RESTITUTIONARY REMEDIES IN THE CONTEXT OF PONZI SCHEMES: A COMMONWEALTH PERSPECTIVE

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I. INTRODUCTION

The basic nature of a Ponzi scheme is widely known and understood. The operator of a Ponzi scheme invites investments on the promise of unusually high rewards of some kind, whether in the form of interest, dividends, profits, or returns in some other form.[2] The scheme is fraudulent in the sense that the high rewards are said to be generated by a business or scheme which either may not exist or is most unlikely to generate resources able to financially support such rewards to investors.[3] In fact, the rewards are paid by the Ponzi operator with assets invested by subsequent investors.[4] In due course, when the supply of further investors runs dry, the scheme collapses.[5] A complex set of legal issues arises as the various participants in or victims of the scheme attempt to sort

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2. U.S. Sec. and Exch. Comm'n, *Ponzi Scheme*, INVESTOR.GOV, https://www.investor.gov/protect-your-investments/fraud/types-fraud/ponzi-scheme (last visited Dec. 19, 2023).

3. *Id.*

4. *Id.*

5. *Id.*

out their entitlements to whatever assets remain in the Ponzi's hands or can be recaptured from others.[6] The law of restitution plays an important role in this context.[7] This article attempts to sort out and describe the various types of restitution claims that might arise in contests among parties who have received payments from the Ponzi operator constituting both a return of capital and profits of some kind ("Net Winners"), parties who have received no payments whatsoever from the Ponzi operator or less than their investment ("Losers"), and the Ponzi operator ("Swindlers"). Three types of claims will be considered – claims by Losers against Net Winners, claims by Ponzi operators ("Swindlers") against Net Winners and claims by Losers against Swindlers.

The doctrines set forth are drawn from jurisdictions of the British Commonwealth and, more particularly, from English and Canadian common law. Although brief mention will be made of American treatment of these issues in the insolvency context,[8] the burden of the article is to explain how Commonwealth doctrine would apply to such claims. Nor does the article attempt to portray the complexities relating to the application of insolvency or fraudulent preference laws to these claims. The availability of restitutionary remedies may, of course, play a significant role in these contexts, but the focus here is on restitutionary relief at *common law*.

Even a casual observer of the contemporary Ponzi phenomenon would infer that over recent decades, Ponzi schemes have proliferated in quantity and size.[9] The early twentieth century scheme of Charles Ponzi,[10] though significant in its time, pales in comparison to the recent gargantuan schemes of Bernard Madoff[11] and R. Allen Stanford.[12] Indeed, it has been suggested

6. Andrew Kull, *Ponzi, Property, and Luck*, 100 IOWA L. REV. 291, 291 (2014).

7. Mallory A. Sullivan, *When the Beezle Bursts: Restitutionary Distribution of Assets after Ponzi Assets Enter Bankruptcy*, 68 WASH. & LEE L. REV. 1589, 1596-97 (2011).

8. *See generally* Kull, *supra* note 6, at 291-322; Sullivan, *supra* note 7, at 1589-1641.

9. Sullivan, *supra* note 7, at 1592.

10. Cunningham v. Brown, 265, U.S. 1, 8 (1924).

11. *See* Bernard L. Madoff Inv. Sec. LLC, 654 F. 3d 229, 242 (2d Cir. 2011) (affirming the Net Investment Method be used to distribute customer property from Madoff's fraud); Picard v. Citibank, N.A. (Bernard L. Madoff Inv. Sec. LLC), 12 F. 4th 171, 192, 199 (2d Cir. 2021) (ruling the trustee recovering money for Madoff's victims did not have to show "willful blindness" and did not have to show defendants' lack of good faith); Andrew Kull, *Common-Law Restitution and the Madoff Liquidation*, 92 B.U. L. REV. 939, 939-67 (2012) (discussing the Madoff liquidation).

12. For a Canadian spin-off of the Stanford litigation, see Wide v. T.D. Bank (2015), ONSC 6900 (Can. Ont. S.C.J.) [Commercial List].

that the contemporary use of digital currency largely involves elements of the traditional Ponzi scheme.[13] Obtaining a clearer view of the restitutionary remedies available in the Ponzi context is a matter of some current importance.

