

THE FUTURE OF IRISH RESTITUTION LAW

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Irish restitution law exists within the gravitational field of English law. On the surface, it is very similar to English law, based on the orthodox unjust factors model. It has evolved in two distinct phases over the past 40 years. The first phase saw judicial innovation that laid the foundations for an indigenous law of unjust enrichment. In contrast, the second phase was characterised by the conscious alignment of Irish law with English law. Yet there remain doctrinal differences between the two systems. The main difference lies in the availability of the constructive trust as a remedy in Irish law, both where the requirements for an unjust enrichment claim are fulfilled, and independently of orthodox unjust enrichment rules. Looking ahead, Irish law's trajectory will substantially depend on the path it is already on. With a view to identifying this, the first three parts of this article identify the doctrinal principles and rules that have evolved in Irish restitution law, examine how the law is applied in practice in trial courts and appellate courts, and evaluate judicial openness to innovation and to influences from other common law jurisdictions. Drawing on these findings, the final part offers some predictions about the future development of Irish restitution law.

A. THE LAW IN IRELAND

As a small jurisdiction, Ireland has relatively few restitution cases with which to fill in the detail of the law. This makes it a very convenient heuristic to assume that Irish restitution law is the same as English restitution law. However, it would be too simplistic to say that Irish restitution is identical to English law and will simply adopt developments in our neighbouring jurisdiction. There are some doctrinal differences between the two jurisdictions, as well as more elusive differences in legal culture and approaches to judging.

1. The evolution of Irish restitution law

(a) Phases of innovation and alignment

The roots of current divergences lie in the evolution of restitution law in Ireland. The era of judicial innovation began in the 1960s, with the expansive application of common law rules to permit restitution for mistake¹ and support recovery of overpaid taxes.² The creation of a modern law of restitution gained speed in the 1970s and 1980s. In just a few years around 1980, the Irish courts recognised the principle against unjust enrichment³ and a general right to recover unlawfully-exacted taxes.⁴ They also granted disgorgement of profits from bad faith breaches of contract⁵ and remuneration for work done in anticipation of a contract (though the work had not

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1. *National Bank v O'Connor* (1966) 103 ILTR 73.

2. *Dolan v Neligan* [1967] 1 IR 247.

3. *East Cork Foods v O'Dwyer Steel Co Ltd* [1978] 1 IR 103.

4. *Murphy v Attorney General* [1982] 1 IR 241.

5. *Hickey & Co Ltd v Roches Stores (Dublin) Ltd* (1976) [1993] RLR 196 (HC, Finnegan P).

come to fruition).⁶ In contiguous areas, the courts enthusiastically embraced promissory and proprietary estoppel, applying them expansively to meet the justice of the case.⁷ They also developed a doctrine of legitimate expectations,⁸ based on promissory estoppel.⁹ Whether by applying existing law liberally or introducing new rules, Irish judges strove to achieve substantive justice in each case before the court. These early developments in Irish restitution law preceded equivalent advances in English law.¹⁰ Judges therefore looked further afield, to Australia, Canada and the United States, for authority to support their innovations.¹¹

The mid-1990s marks a dramatic shift. A second phase, characterised by alignment with English law, began with the decisions in the *Bricklayers* case.¹² Since then, judgments usually invoke English precedents ahead of the earlier Irish ones. This has occurred across the common law of restitution, but most strikingly in the context of overpaid taxes. The domestic Supreme Court authority of *Murphy v Attorney General*¹³ was eclipsed in Irish legal consciousness by the *Woolwich* principle¹⁴ imported from England.

Judges' belief that Irish law mirrors English law is to some extent a self-fulfilling prophecy. However, indigenous innovations from the earlier period subsist and are crucial to understanding the overall picture.

(b) *Unjust enrichment as the basis of recovery*

*East Cork Foods v O'Dwyer Steel Ltd*¹⁵ is the seminal decision that established unjust enrichment—not implied promise—as the theoretical foundation of restitution. The claimant had paid compensation on the basis of a court ruling. When the Supreme Court held that the defendant was solely liable to pay damages, the claimant claimed the sum it had paid plus interest from the defendant. Henchy J said “it would be unjust and inequitable to allow the first Defendant to keep the money. ... [It] would be unjustly enriched”.¹⁶ Though this was a recoupment case rather than a paradigmatic two-party unjust enrichment case,¹⁷ it is the foundation of modern Irish restitution law. The courts later pursued the logical implications of rejecting implied contract theory, recognising that the obstacle to a personal remedy posited in *Sinclair v Brougham*¹⁸ was illusory.¹⁹

Leading Irish cases have combined the language of “unconscionable” and “unjust enrichment”.²⁰ There are two explanations for this. Judges sometimes mean simply that it would be unconscionable to retain an unjust enrichment, not that the defendant acted wrongfully.²¹ Another reason the notion of wrongdoing recurs is because in these cases a claim of unjust enrichment was paired with a request for the recognition of a constructive trust. Whatever the reason, we should be careful: using the language of unconscionability risks blurring the distinction between a strict liability to make restitution of unjust enrichment and liability that responds to wrongdoing.

6. *Folens & Co Ltd v Minister for Education* [1984] 1 ILRM 1.

7. *Cullen v Cullen* [1962] IR 268; J Mee, “Lost in the Big House: Where Stands Irish Law on Equitable Estoppel?” (1998) 33 *Irish Jurist* 187.

8. *Webb v Ireland* [1988] 1 IR 353.

9. Mee (1998) 33 *Irish Jurist* 187.

10. E O'Dell, “The Principle Against Unjust Enrichment” (1993) 15 Dublin ULJ 27.

11. *Rogers v Louth CC* [1981] IR 265; *Murphy v AG* [1982] 1 IR 241, 319.

12. *Dublin Corp v The Ancient Guild of Incorporated Brick and Stone Layers* (6 Mar 1996) Unreported (HC, Budd J) (hereafter, “*Bricklayers*”); *Dublin Corp v Building and Allied Trade Union* [1996] 1 IR 468.

13. [1982] 1 IR 241.

14. *Woolwich Building Society v IRC* [1993] AC 70.

15. [1978] 1 IR 103.

16. *Ibid.*, 111.

17. See eg *Moule v Garrett* (1872) LR 7 Exch 101.

18. [1914] AC 398.

19. *Re PMPA Garage (Longmile) Ltd* [1992] 1 IR 332, 339.

20. *East Cork Foods* [1978] 1 IR 103, 112; *Bricklayers* (*supra* n 12).

21. *Goodman v Minister for Finance* [1999] 3 IR 356, 379. See also *Coyle v Finnegan* [2013] IEHC 463, [35]; *Finnegan v Hand* [2016] IEHC 255, [70].

