its passengers¹²² and therefore the province was not unjustly enriched at the expense of the airline.
- (iii) the total number of taxpayers that would be affected by the decision would be in the millions. In the three actions before the Court over six million dollars was involved.¹²³

118 Ibid at 1204.

119 He referred to both *Vancouver Growers Ltd v Snow Ltd* [1937] 4 DLR 128 and *Glidurray Holdings Ltd* op cit in support. It is not clear whether he used 'constitutional' in the strict or a general context ie referring to the specific field of constitutional law or generally to legislation enacted 'beyond power'. The first case is an example of the former where the ultra vires imposition brought into question the division of powers between the province and the dominion, and the second is an example of the latter, so perhaps it is reasonable to assume he was referring generally to ultra vires enactments.

120 His view is in contrast to that of Glidewell LJ in *Woolwich* above n 9.

121 Ibid at 1207. See for similar sympathies Stoljar above n 8 at 73.

122 Ibid at 1202-1203; some support from McCamus, paper above n 8 at 258-9 reasons may arise where inequitable to grant relief; certain members of the High Court in *Mason's* case would not accept that this fact would deprive the plaintiff of recovery, see Kitto J 129, Menzies J 136 (although may help to show that the person who paid the charges in the first instance did so voluntarily because he would not be out of pocket by doing so), Windeyer J at 138. McTiernan J at 122 who would agree with La Forest J; see however Connolly J in *Bayview Gardens* case, helpful fact in determining if sums paid voluntarily as a reasonable inference that sums were covered by selling price of the land and thus recoverable from the purchasers and see Beach J in *Royal Insurance* (refer above n 73). See generally as to the whether passing on the economic burden of the tax should be a ground to limit recovery, Clifford L Pannam, 'The Recovery of Unconstitutional Taxes in Australia and the United States', 42 *Texas Law Review* 777 at 804-806. He considers it should be. The question does not appear to have arisen in England. Gareth Jones in his essay 'The Law of Restitution: The Past and the Future', *Essays on the Law of Restitution*, Burrows A (ed), Clarendon Press, Oxford, 1991, raises objections to this part of La Forest J's judgement, see at 9. Andrew Burrows in his essay in the same collection at 59 considers the 'defence' misconceived in principle because to pass on one's loss does not necessarily mean that one recoups that loss. He considers a mitigation defence may be viable.

123 Ibid at 1205

On La Forest J's view, then, abolition of the fact-law distinction would not assist the taxpayer unless a misapplication of the law was involved.¹²⁴

Statutory abolition

Sections 124(1) of the *Property Law Act* (WA) and 94A of the *Judicature Act* 1908 (NZ) both provide that where relief would be granted if the mistake was wholly one of fact that relief shall not be denied by reason only that the mistake is one of law whether or not it is in any degree also one of fact.¹²⁵

The enactment of this provision does not, I would submit, affect the outcome of the situation in *Whiteley's* case or any extension thereof ie payment made in submission to actual or threatened litigation or payment in voluntary submission to an honest claim where in both instances the person paying could at any time have withheld payment and tested in a court the issue of liability. The payee can raise these 'defences' whether or not an initial mistake of law or fact is made by the payer by arguing that it was not the mistake that caused the payment.

The recommendation of the New South Wales Law Reform Commission is to leave the voluntary submission principle intact where payments exacted pursuant to ultra vires demands are concerned.¹²⁶ Arguably then, no change would occur in the common law approach, as the old test whether the payment was made under 'duress, co-ercion or compulsion' would be used in assessing the involuntariness of the payment by the payer to negative the assertion by the payee that the payment was made voluntarily (not being caused by the mistake).

La Forest J in *Air Canada* suggests that there should be no recovery where payment is made to compromise an honest claim.¹²⁷

Some defences or restrictions on recovery of monies exacted ultra vires¹²⁸

If recovery of exactions were to be allowed on the basis of the ultra vires doctrine the question arises whether the 'authority' should be able to raise any defences to recovery.