An attempt is also made here to identify the ideal solution to sorting out the entrails of a collapsed Ponzi scheme. It will be suggested that the most fair and equitable approach would be to gather in the remaining assets held by the Ponzi operator together with such recoverable assets as have been transferred by the Ponzi operator to early investors and achieve a *pro rata* distribution of the total to all participants in or victims of the scheme. The results available under restitutionary doctrine will then be compared to this ideal solution.

In the next three sections, we examine the three different types of claims identified above.

2. CLAIMS BY LOSERS AGAINST NET WINNERS AND PARTIALLY REIMBURSED PARTIES

Two types of possible restitutionary claims by Losers against Net Winners may be considered. The distinction between the two is that the first involves a direct *in personam*, or non-proprietary, claim against a Net Winner. The second type is a proprietary claim against the Net Winner on the basis of equitable proprietary doctrine.

A. The Direct *In Personam* Claim

Readers unfamiliar with the law of restitution may not fully appreciate the different types of what might be referred to as "three-party claims" that may arise. The first and most obvious case involves situations where a plaintiff has conferred benefits on a third party which redound to the benefit of the defendant. Where a plaintiff has mistakenly paid taxes to a third-party tax authority,

13. *See, e.g.*, David Segal, *The Crypto Ponzi Scheme Avenger*, N. Y. TIMES (Nov. 11, 2022), p. 32, https://www.nytimes.com/2022/11/11/business/crypto-ponzi-scheme-hyperfund.html (Nobel Laureate Paul Krugman says, "bitcoin is largely a Ponzi scheme"). *See also* Ben McKenzie & Jacob Silverman, EASY MONEY: CRYPTOCURRENCY, CASINO CAPITALISM AND THE GOLDEN AGE OF FRAUD (N.Y., Abrams ed. 2023). Like a Ponzi scheme, cryptocurrencies confer wealth on earlier purchasers at the expense of later purchasers and their continued success rests on their capacity to attract the latter. Unlike Ponzi schemes, they may lack the features of outright fraud and inevitable collapse that typify Ponzi schemes.

which were actually owed by the defendant, a direct claim by the plaintiff would lie against the defendant for a benefit conferred by discharge of the defendant's obligation. Such cases are best viewed as benefits directly conferred on the defendant through discharge of the obligation owed by the defendant to the third party.[14] The second type of three-party claim arises in the context of restitution for benefits acquired by wrongdoing in breach of a duty owed to the plaintiff.[15] It is well established in such cases that the recoverable benefits may have been acquired from third parties.[16] Thus, for example, in the context of breach of fiduciary obligation, the fiduciary will be liable to turn over to the person to whom the fiduciary duty is owed any benefits acquired through improper dealings with third parties. Of particular relevance to the present context, however, is a third line of authority dealing with benefits conferred by third parties on defendants who have not engaged in wrongdoing to which the plaintiff, for some reason, has a stronger claim.[17] This line of authority is well-established and contains at least two streams.[18] First, there are cases where the third party has misappropriated assets which were either owned by or should have been transferred to the plaintiff, but, rather, have been transferred by the third party to an unsuspecting defendant.[19] Second, there are cases where no wrongdoing by a third party is involved but there exist circumstances which indicate that the plaintiff, for some reason, has a higher claim to the benefit conferred by a third party than the defendant who actually received it.[20] A simple example of the latter line of authority would be cases where the defendant has received reimbursement from a third party of expenses initially borne by the plaintiff. For example, a municipal authority might pay to a new registered owner of real property a tax refund with respect to overpaid taxes

14. *See* P.D. Maddaugh & J.D. McCamus, *The Law of Restitution*, c. 12:2 (Looseleaf Ed., Toronto, Thomson Reuters, current) ("Maddaugh & McCamus") c. 12:2

15. Maddaugh & McCamus, *supra* note 14, at c. 3:2.

16. *See, e.g.,* Canadian Aero Service Ltd. v. O'Malley, (1974) S.C.R. 592 at 621-22 (S.C.C.).