(c) *The adoption of the four-stage analytical structure*

The second foundational decision in Irish restitution law is the *Bricklayers* case, which ushered in the era of close alignment with orthodox English principles. The plaintiff municipal authority acquired land from the defendant for road-widening. An arbitration process awarded the defendant a high rate of compensation, calculated to cover the cost of rebuilding the facade of its building. The defendant in fact demolished the building, and the plaintiff sought repayment of the surplus payment intended for reinstatement. Budd J delivered a textbook exposition of modern unjust enrichment law, surveying authority from England and other common law jurisdictions to show that unjust enrichment had become a well-defined area of law. The Supreme Court reversed the judgment on the ground that the arbitrator's award constituted a valid legal basis for the payment, but endorsed the four-stage structure of unjust enrichment analysis.²²

2. The content of each part of the unjust enrichment enquiry

Irish case law allows us to fill out some of the rules of unjust enrichment law, though there are many issues that have not yet arisen. A preliminary rule is that a claim will fail if there is a valid legal basis. This can be an arbitrator's decision,²³ a court order,²⁴ a statute²⁵ or a contract.²⁶

(a) *Enrichment at the expense of the plaintiff*

Several Irish cases concern enrichment.²⁷ They establish, for example, that when a bank customer lodges a bank draft to his account, the bank is not enriched.²⁸ However, there are also judgments that provide a remedy without enrichment clearly being established. *Folens & Co Ltd v Minister for Education*²⁹ is one of the early cases, where the plaintiff was remunerated for substantial preparatory work from which the defendant did not actually receive a benefit. More recently, both a husband and wife were held liable in unjust enrichment for money that the wife—but not the husband—received.³⁰ So far, there has been little focus on valuing enrichment, but it has been held that restitution is not capped by reference to an anticipated contract³¹ and reasonable remuneration may take the form of a commission.³²

No case has yet explored the limits of the need for a direct conferral of the enrichment.³³ In multi-party cases, the techniques of subrogation,³⁴ contribution³⁵ and recoupment³⁶ apply. A person who pays the claims of preferred creditors in a corporate liquidation does not step into their privileged shoes.³⁷ Disgorgement for profitable bad faith breaches of contract³⁸ is

22. *Bricklayers* (supra n 12); *Dublin Corp v BATU* [1996] 1 IR 468, 483.

23. *Dublin Corp v BATU* [1996] 1 IR 468.

24. *City of Limerick Vocational Educational Committee v Carr* [2001] 3 IR 480.

25. *Motor Insurers Bureau of Ireland v Stanbridge* [2011] 2 IR 78, 97.

26. *GF Galvin (Estates) Ltd v Hedigan* (27 Nov 1984) Unreported (HC, Costello J).

27. *Canada Life Assurance Ireland Ltd v O'Connor* [2006] IEHC 286; *Delaney v AIB plc* [2015] IEHC 52; [2016] IECA 5.

28. *Delaney v AIB Plc* [2015] IEHC 52; [2016] IECA 5.

29. [1984] 1 ILRM 1; see also *Callinan v Voluntary Health Insurance Board* (22 Apr 1993) Unreported (HC, Keane J).

30. *Vanguard Auto Finance Ltd v Browne* [2014] IEHC 465.

31. *Callinan v VHIB* (supra n 29).

32. *Bergin v Walsh* [2015] IEHC 594.

33. *Aer Rianta CPT v Ryanair Ltd* (29 Jul 2003) Unreported (HC, Lavan J).

34. *Highland Finance (Ireland) Ltd v Sacred Heart College of Agriculture Ltd (In Receivership)* [1997] 2 ILRM 87.

35. *Moule v Garrett* (1872) IR 7 Exch 101; *East Cork Foods* [1978] 1 IR 103.

36. *Re Bell Lines Ltd (In Liq)* [2006] IEHC 188.

37. *Ibid.*

38. *Hickey v Roches Stores* (1976) [1993] RLR 196.

conceptualised as a species of unjust enrichment;³⁹ judges accept that in this type of case there would not be a direct nexus between the parties.⁴⁰

(b) *Unjust factors*

Irish law recognises the orthodox consent-related unjust factors of mistake,⁴¹ total failure of consideration⁴² and duress.⁴³ Though simple mistake should suffice, earlier Irish judgments emphasise the defendant's fault.⁴⁴ This may have seeped in either to displace the mistake of law bar⁴⁵ or because the plaintiff sought a constructive trust. More recently, the courts have endorsed the test of causative mistake articulated by Robert Goff J in *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd*.⁴⁶ For the time being, a failure of consideration must be total.⁴⁷ However, the courts may disregard occupation of property as a caretaker⁴⁸ or the use of a vehicle when the purchase is void because the seller did not own it.⁴⁹ There is also a glimmer of support for a new unjust factor of want of authority:⁵⁰ a rescue society that had received the plaintiff's horses from those entrusted with them was ordered to return them because the bailees lacked authority to transfer them.

(c) *Restitution from the State*

Case law on recovery of unlawfully-exacted taxes features prominently in the story of Irish restitution law. It shows how judges have interpreted the rules expansively—attenuating restrictions—so as to attain substantive justice. These cases exist at the intersection of public law and private law—an area where Ireland's distinctive constitutional thinking may justify a difference in approach from that in England. Furthermore, it is an area that exemplifies the two phases of Irish law's development, with indigenous principles being supplanted by English rules. This leaves us wondering whether the Irish and English approaches have wholly merged.

The Irish courts began by interpreting the unjust factors liberally, to facilitate the recovery of overpaid taxes. In 1967, Kenny J supported restitution of mistakenly-levied duties through either duress *colore officii* or mistake of law.⁵¹ In *Rogers v Louth County Council*,⁵² the Supreme Court used mistake. Given the inequality between the State and citizen, the payment could not be regarded as voluntary. Moreover, the State was primarily responsible for the mistake of law; the matter about which it was mistaken was entirely within its knowledge.

The next landmark case was *Murphy*,⁵³ which held that there is a general right of recovery of taxes unlawfully exacted by the State.⁵⁴ The judgment allows competing readings as to the basis

39. *Criminal Assets Bureau v JWPL* [2007] IEHC 177.

40. *Ibid.*

41. *Bricklayers* (*supra* n 12), 36, 115.

42. *White v Spendlove* [1942] IR 224.

43. *Dolan v Neligan* [1967] 1 IR 247.

44. *O'Callaghan v Ballincollig Holdings Ltd* (31 Mar 1993) Unreported (HC, Blayney J); *Bricklayers* (*supra* n 12), 36, 115.

45. *Rogers v Louth CC* [1981] ILRM 144 (IESC).

46. [1980] QB 677. See *Donal Rigney Ltd v Empresa De Construcões Amandio Carvalho SA* [2009] IEHC 572.

47. *Bricklayers* (*supra* n 12), 105.

48. *White v Spendlove* [1942] IR 224.

49. *United Dominions Trust (Ireland) Ltd v Shannon Caravans Ltd* [1976] 1 IR 225.

50. *Flannery v Dean* (2 Feb 1995) Unreported (HC, Costello J).

51. *Dolan v Neligan* [1967] 1 IR 247, 259.

52. [1981] ILRM 144 (IESC).

53. [1982] 1 IR 241.

54. *Re Article 26 and the Health (Amendment) (No 2) Bill 2004* [2005] IESC 7; [2005] 1 IR 105, [102].

of the right.⁵⁵ First, there is the logic of unjust enrichment.⁵⁶ The *Murphy* majority held that duress *colore officii* generally justifies restitution in overpaid tax cases.⁵⁷ Secondly, Henchy J offered a constitutional law rationale: unconstitutional legislation provides no legal justification for acting, and anybody harmed by it will normally receive judicial redress.⁵⁸ The vast scale of overpayments in this particular, exceptional, case prompted the court to limit the right to recovery to the plaintiffs themselves.