124 Contrary view expressed by Wilson J at 1213-1216, in that she considered that not only should the mistake of law rule go but in any event should not be extended to the constitutional field. She would have allowed recovery based on the ultra vires exaction alone. Her views are preferred by Birks' Essay above n 8 at 173-4 and Hogg *Liability of the Crown* above n 8 at 184-186.

125 The same statutory enactment is recommended by the New South Wales Law Reform Commission. See Report above n 2 par 5.17 (Draft Bill Clauses 5 and 7).

126 Report above n 2 pars 3.9, 3.14, 3.29 and 5.5. Contrast Stoljar above n 8 at 70 where in this area of the law these matters should be irrelevant. Refer also to above n 82.

127 Above n 115 at 1200. He regards the finality of transactions to be an important but not an absolute value.

128 See Birks Essay above n 8 at 194-204.

It is interesting first to note, that when it is the government trying to recover government funds mistakenly paid to a private citizen, generally no defences are available to the citizen.¹²⁹

As mentioned, La Forest J considers that special considerations apply to take these cases out of the normal restitutionary framework and require a rule responding to the specific underlying policy concerns in the area, the main policy concern in this area, being, that:

no taxpayer should have the right to disrupt the government by demanding a refund of his money, whether paid legally or otherwise...must have regard to the fiscal chaos that would follow.¹³⁰

This policy has in some instances been equated with a defence of change of position. Birks does not consider the defence workable in this area.¹³¹ If McCamus' view of ultra vires exactions being viewed as a 'wrong' prevail, then arguably the defence should not be available.¹³²

A defence suggested by La Forest J is equivalent to equitable laches, a period of limitations enacted by statute. Additional considerations arise in this context eg whether the provisions would preclude recovery in any other way, namely in a common law action for money had and received.¹³³ The legislature through statutory reform could take into account a number of matters prior to recovery, including:

the nature of the tax, the amounts involved, the times within which a claim may be made, the situation of those who are in a position to recoup themselves from others...¹³⁴

129 *Commonwealth of Australia v Burns* [1971] VR 825, Newton J rejected the estoppel defence since the payment was unlawful ie paid out of consolidated revenue without parliamentary authority; See South Australian Law Reform Committee Report above n 41 at 17-8; and New South Wales Law Reform Commission Report above n 2 at 21-2; Goff and Jones above n 5 at 133-4; Birks 'Introduction' above n 8 at 298-9.

130 *Air Canada* above n 115 at 1205, La Forest refers to the possibility of less hospitals and schools, and more roads left unrepaired; See also Issacs J in *Sargood Bros* above n 3 at 303; but contrast Wilson J in *Air Canada* above n 115 at 1215.

131 See Essay above n 8 at 200-201; See also Dickson J in *Hydro Electric Commission of Nepean v Ontario Hydro* 132 DLR (3rd) 192 at 213-217 particularly at 214: mere spending of money does not amount to change of position; *Rural Municipality Storthoaks v Mobil Oil Canada Ltd.* (1975) 55 DLR (3rd) 1, 13 per Martland J whose dictum has been interpreted that the recipient must establish some initiative undertaken in reliance on existence of additional revenue; For possible problems in statutory enactment of defence see New South Wales Law Reform Commission Report above n 2 par 5.30-5.46.

132 See *Lipkin Gorman v Karpnale Ltd* [1991] 3 WLR 10 per Lord Goff of Chieveley at 34.

133 See eg *Dahlia Mining Co Ltd v Collector of Customs* (1989) 17 NSWLR 688 where s 167 of the *Customs Act* 1901 was held not to prevent the mistaken payer of customs duty from recovering under the common law cause of action for money had and received. See also a number of Qld statutes, where if taxpayer disagrees with the assessment objection must be lodged within the prescribed time and generally paid with a later right to a refund of the wrongful levy. *Stamp Act* 1894, s 24; *Land Tax Act* 1915 s 27 and 29; *Payroll Tax Act* 1971 s 32 and 34. Depends on interpretation whether statutory rights are exhaustive.

134 *Air Canada* case above n 115 per La Forest J at 1208.