17. *See generally,* John D. McCamus, *Restitutionary Remedies in Three-Party Cases: A Comparative Perspective*, 14 FLA. INT'L U. L. REV. 65, 66 (2020). *See also* Maddaugh & McCamus, *supra,* note 14, cc'sat 35 and, 36.

18. McCamus, *supra* note 17, at 65-66.

19. Maddaugh & McCamus, *supra* note 14, at c. 36.

20. Maddaugh & McCamus, *supra* note 14, at 35.

which were initially paid by the previous owner.[21] In such a case, the previous owner has a direct claim against the current owner for the moneys reimbursed. Similar claims can arise in the context of contractual arrangements relating to reimbursement. Similar authorities deal with situations where parties have failed to carry out arrangements concerning the allocation of assets following family dissolution or the innocent acquisition of assets initially lost by the plaintiff.[22]

Claims in the Ponzi context brought by Losers against Net Winners fit within the wrongful conduct branch of this third type of three-party claim.[23] In the typical case, a third-party Ponzi operator would have obtained benefits from the Losers through fraudulent means and subsequently transferred those benefits or other equivalent value to the earlier investors or Net Winners. We may consider, then, whether a direct claim by the Losers can be brought against the Net Winners in such circumstances. The wrongdoing branch of this three-party line of authority is long-standing.[24] Relief has been granted at common law in such circumstances in what were formerly known as quasi-contract claims.[25] Thus, in the 18th century authority, *Clarke v. Shee and Johnson*,[26] Lord Mansfield granted such relief in a case where an employee of the plaintiff brewer had misappropriated moneys from customers that should have been turned over to the plaintiff and then paid the misappropriated moneys to the defendant vendor of

21. 80 Mornelle Prop. Inc. v. Malla Prop. Ltd., (2010), 327 D.L.R. 4th 361 (Can. Ont. C.A.).

22. Moore v. Sweet, [2018] 3 S.C.R. 303, 309 (Can.).

23. McCamus, *supra* note 17, at 67.

24. *Id.*

25. *Id.*

26. (1774), 1 Cowp. 197, 98 Eng. Rep. 1041. Although American law has long recognized three-party claims more generally, there is little evidence that the precise holding in the *Clarke* case has migrated into American law. *See* American Law Institute, RESTATEMENT OF THE LAW OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 118 (AM. L. INST. 1937); American Law Institute, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 48 (AM. L. INST. 2011) ("[hereinafter *Restatement Third*]; G. E. Palmer, *The Law of Restitution*, vol. 4 (Boston, Little, Brown & Co., 1978) c. 21 ("Three Party Problems: Restitution of Benefits Received by the Defendant from a Third Person"). An early American work on quasi-contracts refers to *Clarke* somewhat skeptically on the basis that to suggest that such facts create a "contract" between plaintiff and defendant is a "novelty". *See* W.A. Keener, THE LAW OF QUASI-CONTRACTS, at 180-81 (1893). An American lawyer seeking to rely on *Clarke*, presumably, could rely on the general principle against unjust enrichment (*Restatement Third*, p.at 4), together with the fact that relief has long been recognized in American law in analogous three-party cases.

lottery tickets.[27] The plaintiff was granted direct relief for the misappropriated moneys against the defendant. A claim in so-called "money had and received," (the precursor to the modern restitutionary claim for moneys paid to the defendant by the plaintiff) was said by Lord Mansfield to be "a liberal action in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject matter of it, the plaintiff may well support this action."[28] The fact that the lottery transaction was, at the time, unlawful was a significant matter.[29] If, on the other hand, the defendant had given valuable consideration to the third party under a lawful transaction, the third party would have been able to establish a *bona fide* purchase defence.[30] Historically, such relief was made available, not only in cases like *Clarke*, involving theft or tortious wrongdoing, but, as well, where the wrongful conduct of the third party constituted a breach of a contractual obligation owed to the plaintiff.[31]