The *Murphy* case was later overshadowed by English developments. In *O'Rourke v Revenue Commissioners*,⁵⁹ Keane J applied the *Woolwich* principle in preference to *Murphy*. He presented it as “received wisdom” before *Woolwich* that the plaintiff, who had not protested, would not have a remedy. Applying *Woolwich*, however, the taxpayer was entitled to recover the overpayment and interest.⁶⁰ Keane J considered the Supreme Court’s judgment in *Murphy*, not as authority in favour of a general right of recovery, but only in its negative aspect as a possible reason to deny a remedy. Viewing *Murphy* in this restrictive light, he distinguished it, on the basis of the vast differential between the amounts of overpayments at issue in the two cases.

Today, the right to restitution from the State is vigorously protected⁶¹ and recognised as a constitutionally-protected property right.⁶² However, the relationship between the possible causes of action remains surprisingly unclear.⁶³

(d) Uncertainty about mistake of law

Another question-mark concerns the possible subsistence of the mistake of law bar in Ireland.⁶⁴ From the 1960s, the Irish authorities recognised exceptions to the rule.⁶⁵ Other *dicta* after the recognition of the unjust enrichment principle favour allowing recovery for mistakes of law generally.⁶⁶ More recently, several Irish cases⁶⁷ refer approvingly to *Kleinwort Benson Ltd v Lincoln City Council*,⁶⁸ but it has not yet been formally followed. On the other hand, the Supreme Court has suggested *obiter* that the old exceptions to the mistake of law bar may still apply.⁶⁹ It is almost certain that the mistake of law bar is no longer Irish law, and will be erased at the next opportunity.

(e) Defences

Irish law recognises a number of defences that are consistent with English law. Change of position has been accepted as a necessary concomitant of a principle against unjust enrichment since

55. N Cleary, “Public and Private Law Principles: *Murphy v Attorney General* Reassessed” (2011) 34 Dublin ULJ 155; cf N Connolly, “Overpaid Taxes and Constitutional Redress in Ireland”, ch 13 of S Elliott, B Häcker and Charles Mitchell (eds), *Restitution of Overpaid Tax* (Hart, Oxford, 2013).

56. *Murphy* [1982] 1 IR 241, 317.

57. *Ibid*, 316.

58. *Ibid*, 313.

59. [1996] 2 IR 1; *Harris v Quigley* [2005] IESC 79; [2006] 1 IR 165; *Woolwich Building Society v IRC* [1993] AC 70.

60. See also *Harris v Quigley* [2005] IESC 79; [2006] 1 IR 165.

61. *O'Malley Construction Co Ltd v Galway CC* [2011] IEHC 440.

62. *Re Article 26* [2005] IESC 7; [2005] 1 IR 105.

63. *Ibid*, [72].

64. N Cleary, “Restitution for Mistake of Law in Ireland” (2016) 55 *Irish Jurist* 25.

65. *Dolan v Neligan* [1967] 1 IR 247, 259; *Rogers v Louth CC* [1981] IR 265.

66. *East Cork Foods* [1978] 1 IR 103; *Dublin Corp v Trinity College Dublin* [1985] ILRM 283; *Pine Valley Developments Ltd v The Minister for the Environment* [1987] ILRM 747, 764; *Dublin Corp v BATU* [1996] 1 IR 468, 484.

67. *Harris v Quigley* [2005] IESC 79, [19]; *Vanguard Auto Finance* [2014] IEHC 465, [73].

68. [1999] 2 AC 349.

69. *Rogers v Louth CC* [1981] IR 265; *Re Article 26* [2005] 1 IR 105, [2005] IESC 7 [121].

Murphy.⁷⁰ As in other areas, however, the details and limits of the concept have not been elaborated. It seems at least to be disappplied on grounds of wrongdoing of the defendant.⁷¹ The *Murphy* judgment also invokes laches;⁷² Cleary links this to the equitable remedy sought and argues that it should not apply to common law restitution.⁷³ In the *Bricklayers* case, the claim ultimately failed due to “*res judicata*”, better understood as the presence of a valid legal basis.⁷⁴ Voluntariness also excludes a claim in restitution, as where a payment forms part of a settlement of disputed matters.⁷⁵ *Coleman v Mullen*⁷⁶ refused restitution for services that were conferred gratuitously out of benevolence. Lastly, recent Supreme Court *obiter dicta* suggest that the illegality of a transaction may exclude restitution.⁷⁷

3. Distinctive approaches to remedies in Irish law

(a) Constructive trusts as the remedy for unjust enrichment

The principal distinctiveness of Irish restitution law concerns remedies for unjust enrichment. Plaintiffs may seek either a personal right to repayment or a constructive trust.⁷⁸ The foundational cases embraced the constructive trust as a normal remedy for unjust enrichment.⁷⁹ This began in *East Cork Foods*.⁸⁰ There, Henchy J considered that the defendant had a “fiduciary responsibility” over the money it received. It should have realised that, on appeal, the court might hold the money paid to be the property of its co-defendant. Once the Supreme Court ruled that the defendant was not entitled to the money, the law would therefore treat the defendant as a constructive trustee. Recourse to the constructive trust allowed Henchy J to evade legal impediments to the award of interest on common law debts.⁸¹ This accorded with his view that full restitution should—as a matter of justice—include restitution of the use value of money.⁸² In *East Cork Foods* itself, it was not proven that the defendant had profited from the use of the sum, but the courts were soon prepared to assume this.⁸³

Next, in *Re Irish Shipping Ltd*,⁸⁴ unjust enrichment *simpliciter* was considered enough to justify imposing a trust. A mistaken duplicate payment had been made to a company that entered liquidation. Carroll J ruled that the constructive trust is flexible and should be used in a way that is consistent with justice. Unlike ordinary trust funds, mistaken payments have not been deliberately entrusted to the holder. They should be regarded as having belonged at all times to the mistaken payor, as something analogous to lost property.

Subsequently, in *Bricklayers*, Budd J decoupled the questions of unjust enrichment and whether a constructive trust is the appropriate remedy. He reprised the statement from *East Cork Foods* that the order “should be as fully restitutive as the justice of the case will allow”.⁸⁵ This may mean that judges have discretion as to whether the merits of each case justify proprietary restitution. Budd J subtly favoured a requirement of unconscionability for a proprietary remedy,

70. [1982] 1 IR 241, 319; *Bricklayers* (*supra* n 12), 78; *Donal Rigney Ltd v Empresa De Construcoes Amandio Carvalho SA* [2009] IEHC 572; *O'Malley Construction* [2011] IEHC 440; Cleary (2011) 34 Dublin ULJ 155, 158.

71. *Vanguard Auto Finance* [2014] IEHC 465.

72. *Murphy v AG* [1982] 1 IR 241, 318.

73. Cleary (2011) 34 Dublin ULJ 155, 171.

74. *Dublin Corp v BATU* [1996] 1 IR 468.

75. *O'Malley Construction* [2011] IEHC 440, [27], [30].

76. [2011] IEHC 179.

77. *Quinn v Irish Bank Resolution Corp Ltd* [2015] IESC 29, [11.38], [12.16].

78. *Murphy v AG* [1982] 1 IR 241, 316; *Re Article 26* [2005] IESC 7 [121]; see also *Flannery v Dean* (*supra* n 50).

