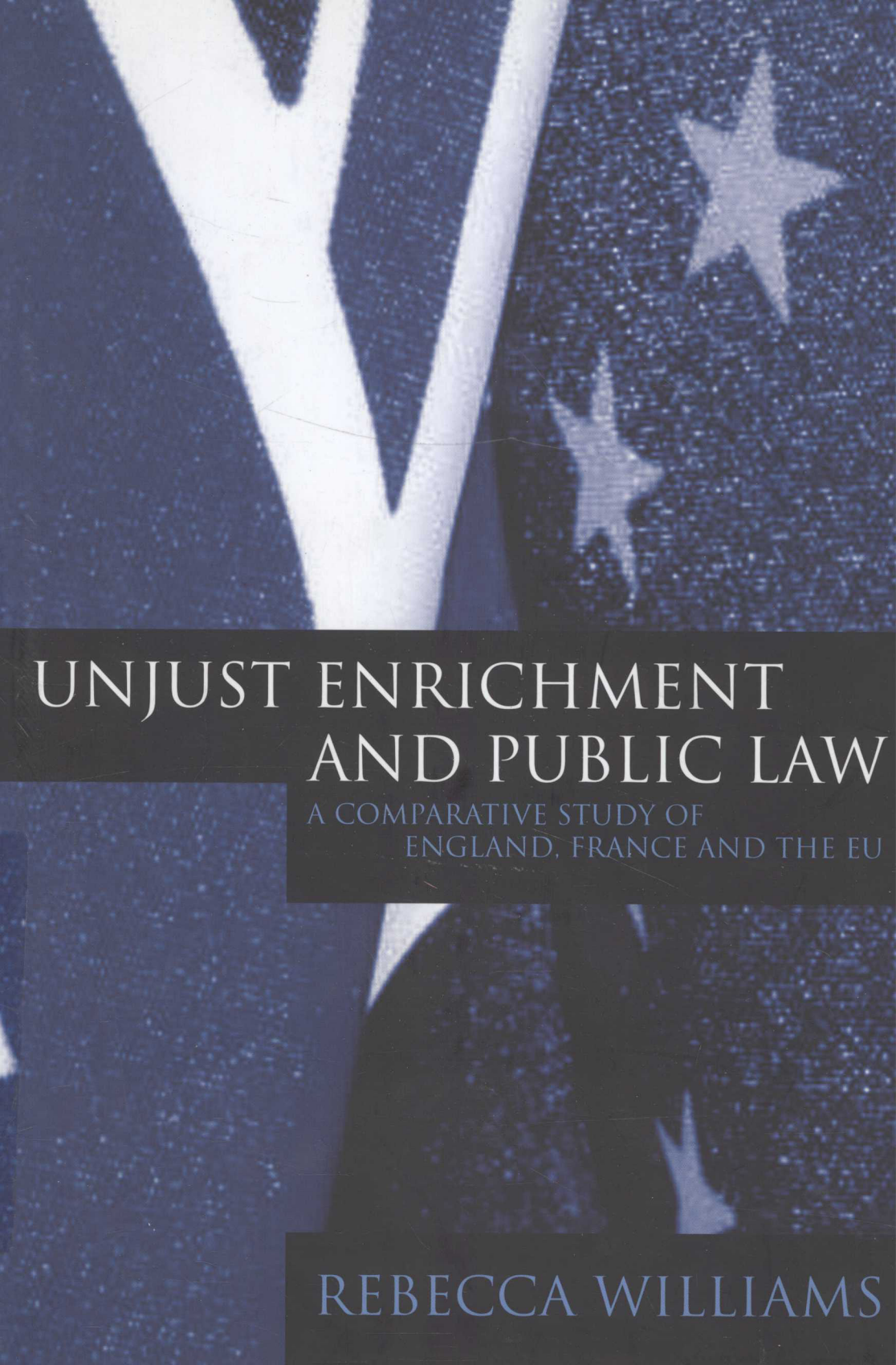

UNJUST ENRICHMENT AND PUBLIC LAW

A COMPARATIVE STUDY OF ENGLAND, FRANCE AND THE EU

REBECCA WILLIAMS

Unjust Enrichment and Public Law

A Comparative Study of England, France and the EU

Rebecca Williams

OXFORD AND PORTLAND, OREGON
2010

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530
Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: http://www.isbs.com

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84113-414-7

Typeset by Hope Services, Abingdon
Printed and bound in Great Britain by
CPI Antony Rowe Ltd, Chippenham, Wiltshire