The leading modern English authority on point is the decision of the House of Lords in *Lipkin Gorman v. Karpnale Ltd.*[32] As in *Clarke*, the facts involved the misappropriation of funds by a rogue third party which were then transferred to an innocent defendant.[33] The rogue, Cass, was a partner in the plaintiff firm of solicitors.[34] Cass misappropriated moneys from the firm and gambled them away at a gambling facility operated by the defendant, carrying on business as the "Playboy Club."[35] In due course, Cass was convicted of theft and, presumably, did not constitute an attractive target for a restitution claim.[36] Relying on the *Clarke* case, however, the plaintiff firm successfully sought restitution of the moneys misappropriated by Cass that had been received and retained by the defendant casino.[37]

The *Lipkin Gorman* decision is a leading authority, not because of its uncontroversial application of the *Clarke* doctrine

27. Clarke v. Shee & Johnson (1774) 98 Eng. Rep. 1041, 1041-42.
28. *Id.* at 1041.
29. *Id.* at 1042.
30. *Id.* at 1043.
31. McCamus, *supra* note 17, at 67.
32. Lipkin Gorman v. Karpnale Ltd. [1991] 4 All ER 512 (HL) (appeal taken from Eng.).
33. *Id.* at 524.
34. *Id.*
35. *Id.* at 524-25.
36. *Id.* at 525.
37. *Id.* at 525-26.

but, rather, because it is the first English authority to clearly embrace the American change of position defence as an available defence in cases of this kind.[38] In the course of its dealings with Cass, the defendant casino had, over time, although not as frequently as Cass would have wished, paid winnings on particular bets placed by him.[39] Thus, the plaintiff's claim was successful only for the difference between the misappropriated moneys gambled by Cass and the moneys paid to Cass by the defendant.[40] Indeed, the decision importantly illustrates the distinction between the defence of *bona fide* purchase and the defence of change of position. Although the business conducted by the casino is now considered to be lawful, the Court noted that the individual gambling transactions did not constitute binding contracts.[41] Accordingly, the defendant was unable to establish a defence of *bona fide* purchase.[42] Nonetheless, to the extent that the defendant, who was innocent in the sense of not being aware of the wrongdoing of Cass, had detrimentally relied on the receipt of moneys by paying out winnings to Cass, those expenditures constituted an effective change of position.[43] Ironically, then, a change of position defence was authoritatively recognized in England, not in its natural home of claims for mistaken payments, but, rather, in the context of three-party claims involving wrongfully misappropriated assets. Lord Goff, the author of the leading opinion in *Lipkin Gorman*, however, had earlier anticipated or asserted the availability of such a defence in the mistaken payment context[44] and the defence is now well-recognized in Commonwealth authorities as being available in mistaken payment claims.[45]

Although there do not appear to be any authorities directly on point in the Ponzi setting, it is obvious that the *Lipkin Gorman* claim would be available in the Ponzi context.[46] In the typical case, a third-party Ponzi operator acquires moneys from Losers by

38. Andrew Burrows, *Change of Position: The View from England*, 36 LOY. L.A. L. REV. 803, 803 (2003).

39. Lipkin Gorman v. Karpnale Ltd., [1992] HL 512, 514.

40. *Id.* at 514.

41. *Id.* at 530.

42. *Id.* at 520.

43. *Id.* at 532.

44. Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd., [1980] Q.B. 677 (1979).

45. *See*, *generally*, Maddaugh & McCamus, *supra* note 14, c. 10:12.

46. Amy Sepinwall, *Righting Others' Wrongs: A Critical Look at Clawbacks in Madoff-Type Ponzi Schemes and Other Frauds*, 78 BROOK. L. REV. 1, 35 (2012).