79. *East Cork Foods* [1978] IR 103; *Murphy v AG* [1982] 1 IR 241, 319.

80. [1978] IR 103.

81. Debtors (Ireland) Act 1840, s 53.

82. See *O'Rourke* [1996] 2 IR 1, 9.

83. *Folens* [1984] 1 ILRM 1.

84. [1986] ILRM 518.

85. *East Cork Foods* [1978] 1 IR 103, 112.

viewing the case before him as “on the outer margins” of a trust being justifiable.⁸⁶ The defendants had received a sum of money calculated to provide for the reinstatement of their building after public works. Budd J reasoned that it was unconscionable for the defendants to receive the money when they themselves had demolished the building and knew at the time of receipt that the purpose of the payment was now impossible.

By focusing on the reasons why the defendants’ conduct in receiving the money might have been unconscionable, Budd J’s judgment allows for the possibility that judges may have a discretion as to when to award a proprietary remedy rather than a personal one. This could help to explain the recent judgment in *Harlequin Property (SVG) Ltd v O’Halloran*,⁸⁷ which decided whether misappropriated funds should be recovered from a third-party recipient by weighing up factors specific to the parties before the court, such as the vulnerability and innocence of the recipient.⁸⁸ However, notwithstanding Budd J’s approach in *Bricklayers*, it is still not clear whether Irish law actually requires unconscionable conduct to grant a constructive trust as a remedy for a proven unjust enrichment claim.

(b) *The evolution of constructive trusts in Irish law*

The creation of constructive trusts as a response to unjust enrichment contrasts with the orthodoxy that constructive trusts require wrongdoing.⁸⁹ However, a neighbouring development in Irish law has produced remedial constructive trusts that do not require unconscionable conduct. There was some uncertainty as to which type of trust should be used as a remedy among the early family home cases.⁹⁰ In response to this, *NAD v TD*⁹¹ clarified the distinction between resulting and constructive trusts and affirmed that the constructive trust requires wrongdoing by the legal owner. Neither the intention of the parties nor fairness justified imposing a constructive trust. This was the orthodox view.

Soon, however, Irish courts moved towards introducing the remedial constructive trust expressly based on Lord Denning MR’s judgment in *Hussey v Palmer*.⁹² In *HKN Invest Oy v Incotrade PVT Ltd*,⁹³ the aftermath of fraud left victims competing with the liquidator of a company set up by the perpetrators, to claim the fraudsters’ assets. Costello J held that the promoters had been constructive trustees of all the money that they received on behalf of the company. He reasoned that, to avoid injustice, even innocent company promoters should be regarded as receiving money for the company before its incorporation as fiduciaries. He articulated an expansive vision of the constructive trust: it “will arise when the circumstances render it inequitable for the legal owner of property to deny the title of another to it”.⁹⁴ The touchstone is “equity and good conscience”.⁹⁵ The next liberal application of the remedial constructive trust was in *Murray v Murray*.⁹⁶ A woman lived in a house that her brother built for her and paid the mortgage on it until her death. The brother intended to gift the house to her, but she did not wish to accept. Based on her payments, Barron J awarded her heir a beneficial interest in three quarters of the house. He framed the legal question as one of fairness.⁹⁷

86. *Bricklayers* (*supra* n 12), 122.

87. [2013] IEHC 362.

88. *Ibid.*, [117].

89. *Fyffes Plc v DCC Plc* [2009] 2 IR 417, 669; *Re Frederick Inns Ltd* [1994] 1 ILRM 387, 398; *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393.

90. J Mee, “Trusts of the Family Home: Social Change, Judicial Innovation and Legislative Reform” (2016) 56 *Irish Jurist* 161.

91. [1985] ILRM 153, 160, 162–163.

92. [1972] 1 WLR 1286.

93. [1993] 3 IR 152.

94. *Ibid.*, 162.

95. *Ibid.*, 162.

96. [1996] 3 IR 251.

97. *Ibid.*, 256.

The new model remedial constructive trust was formally approved as part of Irish law in *Kelly v Cahill*.⁹⁸ Before his death, a man asked his solicitor to ensure that his wife would inherit his land. Due solely to the solicitor's error, a transfer to the wife was ineffective, so that the deceased's nephew inherited the land, contrary to the deceased's intention. Barr J adopted the views of Keane CJ, writing extrajudicially, that sometimes a remedial constructive trust is necessary to effect full restitution.⁹⁹ Here, the testator's clear, positive intention justified the constructive trust.¹⁰⁰ This is a remarkable decision. There was no wrongdoing whatsoever on the part of the nephew, on whom the trust was imposed. Nor were the requirements for an action in unjust enrichment fulfilled. In light of the earlier authorities, however, it is clear that it is not a one-off.¹⁰¹ In each of these cases, the judges have been guided solely by the notion of fairness, as evoked by the specific factual circumstances.

Scholarly commentators criticised the Irish courts' enthusiastic embrace of purely discretionary constructive trusts.¹⁰² This cool reception may in turn have influenced the more recent development of the law. Later judgments have circumscribed the remedial constructive trust, reiterating a need for wrongdoing. In *Re Custom House Capital Ltd*,¹⁰³ Finlay Geoghegan J insisted that the law requires fraudulent conduct to establish a constructive trust.¹⁰⁴ And in *Re Varko Ltd*,¹⁰⁵ where an elderly woman was exploited by her son, a remedial constructive trust arose over property in the possession of his company because he had taken "unconscionable and unfair advantage".

(c) *Distinction between constructive trusts for unjust enrichment and new model remedial constructive trusts*

It is important to differentiate between two scenarios in which the Irish courts impose a constructive trust.

First, Irish law recognises the constructive trust as a remedy for unjust enrichment. To obtain this remedy, a person must first establish his cause of action according to the rules of unjust enrichment law. If he overcomes this hurdle, the law offers the constructive trust as a remedy. It may be generally available or it may be discretionary, based on either unconscionability or the justice of the case.

Second, and rather different, is the new model remedial constructive trust exemplified by *Kelly v Cahill*.¹⁰⁶ To obtain this remedy, the plaintiff does not have to meet the legal requirements for a common law unjust enrichment claim. Instead, the court has a wide discretion in determining whether fairness requires the imposition of a constructive trust. Such a trust can arise whenever it would be inequitable for the legal owner of property to deny another's title to it. Some cases require wrongful conduct to impose this trust.

In practice, the remedial constructive trust is relatively rarely used as the basis of a judgment. Nevertheless, it is significant for understanding Irish restitution law that this species of constructive trust exists at all. It is a mechanism by which plaintiffs can sometimes obtain restitution on grounds of fairness even if the requirements of common law restitution are not fulfilled. This means that, even though Irish restitution law officially follows a rules-based approach in the

98. [2001] 1 IR 56. See also *Murray v Murray* [1996] 3 IR 251.

99. R Keane, *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths, Dublin, 1988).

100. [2001] 1 IR 56, 62.

101. See also *Finnegan v Hand* [2016] IEHC 255, [70].

102. J Mee, "Palm Trees in the Rain—New Model Constructive Trusts in Ireland" [1996] Conv 9; E O'Dell, "Unjust Enrichment and The Remedial Constructive Trust" (2001) 23 Dublin ULJ 71.

103. [2013] IEHC 559; [2014] 1 ILRM 360.