UNJUST ENRICHMENT AND PUBLIC LAW

This book examines claims involving unjust enrichment and public bodies in England, France and the EU. Part 1 explores the law as it now stands in England and Wales as a result of cases such as *Woolwich EBS v IRC*, those resulting from the decision of the European Court of Justice (ECJ) in *Metallgesellschaft and Hoechst v IRC* and those involving Local Authority swaps transactions. So far these cases have been viewed from either a public or a private law perspective, whereas in fact both branches of the law are relevant, and the author argues that the courts ought not to lose sight of the public law issues when a claim is brought in the private law of unjust enrichment, or vice versa. In order to achieve this a hybrid approach is outlined which would allow the law access to both the public and private law aspects of such cases.

Since there has been much discussion, particularly in the context of public body cases, of the relationship between the common law and civilian approaches to unjust enrichment, or enrichment without cause, Part 2 considers the French approach in order to ascertain what lessons it holds for England and Wales. And finally, as the *Metallgesellschaft* case itself makes clear, no understanding of such cases can be complete without an examination of the relevant EU law. Thus Part 3 investigates the principle of unjust enrichment in the European Union and the division of labour between the European and the domestic courts in the ECJ's so-called 'remedies jurisprudence'. In particular it examines the extent to which the two relevant issues, public law and unjust enrichment, are defined in EU law, and to what extent this remains a task for the domestic courts.

For my parents; Roger and Rae Williams

PREFACE

Given how rapidly the law is evolving along the intersection between public law and restitution for unjust enrichment, it was perhaps inevitable that changes would take place in the period between going to press and final publication. In the event there have been several such developments.

THE TREATY OF LISBON

The first, and most significant event was the coming into force on the 1st December 2009 of the Lisbon Treaty. The European law discussed in this book is primarily the jurisprudence of the European courts, so the substance of the law discussed here remains unchanged, but of course there have been some important changes of terminology. The EC Treaty is now known as the Treaty on the Functioning of the European Union (TFEU) and the articles of what was formerly the EC Treaty have again been renumbered. And, of course, the so-called 'depillarisation' brought about by the TFEU means that rather than distinguishing between the 'first pillar' EC and the 'three pillar' EU structure,[1] we should now refer only to the EU as a collective whole.[2] As a result, throughout this book I have used the new TFEU numbering for Treaty articles, giving the pre-Lisbon, Treaty of Amsterdam numbering in brackets afterwards. I have also included a table of equivalences for the Treaty Articles referred to in the book, which gives their numbers under Lisbon, under the Treaty of Amsterdam, and their original pre-Amsterdam numbering. Similarly, wherever I have referred to the European Union or to European Law in a general manner or in the present tense, I have referred to the 'Union' or to 'EU' law. However, where I have quoted from cases decided under the old, three pillar structure, or referred to European law in the past tense, I have left in the old terminology of 'European Community' or 'EC' law, since that was what it was at the time.

[1] See further ch 7 p 233.

[2] There will still be exceptions to this rule regarding the Common Foreign and Security Policy, but these are beyond the scope of the current investigation.

THREE COURT DECISIONS

The other developments are court decisions; the decision of the Court of Appeal in the *FII Group Litigation* case;[3] the decision of Henderson J in the *Thin Cap* case,[4] and the decision of the Court of Appeal in *Chalke and A C Barnes (Wokingham) Ltd v The Commissioners for Her Majesty's Revenue and Customs*[5]. These decisions add in various ways to the discussion in the book, but what follows should be read alongside the relevant passages in the book itself, rather than as freestanding commentary.

1. The principle of 'effectiveness': is FII a 'milestone' case?

(a) The relationship between so-called 'San Giorgio' claims and state liability in damages and the involvement of the ECJ in the choice of cause of action

It will be argued in chapters four and eight[7] that the decision of the ECJ in *FII*,[8] largely reiterated in *Thin Cap*,[9] was significant in that for the first time both the Advocate General and the ECJ became involved in the definition of the cause of action at national level, undercutting in substance their formal adherence to the *Metallgesellschaft and Hoechst*[10] principle that the classification of claims at national level is for the courts of the Member States, not for the ECJ. The key paragraph of Advocate General Geelhoed's opinion in *FII* is as follows:

> [134] In principle, it is for the national court to decide how the various claims brought should be characterised under national law. However, as I observed above, this is subject to the condition that the characterisation should allow the test claimants an effective