fraudulent means and uses those moneys to pay off Net Winners. One potential complication does arise from the *Lipkin Gorman* doctrine. It was accepted in *Lipkin Gorman*, in line with a similar view expressed in *Clarke*, that to enjoy success, the defendant must establish that the moneys misappropriated from the plaintiff can be directly traced into the hands of the defendant in the sense that it must be shown that the plaintiff's moneys were handed over to the defendant by the third party.[47] Thus, in *Lipkin Gorman*,[48] Lord Goff explained, by way of meeting this requirement, that moneys misappropriated came from the firm's client account and thus constituted a debt owed by the bank to the firm.[49] That debt, of course, constituted a choice in action owned by the firm.[50] The moneys had been misappropriated by a fourth party acting under instructions from Cass who withdrew funds from the firm's client account.[51] That party then transferred the cash to Cass.[52] It therefore would have been possible to trace the moneys substituted for a portion of the chose in action into the hands of Cass.[53] Tracing those moneys into funds actually transferred by Cass to the club, however, presented some difficulties.[54] It was unclear whether Cass had mixed the moneys with his own assets in a manner that would complicate, if not preclude, the application of tracing rules.[55] Fortunately, the defendant casino conceded that it had received the misappropriated moneys and the requirement was considered to be met.[56]

Similar problems could arise in the Ponzi context, of course, in cases where Net Winners were reluctant to concede the tracing point. I have argued elsewhere[57] that the tracing requirement should not be considered essential. The ability to trace the moneys from the plaintiff through the hands of the third party into the hands of the defendant plainly establishes that the benefit has been conferred "at the plaintiff's expense", thus providing a foundation for the plaintiff's restitutionary claim. I have

47. *See* Lipkin Gorman, [1992] HL at 539.
48. [1992] 4 All ER 512.
49. *Id.* at 528-39.
50. *Id.*
51. *Id.* at 524.
52. *Id.*
53. *Id.* at 529.
54. *Id.* at 524-25.
55. *Id.* at 525.
56. *Id.* at 528.
57. Maddaugh & McCamus, *supra* note 14, at c. 36:15.

suggested, however, that the ability to trace should not be considered to be necessary to establish a clear connection between the plaintiff's loss and the defendant's gain. Thus, on the facts in *Lipkin Gorman*, it might have been possible to establish, on a review of Cass' normal income and usual expenditures, that he could not possibly have afforded to gamble substantial amounts at the defendant's casino without the misappropriated money.[58] In such a case, there appears to be no principled reason for denying the defendant's restitution claim. In support of this conclusion, it should be noted that the traditional English quasi-contract claim illustrated by *Clarke* is not proprietary in nature.[59] Rather, the proprietary link is insisted upon to demonstrate that the defendant has benefited at the plaintiff's expense.[60] If I am proven wrong on this point, however, the *Lipkin Gorman* line of authority would clearly apply in cases where a proprietary line of connection can be established between the moneys invested by the Losers and the payments made to Net Winners (and partially reimbursed Losers).

B. Proprietary Relief

Alternatively, Losers may be able to obtain proprietary relief against Net Winners.[61] Such relief would rest upon the application of equitable proprietary doctrines which render the transaction under which moneys were paid by Losers to the Swindler voidable in equity[62] and further, by the tracing of equitable proprietary interests in the moneys transferred into the hands of the Net Winners on the basis of equitable tracing doctrine.[63] In the typical Ponzi scheme, investors will be induced to enter into transactions with the Swindler on the basis of the latter's fraud and advance moneys to the Swindler pursuant to those agreements. Such agreements would be voidable in equity in the sense that the transfer of funds can be reversed under a decree of rescission,

58. *See* Lipkin Gorman, [1992] HL 512.
59. *Id.* at 523.
60. *Id.*
61. Kull, *supra* note 11, at 944.
62. The classic English authority on rescission for fraud is Newbigging v. Adam (1886), 34 Ch. D. 582 (C.A.), *aff'd*, (1888) L.R. 13 App. Cas. 308.
63. Although there are occasional cases suggesting that equitable tracing is limited to the fiduciary duty context, tracing in the context of fraud is well established. *See* L.D. Smith, THE LAW OF TRACING 346, 365-67 (Oxford, Clarendon Press, 1997), *citing among other authorities in support*, Small v. Atwood, (1832), You. 407, 159 E.R. 1051 (Exch. in Eq.), *rev'd on other grounds*, (1838), 6 Cl. & F. 232, 7 E.R. 684 (U.K.H.L.).

thereby conferring an equitable proprietary interest in the hands of the Loser.[64] Further, the transferor's equitable proprietary interest in the assets transferred can be traced into the hands of third parties in appropriate cases.