104. See also *MIBI v Stanbridge* [2011] 2 IR 78, 97.

105. [2012] IEHC 278, [40].

106. [2001] 1 IR 56.

interest of legal certainty,¹⁰⁷ judges have a means to sidestep legal limitations in cases where the rules would not produce what they consider the fair outcome.

B. HOW THE LAW IS APPLIED IN PRACTICE

Even though the rules of Irish restitution law are expressly modelled on contemporary English law, it does not necessarily follow that these rules are applied in practice in the same way in Ireland as in England. Two principal factors might colour the application of the rules in practice. The first is the possibility that Irish judges prize doing substantive justice on the merits of each case and may give priority to this objective over careful application of established rules. The second shaping factor relates to the availability (or absence) of expertise in restitution law. In both respects, there is a difference between how the High Court and the appellate courts apply the law.

1. The judicial desire to do substantive justice on the merits of the case

Overall, the Irish case law on restitution and related areas such as estoppel gives the impression of a strong judicial desire to do justice on the merits of each case. In the era of innovation, judges at all levels expanded the law to grant remedies where they deemed them appropriate. The modern Supreme Court and Court of Appeal insist on legal certainty and rules.¹⁰⁸ There is no room for applying equitable principles in a common law cause of action.¹⁰⁹ Nonetheless, many High Court judgments seem to apply doctrine in a flexible, non-technical way, so as to accommodate their sense of the justice of the case.

Many cases show that Irish High Court judges are willing to use a range of legal tools in order to achieve fair outcomes.¹¹⁰ Sometimes they decide matters without recourse to legal tests.¹¹¹ It is, for example, self-evident that the lottery-winner who claims the prize for the syndicate must not keep it for herself,¹¹² or that a society that received horses from others, to whom the owner had entrusted them, must return them to her.¹¹³ A person who lived in and renovated the ancestral home should be compensated for the cost.¹¹⁴ Money paid pursuant to a court order which is subsequently revised downwards must be repaid with interest.¹¹⁵

Sometimes the desire to do substantive justice means stretching the rules. For example, in the 1960s and 1970s, the courts applied both promissory estoppel¹¹⁶ and proprietary estoppel liberally.¹¹⁷ The *Folens* case awarded restitution for services, even though the project was abandoned and the defendant not enriched.¹¹⁸ And a client who pays a stockbroker for shares the day before the stockbroker is suspended from trading can recover his payment, even though it is mixed with other money.¹¹⁹ Fairness can trump strict logic too. For example, company promoters

107. *Bricklayers* (*supra* n 12); *Vanguard Auto Finance* [2014] IEHC 465 [75].

108. *Quinn v IBRC* [2015] IESC 29, [8.46]

109. *Morrissey v Irish Bank Resolution Corp Ltd* [2017] IECA 162, [48–49].

110. *McCarron v McCarron* (13 Feb 1997) Unreported (SC), 9; *Coyle v Finnegan* [2013] IEHC 413; *Finnegan v Hand* [2016] IEHC 255.

111. See Mee (1998) 33 *Irish Jurist* 187.

112. *Walsh v Walsh* [2017] IEHC 181.

113. *Flannery v Dean* (*supra* n 50).

114. *Dolan v Reynolds* [2011] IEHC 334.

115. *Best v Wellcome Foundation Ltd* (8 Mar 1996) Unreported (HC, Barron J).

116. *Cullen v Cullen* [1962] IR 268.

117. *McMahon v Kerry CC* (28 Jul 1976) Unreported (HC, Finlay J).

118. *Folens* [1984] 1 ILRM 1; see also *Callinan v VHIB* (*supra* n 29).

119. *Re Money Markets International Stockbrokers Ltd* [1999] 4 IR 267; *Harlequin Property* [2013] IEHC 362; see also *Shanahans Stamp Auctions Ltd v Farrelly* [1964] 98 ILTR 4.

must receive assets on trust for a company that does not yet exist.¹²⁰ Similarly, the Irish courts are very reluctant to allow separate legal personality to be used to perpetrate an injustice.¹²¹

In practice, trial judges may be influenced by considerations such as responsibility or vulnerability that are not necessarily part of a common law unjust enrichment analysis. Irish private law is very protective of vulnerable people, especially elderly people with declining mental acuity. It has developed an expansive approach to unconscionable bargains, which does not require moral turpitude by the other party.¹²² This concern seems to have informed the decision in *Harlequin Property*.¹²³ It is likely that trial judges will sometimes take a view of the substantive justice of restitution cases that reflects sympathy for the vulnerable. Depending on how strictly they conduct the legal analysis, this may determine the outcome.

2. Expertise on restitution law

(a) *The legal community's familiarity with restitution law*

A second element that shapes how doctrine is applied in judgments is the need for expertise in restitution law. It is a relatively specialist area of private law. Judges, however, are distinguished generalists, whose expertise must range across every branch of law. Crucially, the judge always depends on the arguments presented by counsel. Relatively few Irish lawyers have studied restitution law, and both awareness and knowledge of this branch of law may be relatively low among legal practitioners. As a result, some High Court judgments reveal a lack of understanding of the structure and principles of common law restitution;¹²⁴ this is apparent when argument has concentrated on a single authority, without a sense of how that fits into a wider structure of law.¹²⁵ Individual High Court judgments should therefore be treated with caution as statements of the law, especially where they seem to involve novel departures.¹²⁶

By comparison, the decisions of the Court of Appeal and Supreme Court are generally very well-informed about the specific rules of unjust enrichment at issue in the case before the court. They typically engage in careful, principled legal analysis, drawing on authorities from other common law jurisdictions as persuasive authority. Even so, there is a sense that individual legal points may sometimes be argued and considered without a full understanding of how they relate to the broader picture. An example is *Quinn v Irish Bank Resolution Corporation Ltd*,¹²⁷ where the Supreme Court engaged in an authoritative discussion of the law on enforcing illegal contracts. Clarke J considered that, if a contract was not enforceable, the loss would inevitably lie where it fell—he did not envisage the possibility of restitution in the context of illegal bargains. Since *Quinn* was about enforcing guarantees, these remarks were *obiter dicta*, but they suggest that judges may not be fully aware of restitution law issues unless and until they are argued before the court. The Supreme Court's vague remarks about the grounds for restitution of overpaid tax in the *Health Amendment Bill Reference*¹²⁸ suggest the same.

120. *HKN v Incotrade* [1993] 3 IR 152, 162.

121. *Chaieb v Carter* (11 Jan 1985) Unreported (HC, McWilliam J); [1987] IESC 5; *Re Varko* [2012] IEHC 278.

122. *Keating v Keating* [2009] IEHC 405; *Prendergast v Joyce* [2009] IEHC 199, [74]; *MC (A ward of court) v FC* [2013] IEHC 272; [2013] IESC 36; R Clark, "The Unconscionability Doctrine Viewed From an Irish Perspective" (1980) 31 NILQ 114; D Capper, "The Unconscionable Bargain in the Common Law World" (2010) 126 LQR 403.

123. [2013] IEHC 362.

124. *Vanguard Auto Finance* [2014] IEHC 465, [70].

125. *Coleman v Mullen* [2011] IEHC 179.

126. *Vanguard Auto Finance* [2014] IEHC 465, [82].

127. [2015] IESC 29.