There can be real concern with statutory intervention, where constitutional issues arise, particularly after the tax is declared invalid, in countries such as Australia and Canada which have written constitutions thereby involving possibilities of having the legislation declared beyond power, whereas in England with no written constitution, primary as opposed to delegated legislation can never be struck down by the courts.¹³⁵

Finally, in view of the fact that there is no common law doctrine in Australia for prospective over-ruling of precedents,¹³⁶ the New South Wales Law Reform Commission Report recommends the enactment of a change in law provision, but in simpler terms than that contained in the existing Western Australian and New Zealand provisions.¹³⁷

It is obvious that the juristic basis of recovery must be established before limitations on recovery can be defined. If recovery of ultra vires taxes were based on mistake of law in the event of mistakes of fact and law being placed on an equal footing, then there is no difficulty with 'close the transaction' payments being exceptions to recovery as these payments are not recoverable if the mistake is one of fact. Whether the same circumstances

135 See Birks' Essay above n 8 at 203. In Canada see *Amax Potash Ltd v Government of Saskatchewan* 71 DLR (3d) 1 and judgement of La Forest J in *Air Canada* distinguishing *Amax* on basis that in *Air Canada* province had the power but there was a technical hitch whereas in *Amax*, there was no power to pass the legislation. In Australian context see *Antill Ranger & Co v Commissioner for Motor Transport*, (1955) 93 CLR 83 as affirmed in the Privy Council sub nomine *Commissioner for Motor Transport v Antill Ranger & Co Pty Ltd* [1956] AC 527. To specifically deal with the many claims similar to the situation in *Mason's* case, New South Wales had enacted special legislation, the *State Transport Co-ordination (Barring of Claims and Remedies) Act* 1954, which purported to retroactively extinguish all claims for refunds of license fees whether they were paid under compulsion or not. Both the High Court and the Privy Council held that the legislation, as had certain sections of the *State Transport (Co-ordination) Act* 1931-1954, violated s 92 of the Constitution and was therefore also unconstitutional. Further legislation retroactively imposing a limitation period of one year on all refund claims including those paid under compulsion was also held unconstitutional in *Barton v Commissioner for Motor Transport* 97 CLR 644, in particular see Kitto J at 662. As Pannam above n 122 at 811-812 points out there is probably nothing to prevent states prospectively legislating to shorten limitation periods provided the limitation periods were reasonable. See generally his paper at 809-816. It should be noted though that the Australian statutory attempts to limit recovery were retrospective whereas the Government of Saskatchewan was relying on previously existing legislation. Despite Pannam's view, where constitutional issues are involved, governments must still be careful not to use or enact any statutory provision in such a way as to bar access to a court in respect of a matter in which a plaintiff would otherwise have a right of action.

136 Keith Mason QC 'Prospective Overruling' (1989) 63 ALJ 526 See also New South Wales Law Reform Commission Report op cit par 5.25 and Stoljar above n 2 at 88-90.

137 For interpretation and difficulties see *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* [1969] WAR 155, 158-160 (*Bell Bros* states that there must be some generality of understanding beyond that of the parties to the action) and New South Wales Law Reform Commission Report par 5.20-5.29. See Law Reform Commission of British Columbia, *Report on Benefits Conferred under Mistake of Law* LRC (1981) at 70-73 which does not accept the enactment of such a provision and Great Britain Law Commission Consultation Paper *Restitution of Payments Made under a Mistake of Law*, 1991 at 109-110.

should be an exception if recovery is based on the ultra vires nature of the demand is a more difficult question to answer. On the one hand, as indicated in *Woolwich* such considerations should be irrelevant, but on the other as argued by Collins, not to take such factors into account, is clearly inconsistent with the general principles of restitution. Whatever the basis for recovery it is arguable that the receipt of a benefit should preclude recovery. The *Bayview Gardens* case is perhaps the clearest 'day to day' example of the policy issues that arise, the finality of transactions versus the encouragement of 'illegal burdens'. In the event of reform in this area of the law the juristic basis of recovery (subject to any limitations) would decide the outcome of such cases, it being particularly relevant that in such circumstances, no mistake of law is involved.