Turning to the question of tracing, the law of tracing does not, of course, lack complexity.[65] A brief sketch will suffice for present purposes. Common law title or rights of ownership can be traced under the common law tracing rules.[66] Equitable proprietary interests can be traced under equitable tracing rules.[67] Tracing doctrines at both common law and equity permit two different types of tracing – *substitution* of assets, one for another, with the result that the owner of the initial asset becomes the owner of the substituted asset and secondly, *following* assets into the hands of third parties.[68] The common law tracing exercise in *Lipkin Gorman*, briefly described above, illustrates both substitution and following. The chose in action owned by the law firm was converted into cash by the person who assisted Mr. Cass and that substituted asset was followed into the hands of the defendant casino.[69] Traditionally, the tracing of moneys into mixed funds was considered problematic at common law.[70] The common law rules permitting the tracing of owners of assets that had found their way into mixtures of similar assets by creating a *pro rata* interest in the mixture were considered to not apply at common law to mixtures of moneys.[71] Thus, tracing of moneys invested in a Ponzi scheme into a mixed account typically held by the operators of the Ponzi scheme would not be possible under traditional common law. Doctrines of equity emerged however, under which more generous tracing rules were established.[72] It is necessary to distinguish

64. Robert Stevens, *When and Why Does Unjustified Enrichment Justify the Recognition of Proprietary Rights?*, 92 B.U. L. REV. 919, 927 (2011).

65. *See*, *generally* L.D. SMITH, THE LAW OF TRACING (Oxford, Clarendon Press, 1997); *supra* note 63; Jordan English & Mohammud Jaamae Hafeez-Baig, THE LAW OF TRACING (Sydney, Federation Press, 2021); DENIS ONG, ONG ON TRACING (Sydney, Federation Press, 2019). *See also* Maddaugh & McCamus, *supra* note 14, at cc's 6 and 7.

66. Margaret Stone & Alistair McKeough, *Tracing in the Age of Restitution*, 26(2) UNSW L. J. 377, 380 (2003).

67. *Id.*

68. *Id.* at 378.

69. *See* Lipkin Gorman v. Karpnale Ltd., [1992] 4 All ER 512, at 525-26.

70. Richard Edwards & Nigel Stockwell, TRUSTS AND EQUITY, *451 (Pearson Longman, 9th ed. 2009).*

71. *Id.*

72. Shaswata Dutta, *Principles of Equity and Contracts* 6-7, 9 (2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=895862.

between cases where the moneys of innocent parties have been mixed with moneys of the wrongdoer as opposed to cases where the mixture consists entirely of moneys obtained from innocent parties. In the former case, the rules are designed to ensure, to the extent possible, that the moneys remaining in the mixture are those of the innocent parties.[73] On the other hand, where the mixture consists only of moneys acquired from innocent parties under voidable agreements and then placed in a mixed fund, that mixture could be subject to a *pro rata* equitable tracing claim on behalf of each of the contributors to the fund.[74] One can easily imagine, then, circumstances involving the operation of a Ponzi scheme in which the investments of the various contributors are deposited in a mixed fund from which are drawn the moneys paid to Net Winners. In such circumstances, the contributors, that is, the Losers, would be entitled to a *pro rata* share of the mixed fund and could follow those funds into the hands of Net Winners, subject, of course, to any defences that might be available to the latter.