[3] [2010] EWCA Civ 103 (Ch). Throughout the text of the book reference is made to the decision of the ECJ in Case C-446/04 *Test Claimants in the FII Group Litigation v Commissioners of the Inland Revenue* [2006] ECR I-11753, and to the decision of Henderson J in *Test Claimants in the FII Group Litigation v The Commissioners for Her Majesty's Revenue & Customs* [2008] EWHC 2893, [2008] STI 2726. 'FII' stands for 'Franked Investment Income'. I am very grateful to Rupert Shiers for his views on these cases from the tax perspective, though of course any remaining errors are mine alone.

[4] *Test Claimants in the Thin Cap Group Litigation v Commissioners for Her Majesty's Revenue and Customs* [2009] EWHC 2908 (Ch). 'Thin Cap' stands for 'thin capitalisation'; the practice by parent companies of funding their subsidiaries by loans, rather than by equity, in order to reduce their liability to tax.

[5] [2010] EWCA Civ 313. References throughout the book are to the first instance decision; *F J Chalke Ltd and AC Barnes (Wokingham) Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2009] EWHC 952 (Ch).

[6] Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595. See further p 254.

[7] At pp 85–6, 104–5 and 261–4.

[8] Above n 3.

[9] Case C-254/04 *Test Claimants in the Thin Cap Group Litigation v IRC* [2007] ECR I-2107.

[10] Cases C-397/98 and C-410/98 *Metallgesellschaft and Hoechst v IRC* [2001] ECR I-1727.

> remedy in order to obtain reimbursement or reparation of the financial loss which they had sustained and from which the authorities of the member state concerned had benefited as a result of the advance payment of tax. This obligation requires the national court, in characterising claims under national law, to take into account the fact that the conditions for damages as set out in *Brasserie du Pêcheur*[11] may not be made out in a given case and, in such a situation, ensure than an effective remedy is nonetheless provided.

In *FII*, counsel for the applicants essentially argued that this paragraph should be interpreted as follows: (1) a cause of action for state liability in damages requires the presence of a sufficiently serious breach, which may be difficult to fulfil in a given case. (2) European law requires the claimant to be given an effective remedy. And crucially, (3) thus the *San Giorgio* unjust enrichment action should be broadly defined so that the claimants receive just and effective satisfaction when the state liability in damages action is unavailable. The Court of Appeal agreed that 'the Advocate General would seem to have supported this submission in paragraph [134] of his opinion' but refused to accept it themselves and held that the ECJ had rejected this approach. Similarly, in his decision in *FII*, Henderson J had assumed that the ECJ endorsed this approach,[12] but in *Thin Cap* he stated that he had been wrong to do so.[13]

Certainly, as the Court of Appeal in *FII* points out,

> The ECJ established the requirement of a sufficiently serious breach because it considered it just to do so. The difficulty that this creates for the Claimants is not an acceptable basis for striving to circumvent the requirement by enlarging the scope of a remedy that is not subject to this requirement. A claimant who cannot establish a sufficiently serious breach is not for this reason deprived of an effective remedy: he is not entitled to an effective remedy.[14]

However, it is not clear that even the Advocate General's opinion should be interpreted as suggesting such a thing. His paragraph [134] quoted above, followed on from his finding in paragraphs [132] and [133] that 'with one exception' (relating to the *FID* enhancements)[15] 'the claims . . . should be considered equivalent to claims for recovery of sums unduly paid, that is to say, claims for recovery of charges unlawfully levied'. On that basis his opinion could alternatively be read as being simply that where a claim *can in any event* be interpreted as a so-called *San Giorgio* unjust enrichment claim at European level, which would automatically give a right to reimbursement, it is not then open to a national court to make use of the *Metallgesellschaft* principle in order to choose instead a cause of action at national level which would subject the claim to the *extra* requirement of proving a

[11] Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Germany and R v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR I-1029. The condition in question is that the breach of European law be 'sufficiently serious', see further ch 8 p 239 and n 122.

[12] Above n 3 at [231].

[13] Above n 4 at [213].

[14] Arden LJ, giving the judgment of the Court, above n 3 at [137].