128. *Re Article 26* [2005] 1 IR 105, [2005] IESC 7.

(b) An old-fashioned approach to “quantum meruit”

One idiosyncrasy in the current application of restitution law in Ireland is that services cases are still being adjudicated as a distinct *quantum meruit* claim, rather than integrated into the conceptual framework of modern restitution law.¹²⁹ This seems to be due to a narrow focus in pleadings on the most directly relevant precedents, coupled with unjust enrichment law as a whole not being to the forefront of legal practitioners’ minds. One illustration is *Coleman v Mullen*,¹³⁰ which correctly excludes restitution for services provided by a good neighbour to an elderly lady. The neighbour had voluntarily provided the services and there was no understanding that she would be paid. Adopting a restitutionary analysis, these findings are indeed determinative: voluntariness answers restitution claims based on impaired consent and any argument based on free acceptance could not succeed if the recipient did not understand that the benefit was to be paid for. However, the judgment in *Coleman* focused on the fact that the parties did not intend to create legal relations, and concluded that the appropriateness of conferring a right to remuneration on good Samaritans was a policy matter that the legislature would be better suited to consider. Subsequently, in *Coyle v Finnegan*,¹³¹ Laffoy J relied solely on *Coleman* for the restitution point. She identified the test for *quantum meruit* as being whether there was an intention on the part of both parties that the plaintiff would be entitled to reasonable remuneration for his labour. Using the analytical framework of unjust enrichment would enhance the reasoning in such cases, and improve the coherence of the law.

C. JUDICIAL ATTITUDES TO DEVELOPING THE COMMON LAW

1. Willingness to innovate

Moving from a portrayal of the *status quo* in Irish restitution law, we can consider elements of legal culture that govern its capacity for change. In particular, the future of Irish restitution law is likely to turn on judicial attitudes to developing the common law and the sources that judges use for inspiration. Irish law has gone through highly innovative and more conservative phases. It is also a very permeable system, open to influences from other common law jurisdictions.

The remarkable dynamism of Irish restitution law in its first phase of development reflected wider trends in the Irish legal system at that time. Before the 1970s, the legal profession was highly positivist and conservative.¹³² However, judges became notably more active in the 1960s. In 1965, the Supreme Court rejected the strict doctrine of *stare decisis*,¹³³ and over the following decade Irish judges created a vigorous new constitutional jurisprudence.¹³⁴ Little wonder then that they simultaneously adopted an audacious approach to developing private law. Irish judges have a Constitutional duty to vindicate the personal rights of citizens if they suffer injustice.¹³⁵ This supported removing legal restrictions that might unjustifiably hamper their doing justice.¹³⁶ In tort law, for example, the courts repudiated the doctrine of sovereign immunity,¹³⁷ introduced the

129. *Donnelly v Woods* [2012] IEHC 26; *Bergin v Walsh* [2015] IEHC 594.

130. [2011] IEHC 179.

131. [2013] IEHC 413.

132. W Binchy, “Meskell, the Constitution and Tort Law” (2011) 33 Dublin ULJ 339; see also GW Hogan and GF Whyte, *JM Kelly: The Irish Constitution*, 4th ed (LexisNexis Butterworths, Dublin, 2003), Preface to the First Edition; B McMahon, “The Irish Contribution to Tort Law” (1982) 4 Dublin ULJ 1.

133. *AG v Ryan’s Car Hire Ltd* [1965] IR 642.

134. G Hogan, D Kenny and R Walsh, “An Anthology of Declarations of Unconstitutionality” (2015) 54 *Irish Jurist* 1, 15–16; G Hogan, “Mr Justice Brian Walsh: The Legacy of Experiment and The Triumph of Judicial Imagination” (2017) 57 *Irish Jurist* 1.

135. *Bunreacht na hÉireann* (Constitution of Ireland) (1937), Arts 40.3.1 and 40.3.2.

136. W Binchy, “Meskell, the Constitution and Tort Law” (2011) 33 Dublin ULJ 339.

137. *Byrne v Ireland* [1972] IR 241.

concept of a constitutional tort,¹³⁸ and adopted expansive approaches to other doctrines.¹³⁹ The Irish courts' expansion and principled refoundation of unjust enrichment law fits perfectly in this surrounding context. The evolution of ideas in Irish public law from the 1960s also directly affected the overpaid taxes cases.¹⁴⁰ Lastly, the absence of domestic textbooks at that time allowed judges space to reimagine the law.

Why, then, did Irish law choose in the 1990s to subscribe to English unjust enrichment law, in place of further developing its own principles? The decisive change was English law's recognition of the unjust enrichment principle.¹⁴¹ Once a modern and comprehensive English law existed, it made sense for Irish law to adopt it. A small jurisdiction could not hope to replicate the immense intellectual effort needed to construct an entire branch of law: Irish courts could certainly endorse *general* rules, but they did not decide enough cases to fill out the fine details. Irish scholars also contributed to the shift. They urged more faithful application of the new norms, criticising Irish judgments by reference to them, and wove Irish and English authorities into a single combined narrative.¹⁴² The Irish courts therefore stopped innovating in restitution law. Reinforcing this, Irish judges may generally have become more conservative around this time.

This caution continues. Broadly-speaking, the Court of Appeal¹⁴³ and Supreme Court remain willing to develop the common law, but on a cautious, incremental basis. Recent changes include the reformulation of the law on illegality¹⁴⁴ and the introduction of damages for breach of legitimate expectations.¹⁴⁵ However, the Supreme Court has warned that "courts should not engage in an alteration of the common law which amounts to legislation as opposed to the orderly evolution of common law principles".¹⁴⁶ The Court of Appeal's recent rejection of a duty of good faith in contractual performance is the flag-bearer for this sort of restrained approach to the common law's development.¹⁴⁷ If this mindset persists, future judge-made developments are unlikely to be dramatic.

2. Openness to foreign influences

As a small jurisdiction, Ireland regularly looks both to England and to other common law jurisdictions to fill gaps or identify better solutions to legal problems.

It is commonplace to invoke English authorities and to treat English precedents as part of the fabric of Irish doctrine. Judges also regularly survey case law from a range of common law jurisdictions when considering modifying the law.¹⁴⁸ The Supreme Court generally supports paying attention to developments in other jurisdictions, particularly if a consensus has emerged.¹⁴⁹ A notable illustration is *Quinn v IBRC*,¹⁵⁰ where the High Court and Supreme Court demonstrated a self-confident, outward-looking approach to developing Irish law. Looking to other common law jurisdictions, the judges were prepared to diverge from English law.

Citing authorities from other jurisdictions is a selective process, even when English authorities are presented as part of the same law as Irish law. Irish courts follow English precedents most

138. *Meskill v C oras Iompair  ireann* [1973] IR 121; *Ogieriakhi v Minister for Justice* [2014] IEHC 582.

139. *Purtill v Athlone UDC* [1968] IR 205; *McNamara v Electricity Supply Board* [1975] IR 1; *Moynihan v Moynihan* [1975] IR 192; *Ward v McMaster* [1989] ILRM 400.

140. Cleary (2016) 55 *Irish Jurist* 25, 35; Cleary (2011) 34 *Dublin ULJ* 155, 164–165.

141. *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

142. E O'Dell, "The Principle Against Unjust Enrichment" (1993) 15 *Dublin ULJ* 27.

143. *Bunreacht na h ireann* (Constitution of Ireland) (1937), Art 34.4.