As for defences, generally speaking, one cannot in equity follow moneys into the hands of a *bona fide* purchaser who has, in good faith, given value in return for the moneys received.[75] The defence of *bona fide* purchase is not likely to be of assistance to Net Winners in the Ponzi context. In general terms, the defence is available to one who gives fresh consideration to acquire the asset in question on the mistaken belief that the transferor is the actual owner of the asset being purchased.[76] The more difficult question is whether the defence ought to be available to Net Winners simply because the moneys have been paid by the Swindler on the basis of an obligation to do so set forth in the initial investment agreement. American law has clearly recognized a "*bona fide* payee" defence where a *mistaken* payment has been made where

73. Thus, for example, the presumption of "rightful withdrawal" assumes that moneys withdrawn from the fund by the wrongdoer are those of the wrongdoer. *See* Re Hallett's Est.: Knatchbull v. Hallett, 13 Ch. D. 794, 810-11 (C.A., 1874-80).

74. Ont. Sec.Comm'n v. Comm'n Greymac Credit Corp. et al. (1986), 30 D.L.R. (4th 1 (Can. Ont. C.A.), *aff'd* [1988], 52 D.L.R. (4th) 767; (1988) 2 S.C.R. 172 (S.C.C.). For discussion, see Maddaugh & McCamus, *supra* note 14.

75. For discussion of application of this defence in the tracing context, see L.D. Smith, *supra* note 65, at 386-96.

76. *Id.*

the payer owes an antecedent debt to the payee.[77] Whether that defence should extend to the Ponzi context, where the original owner of the funds and the ultimate recipient are both victims of the fraud committed by the Swindler, is a question of some dispute in American law.[78] In Commonwealth law, however, the *bona fide* payee defence has not yet been clearly recognized as a defence in a mistaken payment claim,[79] and it is a matter of sheer speculation whether such a defence, if recognized, would be extended to cases involving common victims of fraud.

Apart from consideration of defences, it is necessary for the plaintiff to be able to identify the asset to be traced into the hands of the defendant. This may be particularly difficult in the context of tracing money. There are two doctrines that may limit the capacity of Losers to bring tracing claims against Net Winners. These doctrines may limit the ability of Losers to trace their moneys in and out of mixtures containing only moneys from innocent investors. The first is the traditional English rule suggesting that a special rule should apply to mixtures contained in an active bank account.[80] The rule in *Clayton's Case*[81] holds that an attempt should be made to identify specific ownership of moneys contained in the fund on the basis of the order in which they have been deposited and withdrawn from the mixtures. The rule is often referred to as "first in, first out" ("FIFO") and holds that the moneys of the first contributors to the mixtures are those that are first withdrawn.[82] When applied, this rule would obviously confer an advantage upon earlier investors. Indeed, one might consider it an unfair advantage. The FIFO rule has been harshly criticized by American,[83] English[84] and Canadian authorities and, more particularly, in a leading decision of the Ontario Court of

77. *See American Law Institute,* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 67 (AM. L. INST. 2011); Andrew Kull, *Defenses to Restitution: The Bona Fide Creditor*, 81 B.U. L. Rev. 919, 923 (2001).

78. *See* Andrew Kull, *Defences to Restitution Between Victims of a Common Fraud*, *in* ANDREW JAMES FREDERICK DEFENCES IN UNJUST ENRICHMENT 229, 250 (Andrew Dyson et al. eds. 2016) 250.

79. *See* A. Burrows, *Is There a Defence of Good Consideration*, *in* C. Mitchell and W. Swadling, eds., *The* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT 165, 180-81 (Charles Mitchell and William Swadling, eds., Oxford, Hart Publishing, 2013) c. 7.

80. Eoin O'Dell, *The Use and Abuse of Clayton's Case*, 22 Dublin U. L. J. 161, 164 (2000).

81. Devaynes v. Noble, Clayton's Case [1816], 1 Mer. 572, 608, 35 E.R. 781 (UK Ch.).

82. O'Dell, *supra* note 80, at 164.

83. *In re* Walter J. Schmidt & Co. 298 F. 2d 314, 316 (S.D.N.Y. 1923).

84. *See*, L.D. Smith, *op. cit., supra*, note 65, at pp. 185-194.

Appeal[85] which simply declined to apply the rule in the context of considering competing beneficial entitlements to funds mingled in a trust account. The Court applied a *pro rata* sharing analysis.[86] One may speculate, therefore, that it is likely, at least in common law Canada, that the *pro rata* approach would be applied in Ponzi cases.