[15] See further below pp 103–5.

sufficiently serious breach. Rather than the Advocate General suggesting that the cause of action in state liability in damages should be examined first and the *San Giorgio* unjust enrichment action then altered to catch anything left over, the order of consideration would on this interpretation be the other way round; actions *already* available under *San Giorgio* on its own terms must not be limited by use of the rules on state liability in damages. There would then not be such a discrepancy between the opinion of Advocate General Geelhoed in *FII* and the decision of the ECJ, since neither would be suggesting the alteration of one cause of action to escape the requirements of another. The point would simply be that while in principle the choice of cause of action is open to a national court when there is nothing to choose between the options available, (*Metallgesellschaft*), when the *San Giorgio* action is, on its own terms, straightforwardly available, but the state liability in damages action seems likely to fail as a result of the 'sufficiently serious breach' requirement, the principle of effectiveness requires that a 'remedy' be given at national level for that *independently* available *San Giorgio* action (*FII*).

In any event, as argued in the book, the case remains important evidence of the involvement of the ECJ and its Advocates General in the choice of cause of action at national level,[16] and on this front it is submitted that it certainly can be regarded as a milestone. In addition the case is further evidence of the fact that a breach of European law will give rise more easily to a *San Giorgio* unjust enrichment action than to an action for state liability in damages, contrary to the views of Lord Scott in *Deutsche Morgan Grenfell.*[17]

(b) Whether the ECJ now regards interest as a central, rather than an 'ancillary' matter

In addition to seeing the ECJ's decision and Advocate General's opinion *FII* as a milestone in terms of the choice of 'remedy' available, Henderson J also regarded them as marking 'a significant advance' in the jurisprudence of the ECJ on the issue of interest.[18] 'His view was that until *FII* there was a consistent line of ECJ authority that *San Giorgio* claims are for the repayment of the unlawful charges and that it is for the national law to settle all ancillary questions such as the payment of interest and the date from which it must be calculated'[19] but that this was changed by the decision in *FII* so that

> *FII* . . . does . . . represent a significant advance on *Hoechst* in the jurisprudence of the Court. The identification of an underlying general principle, the linking of it to the principle of effectiveness, and the subsuming within the general principle of the loss of use claim in *Hoechst*, are important new milestones (or perhaps I should say kilometre posts) on a journey that is still far from completed. They are sufficient, however, to make it clear, to my mind, that the *San Giorgio* principle must now be regarded as entitling a

[16] See further p 262.
[17] *Deutsche Morgan Grenfell v IRC* [2006] UKHL 49, [2007] 1 AC 558 (HL). See further pp 77–86.
[18] *FJ Chalke (Chancery)*, above n 5 at [107].
[19] *F J Chalke* (CA), above n 5 at [35].

> claimant who has paid tax levied in breach of Community law not only to repayment of the tax itself, but also to reimbursement of all directly related benefits retained by the member state as a consequence of the unlawful charge. It is only in this way that the claimant can obtain an effective remedy for its loss, and effect can be given to the underlying principle that the member state should not profit from the imposition of the unlawful charge.[20]

On appeal, however, the Revenue argued that the Judge had been wrong to interpret *FII* in this way, and the Court of Appeal's response was that the issue was 'unclear':

> There is considerable cogency in the argument of the Commissioners and the analysis of the judge that, at least until *FII*, the settled jurisprudence of the ECJ in relation to *San Giorgio* claims was that, save in the *Metallgesellschaft* case of premature levying of tax, interest was an ancillary matter to be dealt with in accordance with national law, including whether there was a right to any interest at all and, if so, the rate and the time for which it was to be paid. It is also striking, as the Commissioners have forcefully submitted, that there is no clear statement by the ECJ, whether in *FII* or any subsequent case, that the former settled jurisprudence has been changed by the formulation of the *San Giorgio* principle in paragraph 205 of the ECJ's judgment in FII, and that, in cases of overpayment as much as cases of premature payment, the *San Giorgio* principle requires the recipient to pay compensation for the time value of the wrongful retention of tax when it was not lawfully due. On the other hand, it is clear, as the Judge found and as the claimants contend, that the formulation of the *San Giorgio* principle in paragraph 205 of *FII* is, on one interpretation, broad enough to encompass the claimants' claims to payment for the time value of the overpayments of VAT while retained by the Commissioners. It is also difficult to see any logical basis for distinguishing in this respect between the premature levying and payment of tax and the overpayment of tax. In both cases, only compound interest will normally give a full and effective remedy.[21]