144. *Quinn v IBRC* [2015] IESC 29.

145. *Lett & Co Ltd v Wexford BC* [2012] IESC 14.

146. *Re Flightlease (Ireland) Ltd* [2012] IESC 12, 43; *Coleman v Mullen* [2011] IEHC 179, [18–19].

147. *Flynn v Breccia* [2017] IECA 74.

148. See eg *Re PMPA Garage* [1992] ILRM 349; *Quinn v IBRC* [2015] IESC 29.

149. *Re Flightlease* [2012] IESC 12, 36.

150. [2015] IESC 29, [8.5].

readily when they match their own conceptions of substantive fairness. This is exemplified by their easy reception of the *Pallant v Morgan*¹⁵¹ trust and the *Chase Manhattan* constructive trust over mistaken payments.¹⁵² Irish judgments have similarly welcomed recent English developments in proprietary estoppel.¹⁵³ Most remarkable is the strong reliance on Lord Denning's judgments in Irish restitution law cases. Irish courts enthusiastically adopted his judgments concerning promissory estoppel,¹⁵⁴ the remedial constructive trust¹⁵⁵ and exceptions to the mistake of law bar.¹⁵⁶ They also relied on Lord Denning's views in constructing the doctrine of legitimate expectations.¹⁵⁷ Strikingly, some English authorities live on in Irish law even after falling out of favour at home.¹⁵⁸ *Hussey v Palmer*¹⁵⁹ is, of course, a prime example of this.

Occasionally Irish judgments canvas precedents from around the common law world as if they all represent a single, unified view of the law.¹⁶⁰ It is unclear whether Irish lawyers think that there is, indeed, a single common law approach to the matters in question, or whether this is a sort of judicial sleight of hand designed to allow the judge free choice of whichever solution appeals most.

Of the common law jurisdictions, Canadian law's influence has been more limited than one might expect, given the apparent similarities between the legal cultures of Ireland and Canada. There is no express evidence in the Irish cases of Canadian influence on the use of the constructive trust as a remedy for unjust enrichment. Canadian judgments are only mentioned in the *Bricklayers* judgment, long after Ireland endorsed proprietary restitution.¹⁶¹ It is also a noteworthy omission that Irish law has not referred to the public law explanation of the recovery of overpaid taxes in *Kingstreet Investments Ltd v New Brunswick*,¹⁶² which seems an excellent fit for Irish legal culture.

While the appellate courts may not be as radical as in the heady days of the early 1980s, they remain willing to develop the common law in a cautious way, focusing on individual rules. In many cases, they will simply adopt the English solution. If there is a gap, or if they consider an existing rule unsatisfactory, they are likely to look to jurisdictions such as Australia and Canada for possible answers. Much depends on the arguments made by counsel. Informed arguments about restitution law in these comparator jurisdictions will assist the courts in making the most of their capacity to choose.

D. THE FUTURE OF IRISH RESTITUTION LAW

Looking to the future, the changes that we can both predict and wish for Irish restitution law over the next few years are relatively modest in scale. There will undoubtedly be some developments in relation to doctrine, but there will not be a radical transformation. English law remains a sound overall model for common law unjust enrichment, and the courts should continue the work of modernising Irish law and improving its clarity. The manner in which the law is applied in practice

151. *Pallant v Morgan* [1953] Ch 43; *Shiel v McKeon* [2007] 2 ILRM 144.

152. *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105; *Re Irish Shipping* [1986] ILRM 518.

153. *Gillett v Holt* [2001] Ch 210; *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776. See *Coyle v Finnegan* [2013] IEHC 463 [26]; *Finnegan v Hand* [2016] IEHC 255.

154. *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130; *Cullen v Cullen* [1962] IR 268.

155. *Hussey v Palmer* [1972] 1 WLR 1286; *Murray v Murray* [1996] 3 IR 251; *Kelly v Cahill* [2001] 1 IR 56.

156. *Kiriri Cotton Ltd v Dewani* [1960] AC 192; *Dolan v Neligan* [1967] 1 IR 247, 259; *East Cork Foods* [1978] 1 IR 103; *Rogers v Louth CC* [1981] IR 265.

157. *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84; *Webb v Ireland* [1988] 1 IR 353.

158. *Hussey v Palmer* [1972] 1 WLR 1286; *Chase Manhattan* [1981] Ch 105.

159. [1972] 1 WLR 1286.

160. See eg *Bricklayers* (*supra* n 12).

161. *Rathwell v Rathwell* [1978] 2 SCR 436; *Pettikus v Becker* [1980] 2 SCR 834.

162. 2007 SCC 1; [2007] 1 SCR 3.

is also likely to continue along current lines, with a division between non-formalist trial courts and more rule-focused appellate courts. Finally, more expert commentary on domestic restitution law could have a significant effect on the quality of legal reasoning in this area.

1. Maintaining a close relationship with English law

The decision by Irish judges to adopt English restitution law as their primary guide has been an appropriate one. While Irish courts were, during their most innovative period, quick to endorse the principles of a modern law of unjust enrichment, a small jurisdiction can hardly produce enough case law to develop a detailed body of rules. The English law of unjust enrichment offers a well-constructed model that fits well overall with the values and sensibilities of Irish judges. The large body of English case law offers a wealth of valuable legal analysis. It is inconceivable that Irish law would turn its back on this store of legal wisdom.

It is extremely unlikely that Irish law would radically depart from the unjust factors approach in favour of an absence of juristic reason model.¹⁶³ There have been no calls from academics or judges to embrace absence of basis. The courts are not usually particularly focused on the law's theoretical foundations and overall structures, so long as the law enables them to reach the right decision in the case before the court. Moreover, current judicial views on developing the common law are relatively cautious. If the courts are unsatisfied with the law, they are far more likely to modify individual rules than to transform the conceptual framework. We can confidently predict that Irish law would not consider such radical change unless English law did so first.

2. The future of existing divergences from English law

Although the rules for establishing common law unjust enrichment are essentially similar in the two jurisdictions, the divergence in relation to proprietary remedies is significant. Will these distinctive features persist in Irish law?

The availability of a constructive trust as a remedy once a plaintiff has proven unjust enrichment has been approved by binding Supreme Court precedent.¹⁶⁴ It is therefore unlikely that the courts will repudiate it. However, it is conceivable that judges may in future interpret the authorities as requiring actual unconscionable conduct in addition to unjust enrichment as a condition for this form of constructive trust. This would bring Irish law closer to the more restrictive view of the availability of proprietary restitution in English law, as articulated by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*.¹⁶⁵

By comparison, the position of the flexible new model remedial constructive trust is less secure.¹⁶⁶ It is being used in some High Court decisions but it has not yet been endorsed by the Supreme Court. Indeed, a few recent cases that appear to insist on wrongful conduct suggest that its ambit may be contracting. Yet the cases in which it was invented and applied show that this device responds to a judicial appetite to achieve substantive justice. While it is certainly inconsistent with the appellate courts' desire for legal certainty and with English law, the Irish legal system may be generally more tolerant of judicial discretion than English law. If this is so, then it may be due to the sorts of disputes that come before the courts. Irish restitution cases very often involve ordinary people, not large commercial actors.¹⁶⁷ Furthermore, in a small jurisdiction, there may be less need actively to strive to ensure rigid coherence and less fear of the floodgates

163. *Garland v Consumers' Gas Co* 2004 SCC 25; [2004] 1 SCR 629.