In view of these 'doubts and difficulties and the importance and financial implications of the issue'[22] the Court concluded that 'it seems plainly desirable that there should be a reference to the ECJ for a preliminary ruling on the issue',[23] but since the Court also concluded that Henderson J had been right to hold that the claims for compound interest were in any event time barred, it would not be possible to make a reference from these proceedings since an answer to the question was not necessary to enable judgment to be given in the case.[24]

In the book I argue that compound interest is necessary if transactions are to be fully unravelled,[25] though not in the particular case of *Chalke* for the reasons given by Henderson J and upheld by the Court of Appeal.[26] However, it is harder to

[20] *FJ Chalke (Chancery)*, above n 5 at [107]. See further pp 44–9.
[21] *FJ Chalke* (CA), above n 5 at [40].
[22] Ibid at [41].
[23] Ibid.
[24] Ibid.
[25] See further pp 44–9.
[26] The Court of Appeal also held that the claimants in *FJ Chalke* had a year after the *Marks and Spencer* decision to institute proceedings before their claim became time-barred (above n 5 at [66]) and that in any case if they had brought their claims before the decision in *Sempra* it is not clear that those

know whether this conclusion ought to follow from the European principle of effectiveness or be left for domestic law to determine. In chapter eight I outline the problems associated with what is known as the ECJ's 'remedies jurisprudence' (a term which by its own vagueness indicates the lack of clarity surrounding the area) and I highlight the need for a more satisfactory determination of the division of labour between national and European courts.[27] And unless and until this occurs, and a clearer view is taken of what constitutes a 'remedy' which can be dictated by European law, it is inevitable that we will not know which issues fall into this category and which, by contrast, are 'ancillary' and thus to be left to the courts of the Member States. The question of compound interest in *Chalke*, therefore, is simply another illustration of this point, and no doubt it will not be the last.

2. The principle of equivalence

Of course it is the European requirement to provide an 'effective' 'remedy'[28] which is at issue in the questions above, but in addition to this there is, of course, the requirement of equivalence.[29] Throughout the book it is argued that while European law requires the provision of an effective 'remedy' for breach of that law, domestic 'remedies' for breach of European law are subject also to the principle of equivalence. Thus it would be perfectly acceptable to adopt the public law reason for restitution as an exclusive route to restitution in public body cases as proposed here, since that would provide an effective 'remedy' equivalent to anything provided for cases involving public bodies in a wholly domestic context, and a distinction between public and private law is perfectly acceptable as a matter of European law.[30] It is this argument which answers Henderson J's decision in *Thin Cap* that it would not avail the Revenue to establish that the *Woolwich* cause of action would, by itself, or with appropriate extensions, be sufficient to satisfy the claimants' *San Giorgio* claims when they also have the alternative open to them of making a mistake-based restitution claim.[31]

claims would have been dismissed, as indeed the claims in *Sempra* itself were not (at [71]). It may well be that the Court of Appeal was thus right to reject the claimants' assumption that any proceedings commenced by them would, as a matter of fact, undoubtedly have been dismissed, but what would in practice have happened is, of course, different from what the claimants could have been expected to predict. It would be undesirable to penalise claimants who assume that the law as it stands will continue to apply and who, as a result, do not go to the expense and trouble of bringing an action to challenge it, when in prospect they have no means of knowing the likelihood of success of such an action.

[27] See in particular pp 252–7 and 271–4.

[28] On which see further pp 237–41.

[29] On which see further pp 237 and 241.

[30] See further pp 100–1and 237–41.

[31] 'it is no part of the principle of effectiveness to say that [if English law provides two alternative causes of action] only the more restrictive of those causes of action is needed'. Above n 4 at [223]. The point is that English law need not provide the alternative cause of action based on mistake; the public law reason for restitution is in itself sufficient to fulfil the EU requirements of equivalence and effectiveness.

The approach taken in this book now receives support from the decision of the Court of Appeal in *FII* . This held that sections 320 of the Finance Act 2004 and 107 of the Finance Act 2007 were not precluded by the European principles of equivalence, effectiveness, legal certainty and legitimate expectations[32] because those provisions only limited mistake claims and mistake claims were not required by Community law. Similarly the Court held that the claimants' claim for overpaid corporation tax in *FII* bore greater similarities to other claims for excess tax paid by reason of a mistake in a return than to claims for repayment of tax paid under wholly ultra vires assessments, so that it would not be a violation of the principle of equivalence for s 33 of the Taxes Management Act 1970 to apply to them. Of course, whether or not the Court is correct on this point as a matter of fact depends in turn on the extent of invalidity of the UK rules (on which see further issue 5 below), but the point remains that, as I have argued in this book, it is not necessary for domestic law to provide the most extensive remedy imaginable, only the most extensive remedy applicable to equivalent, public, domestic claims, provided that this is in itself an effective remedy. It is submitted that the public law reason for restitution I outline fulfils both these requirements.

3. The relationship between *San Giorgio* and *Woolwich*[33]

This is, of course, closely connected to the fact that at first instance in *FII* Henderson J had argued that a mistake claim was necessary to give effect to the so-called '*San Giorgio*' principle at national level, whereas it is argued in the book that this is not the case and that, conversely, *San Giorgio* is a subset of *Woolwich* in the sense that all claims which are beyond the powers of the public body in question fall within the public law reason for restitution first created by *Woolwich*, but only some of these claims will be beyond the public body's powers as a matter of European law, as in *San Giorgio*. This view receives support from the decision of the Court of Appeal in *FII*, which held that Henderson J should have accepted the Revenue's submission that *Woolwich* alone provides a sufficient UK cause of action for *San Giorgio* claims.[34]

4. The need for a demand

Closely connected to the *San Giorgio*-*Woolwich* relationship is the question whether a '*Woolwich* claim' can only be made where the money was paid in response to a demand. In chapter three it will be argued that the public law reason for restitution (as *Woolwich* should properly be understood) does not have any such requirement;[35] the simple ultra vires nature of the payment is sufficient. However, at first

[32] On which see further ch 8 pp 237–41 and 265.
[33] *Woolwich Equitable Building Society v IRC* [1993] AC 70 (HL).
[34] Above n 3 at 157.
[35] pp 40–1.

instance in *FII* Henderson J had suggested that a demand would be necessary, hence his finding that *Woolwich* was not sufficient to absorb at national level all *San Giorgio* European claims. The Court of Appeal in *FII* has now added weight to the view taken here, holding that there is no authority to suggest that a demand is required, but that if there had been such a requirement it would be displaced in the context of European law.[36] Such a distinction would obviously be undesirable and this provides a further reason for preferring the interpretation of the *Woolwich* cause of action suggested in the book, according to which *San Giorgio* claims are merely a subset of cases in which the reason for restitution is public law.[37]

This approach would also provide an answer to a further question. At paragraph [227] of the *Thin Cap* decision, Henderson J asks whether the claimants in that case have any other claims which are not *San Giorgio* claims and as a matter of European law would give rise only to an action for state liability in damages but which nevertheless are good restitutionary claims as a matter of English domestic law. On the interpretation given here the answer to this question must inevitably be in the negative. If *Woolwich* is understood as establishing a right to restitution for unjust enrichment wherever there has been an ultra vires action by a public body which invalidates the payment in question, and if *San Giorgio* is understood as representing the subset of such claims in which the invalidity is a matter of European rather than domestic law, then any breach of Community law capable of generating what Henderson J calls 'a *Factortame* claim for damages'[38] which could also found a domestic '*Woolwich*' public law unjust enrichment claim, ought also, by definition, to be a *San Giorgio* claim. Indeed it would be more straightforward to make out such a claim than to make out a claim for state liability in damages, since as noted above, the latter would be subject to the additional requirement of sufficiently serious breach.[39] The fact that this is not yet clear as a matter of European law is almost certainly a further result of the fact that, as noted in chapter seven, unjust enrichment is regarded largely as a general principle of European law, rather than as a freestanding cause of action in its own right, a position which is inherently in tension with the ECJ's increasing involvement in the definition of aspects of the claim in cases originating in Member State courts.[40]

5. The claims in *FII* and *Thin Cap* which fall within the '*San Giorgio*' principle

This question of causation brings us to a further issue. Of the claims in *FII* three in particular were thought to fall outside the so-called '*San Giorgio* principle'.

[36] Above n 3 at [169]–[174].
[37] See further p 107.
[38] Above n 4 at [227].
[39] Above n 14 and surrounding text.
[40] See further pp 229–31, 259–64 and 271–4. See also R Williams, 'Case C-47/07, *Masdar (UK) Ltd v. Commission*; Case C-446/04, *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue*' (2010) 47 *CMLR* 555.