164. *Murphy v AG* [1982] 1 IR 241.

165. [1996] AC 669.

166. *Kelly v Cahill* [2001] 1 IR 56.

167. H Biehler, "Remedies in Cases of Proprietary Estoppel: Towards a More Principled Approach?" (2015) 54 *Irish Jurist* 79, 91–92; *LSREF III Achill Investments Ltd v Corbett* [2015] IEHC 652, [36], [37].

opening.¹⁶⁸ Thus, while the future of the remedial constructive trust is not certain, it is probable that Irish law will retain this discretionary remedy as a useful and flexible tool.

The new model remedial constructive trust also has a wider significance for our understanding of Irish restitution law as a whole. It provides a safety-valve that may allow Irish law to reconcile its inclination towards discretion and substantive justice with rules-based restitution. In the exceptional case where the rules of restitution law would not produce the solution that judges regard as just in the circumstances, they can reach instead for the remedial constructive trust and bypass any obstacles without disturbing the rules of common law restitution.

Apart from these points of marked divergence, there are areas in which we need clarity as to whether or not Irish law is the same as English law. In particular, the courts should clarify the relationship between the indigenous *Murphy* right to recover overpaid taxes and the *Woolwich* principle. One practical question is whether a defence like change of position is still available to the State, as *Murphy* allowed. The courts should further consider whether the right to recover overpaid taxes might appropriately belong in constitutional law in the Irish context. Ireland has a much more expansive conception of public law remedies than the United Kingdom.

3. Modernisation and modification of doctrine

The gradual growth in domestic case-law might provide some more detail about the contours of the rules. The limiting factor here is not primarily the small size of the jurisdiction, but the fact that many disputes that are functionally restitution scenarios are not pleaded on the basis of unjust enrichment law. All the additions and changes that we hope to see in Irish restitution law depend on a suitable case coming before the courts and being argued appropriately.

The main task for Irish lawyers will be to finish the job of modernising the rules to accord with the logical implications of the principle against unjust enrichment. The changes needed are just the sort of incremental evolution of the common law that the appellate courts support. Irish law certainly ought to modernise its treatment of restitution cases where the enrichment takes the form of services, which are still not integrated into the structures of unjust enrichment law. There is no reason why these “*quantum meruit*” cases should exist in a silo of their own, disconnected from the rest of unjust enrichment law. Other changes are inevitable in contemporary unjust enrichment law. An obvious example is the long-awaited abolition of the mistake of law bar. We might also expect that Irish law will abolish the total failure of consideration requirement in an appropriate case. Allowing restitution on a proportionate basis in cases where there is a partial failure of consideration fits the judicial desire for substantively fair decisions.

There are some ways in which the earlier Irish authorities do not conform perfectly to current unjust enrichment principles. For example, leading judgments have taken account of considerations such as responsibility or wrongdoing.¹⁶⁹ This has the potential to create confusion about the tests for unjust factors such as mistake. It would be desirable therefore to clarify why these considerations were relevant in those cases. An appealing explanation may be that these considerations in fact bear on the question whether to grant a personal or proprietary remedy.

Irish law is likely to follow current and future changes in English restitution law. And it would be particularly receptive to developments in English law that move towards less formalist approaches. For example, Irish courts would be unlikely to retain a strict direct provider rule, whose limits have been tested in recent English authorities.¹⁷⁰ Again, though the Irish Supreme

168. K Goodall, “What Defines the Roles of a Judge? First Steps Towards the Construction of a Comparative Method” (2000) 51 NILQ 535, 538.

169. *East Cork Foods* [1978] 1 IR 103, 111, 112; *Bricklayers* (*supra* n 12), 36, 93.

170. *Menelaou v Bank of Cyprus UK Ltd* [2015] UKSC 66; [2016] AC 176; *cf Investment Trust Companies (In Liq) v HMRC* [2017] UKSC 29; [2017] 2 WLR 1200.

Court has recently reformulated the law on illegality, the subsequent decision in *Patel v Mirza*¹⁷¹ would fit well with Irish sensibilities. Irish law may move towards assimilating the two positions—a desirable development. Logically, there are cases in which the policy of a statutory prohibition argues against enforceability but favours the reversal of anything done under the illegal contract.

We can expect that most future developments will concern the nuts and bolts of restitution law. It is impossible to predict at this stage the concrete choices that the courts will be asked to make. The important thing is that those choices should be made in a conscious, informed way. Where Irish law already differs from English law, Irish lawyers should decide whether the indigenous rule is preferable, whether it can be reconciled with the English variant, or whether to adopt the English rule instead. Irish law need not follow English law in every respect. Since there are already important divergences between Irish and English restitution law, there is no reason for Irish judges to forswear looking to other common law jurisdictions for inspiration when reforming individual rules. In doing so, the courts should be aware of how different jurisdictions' laws differ and how transplanted ideas fit into our own body of law.

4. The application of restitution law in Ireland

It is likely that a gap will continue to exist between how restitution law is applied in the Court of Appeal and Supreme Court and how it is applied in the High Court. The appellate courts are reasonably formalist. They favour legal certainty and the careful application of legal doctrine. In contrast, first instance decisions are often shaped by judges' sense of the substantive justice of the individual case. There is no reason to suppose that this will change. Most reported restitution law cases nowadays are decided in the High Court. It is hard to see how the appellate courts can require the trial courts generally to adhere more closely to doctrinal orthodoxy. In the case law that exists to date, it seems rare for parties to appeal High Court judgments. This means that, even if Irish law officially adopts orthodox English-style rules throughout restitution law, those rules will frequently be applied at ground level in a flexible way, influenced by considerations that should not, strictly-speaking, be relevant. Accordingly, in practice, the real division is likely not to be between Irish and English law, but between the official rules approved in the appellate courts and the law applied day-to-day in trial courts.

The quality of decision-making in all courts would be improved if the legal profession as a whole becomes better-informed about unjust enrichment law. This can best be achieved by commentary that is specifically focused on Irish restitution law. Irish judgments frequently rely on indigenous textbooks where they are available. In the absence of an Irish restitution law text, the restitution cases have sometimes cited *Goff & Jones*, but most decisions are not informed by English texts. A comprehensive, specifically *Irish* account of the law would bring many benefits: it would make contemporary restitution law more accessible to the legal profession; it would improve the quality of pleadings; it would enable judges more confidently to apply an established set of rules; and it would show jurists how individual lines of authority fit within the bigger picture. Work focused specifically on Irish law is also necessary to ensure its overall coherence across the areas that are functionally-related to restitution. Since Irish law contains a mix of features that is not shared by any other jurisdiction, interpretive accounts developed in other jurisdictions, which explain those jurisdictions' doctrines, do not perfectly explain Irish law.

The practical conclusion is that, while we cannot predict many of the concrete choices that Irish restitution law will be called upon to make in the coming years, both the development of doctrine and the application of the law in practice will be enhanced if we can improve the general understanding of restitution law within the Irish legal system.

171. *Patel v Mirza* [2016] UKSC 42; [2017] AC 467.