Advocate General Geelhoed, the ECJ and Henderson J were all in agreement that the 'FID enhancements' could not fall within that principle; the ECJ and Henderson J added to this the waiver of tax credits in order to increase the liability to MCT against which ACT could then be offset, and Henderson J included a third category of claims excluded from *San Giorgio* concerning the 'consequential steps that were taken within the group to utilise surplus ACT, for example by setting it off against unlawful Case V corporation tax', both on the basis that this was not a 'direct and inevitable consequence' of the UK's breach of European law, and on the basis that the Revenue had not been enriched.[41] The exclusion of all three categories of claim will be discussed in more detail in chapters four and eight,[42] but it will be argued in particular that it is not clear that Henderson J was right to add this third category of cases to those already excluded by the Advocate General and ECJ. The decision of the Court of Appeal now supports this view, holding that the claim in respect of ACT set against the unlawful Case V charge is also a *San Giorgio* claim.[43] Of course, in reaching this conclusion the Court continued to rely on the 'inevitable consequence' reasoning of the ECJ,[44] and as long as that test remains at European level, this inefficient bar to mitigation will remain.[45]

In addition to the setting off of ACT against unlawful Case V corporation tax, the claimants in *FII* sought to argue that the setting off of group relief and management expenses against that Case V charge could also be included in a *San Giorgio* claim for recovery.[46] The Court of Appeal disagreed, though it is not wholly clear that they should have done so. Their principal reason for rejecting these claims was a lack of enrichment on the part of the Revenue.[47] However, there is no reason to suppose that this means the claims must be barred in principle. If the argument is that reliefs were used in the first year against an unlawful tax so that that those reliefs were not then available in the second and subsequent years then it is difficult to see why in principle the Revenue should not be regarded as unjustly enriched. Surely 'spending' reliefs against an unlawful tax is (subject to questions of valuation) not so different from spending money on that tax? Of course it must be borne in mind that valuing the enrichment would be problematic in circumstances where it is not clear what would have happened to the reliefs had the unlawful tax not existed.[48] And if those reliefs would not have been available for anything else in the first year and would not have been available at all in the second year[49] then that would obviously also defeat the enrichment argument. But these are questions of fact and do not mean that management expenses and

[41] See further p 118 onwards.
[42] See further pp. 111–118 and 259–264.
[43] Above n 3 at [151].
[44] Ibid at [149].
[45] See further pp 113–6 and 263–4.
[46] Above n 3, 'Issue 13' at [175]–[9].
[47] 'Utilisation of the other reliefs may have been a detriment to the Claimants, but did not represent a gain to the Revenue for the purpose of a restitutionary cause of action'. Above n 3 at [179].
[48] Ibid at [180].
[49] Ibid at [183].

group relief can be distinguished from the payment of ACT against unlawful MCT as a matter of principle.

Similarly in the *Thin Cap* decision Henderson J was asked to consider whether various claims should be regarded as *San Giorgio* claims or not.[50] 'Thin cap' stands for 'thin capitalisation', the practice by which parent companies finance their group members by loans rather than equity. This is done in order to reduce their liability to tax, since in many Member States companies are permitted to deduct interest payments on loans for the purposes of calculating their taxable profits, whereas in the case of equity finance, distributions paid to shareholders are not similarly deductable. However, since the practice of thin capitalisation essentially involves presenting what is in substance an equity investment as a loan, and manipulating the manner in which capital is provided so as to choose where profits will be taxed, many Member States regard the practice as abusive and have taken measures to counter it.[51] On a reference to the ECJ, the UK's rules were found to have involved a difference in treatment between resident and non-resident borrowing companies which constituted a restriction on freedom of establishment which could not be justified by the need to ensure cohesion of the UK's tax system,[52] and while it could be justified on the ground of prevention of abusive practices, Henderson J found that in fact the UK thin cap provisions were not proportionate to achieve this purpose because they did not allow for a separate defence of commercial justification.[53] The UK provisions were thus in breach of the rules on freedom of establishment and liability was in principle made out.

As for recovery, however, three claims in particular were in dispute: (c) a claim for repayment of corporation tax paid by the borrowing company where a lesser amount of interest on the loan was paid to the lending company because the lending company funded the borrower with equity capital or converted existing debt to equity due to the thin cap provisions;[54] (d) a claim for repayment of corporation tax paid by the borrowing company where a lesser amount of interest on the loan was paid to the lending company because the rate of interest was reduced or the loan was made interest free due to the thin cap provisions[55] and (e) a claim for restitution or compensation in respect of losses or other tax reliefs or credits of the borrowing company or other companies used by the borrowing company to offset the additional corporation tax liabilities said to have arisen in the above claims.[56]

In chapter four I state that in relation to the *FII* decision 'it is at least arguable that since the[actions taken were] the result of the companies' attempts to mitigate the loss to them caused by the IRC's unlawful discrimination against them it was

[50] Above n 4 at [199].
[51] See further above n 4 at [1]–[2].
[52] Ibid at [9].
[53] Ibid at [75].
[54] Issue (c), ibid at [199] .
[55] Issue (d), ibid.
[56] Issue (e), ibid.

equally unlawful for the Revenue to receive the benefit of those constrained choices'.[57] And for these three issues (c), (d) and (e) in *Thin Cap* the same argument applies; on Henderson J's assumption that a causal link can be established between the actions of the Revenue and the actions of the claimants,[58] if as a result of the unlawful thin cap rules the companies (c) replaced debt with equity, (d) reduced their rate of interest or (e) used reliefs to offset tax, meaning that in each case they paid tax which they would not have done if the unlawful thin cap rules had not been in place, then it must be at least arguable that receipt of this extra tax was in each case beyond the powers of the Revenue. Of course the case is stronger in relation to (e) where the companies' actions are simply responding to the tax already imposed, whereas in (c) and (d) their actions are anticipatory, changing their behaviour in order to alter the tax rules applicable in the first place, which may be thought to introduce more problematic questions of remoteness. However, while simple responses may be more predictable and straightforward than anticipatory actions, surely the whole point of tax legislation is that companies will alter their commercial arrangements accordingly. So if a company acts in advance to rearrange its dealings in order to produce certain tokens, rather than just spending those tokens once received, surely that is still something the Revenue can be held to have caused. The *Thin Cap* decision thus provides further evidence for two points made in the book: first, that it is vital that we adopt the correct test for causation, and that it is by no means obvious that the 'direct consequences' test chosen by the ECJ is the best one for this purpose, especially since it discourages efficient mitigation.[59] And second, that it is imperative that we adopt the hybrid public and private approach suggested here so that we can address questions of remoteness directly from both points of view. We should be asking not only what the tests of causation and remoteness are in unjust enrichment but also how far the invalidity of the UK rules should extend as a matter of public law.[60] If the thin cap rules themselves were beyond the powers of the UK as a matter of European law, we need also to examine the extent to which this unlawfulness invalidated subsequent and consequential receipts of tax or reliefs from it.

6. The definition of mistake

As noted at several points in the book, this approach would also avoid the difficulties associated with trying to interpret such cases as turning on the existence of a mistake.[61] A further example of such difficulties is provided by paragraphs [231] and [232] of Henderson J's decision in *Thin Cap*. Here, as he himself notes, 'much may depend on the level at which the relevant mistake of law is identified'. This in

[57] See further p 112.
[58] See n 4 at [203]–[5].
[59] See further pp 113–6 and 263–4.
[60] See further pp 110–13.
[61] See further eg 64–7, 86–8, 94–7, 109–10 and 121–2.

turn opens up the possibility of disagreement over the precise kind of mistake necessary to found a claim[62] and of discrepancy between the treatment of mistakes and other causative factors.[63] If, rather than becoming sidetracked by or entangled in the correct definition of mistake we were instead to deal with the problem head on, examining the extent of the invalidity as a matter of public law and using this as the reason for restitution instead, these difficulties could be avoided.

7. Miscellaneous other points

For the sake of completeness it is worth recording that in addition to the points discussed above, in *FII* the Court of Appeal confirmed that it did not think the defence of change of position would be compatible with the requirement to provide an effective remedy in *San Giorgio* cases,[64] and that it did not regard the breach of European law in that case to have been sufficiently serious to found an action for state liability in damages.[65] And in *FII*, confirmed in *Chalke*, the Court held that a mistake would only be relevant for the purposes of section 32(1)(c) of the Limitation Act 1980 if it is an essential element of the cause of action.[66]

[62] As in those paragraphs themselves, and see further ibid

[63] See further p 116.

[64] Above n 3 at [191]. See further pp 136–49.

[65] Ibid at [201]. See further ch 4 n 198. For general details of the sufficiently serious breach requirement see ch 8 n 122.

[66] Ibid at [230]–[245] and above n 5 at [44]. See further ch 4 pp 74–5, n 16 and J Edelman, 'Limitation Periods and the Theory of Unjust Enrichment' (2005) 68 *MLR* 848.