The second limitation is created by the "lowest intermediate balance rule" ("LIBR")[87] pursuant to which the claimant is limited to a share only of the lowest balance held in the mixed account between the time of the claimant's contribution to the mixture and the time of the claim. The LIBR rule is likely to reduce the extent of the proprietary relief available to Losers and thus advantage later investors. Further, however, Ontario appellate authority has expressed reservations about the application of LIBR to mixed accounts containing only contributions from innocent parties.[88] The Ontario Court of Appeal initially held[89] that the LIBR rule should only apply where moneys of the wrongdoer are contained in the mixed account. More recently, the same court held that this limitation on the LIBR rule ought to apply only to exceptional situations in which calculations are very complicated and extensive to an extent rendering the application of the LIBR rule unworkable.[90] In effect, then, under current Ontario law, the LIBR rule will apply in the Ponzi context only in situations where it is feasible to do so as a practical matter.[91] Otherwise, a *pro rata* approach will be applied.

In short, Losers are entitled to equitable proprietary relief to the extent that they can trace their moneys through the hands of the Swindler into the hands of the Net Winners. The rules relating to the tracing of moneys into the hands of the Net Winners, however, are subject to a *bona fide* purchase defence and to limitations concerning the tracing of moneys into mixtures that are

85. Ont. Sec. Comm'n v. Greymac Credit Corp. et al., 1986 (Can.), *aff'd*.

86. *Id.* at para. 11.

87. *See* Maddaugh & McCamus, *supra* note 14, at c. 7:8.

88. L. Soc'y of Upper Can. v. Toronto Dominion Bank, (1998) 42 O.R. 3d 257, para. 66 (Can. Ont. C.A.).

89. *Id.*; *Cf.*, Lionel Smith, *Tracing in Bank Accounts: The Lowest Intermediate Balance Rule on Trial* (2000), 33 Can. BUS. L. J. 75,75-76 (2000) (critically assessing the court's decision).

90. Boughner v. Greyhawk Equity Partners Ltd. P'ship (Millenium), 2013 ONCA 26 CanLII 26 26, para. 8-9 (Can. Ont. C.A.).

91. *Id.* (citing Ont. Sec. Comm'n v. Greymac Credit Corp. et al. (1986), 30 D.L.R. 4th 1, at para. 46 (Can. Ont. C.A.), *aff'd* [1988], 52 D.L.R. 4th 767; (1988) 2 S.C.R. 172 (S.C.C.).

of uncertain amplitude. To the extent that such relief is available, however, it would encompass not only payments made to Net Winners in the form of profits but, as well, payments made in the form of return of capital.

3. CLAIMS BY SWINDLERS AGAINST NET WINNERS

Perhaps it is less obvious that Swindlers may also have viable restitutionary claims against Net Winners. Although it is true that in the insolvency context, claims will be brought against Net Winners by the trustee, in effect, on behalf of the insolvent Swindler, they would often be understood as an assertion by the trustee or receiver of claims asserting the rights of Losers. It does appear possible, however, that direct claims against Net Winners can be asserted by Swindlers perhaps even in circumstances where the Swindler has not yet become insolvent. Such claims could rest upon the premise that the agreements entered into by the Swindler and Net Winners are contracts entered into by the Swindler with a view to perpetrating a fraud either on the immediate investor or upon subsequent investors. Such agreements would be illegal at common law and unenforceable by either party.[92] The question arises then as to whether the Swindler might be entitled to restitutionary recovery of benefits transferred under illegal contracts. This is, as is well-known, a difficult subject with a complex history. The initial position taken at common law was that just as claims to enforce such agreements were disallowed, so too were claims to recover benefits transferred under such agreements.[93] As Lord Mansfield famously said in the leading authority of *Holman v. Johnson*, "(n)o court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act."[94] Denying all forms of restitutionary relief was plainly unsatisfactory, and, as a result, the common law developed a number of exceptions to the *Holman* principle. First, a plaintiff who was mistaken about a fact rendering a transaction illegal could recover benefits conferred.[95] Second, a claimant who was a

92. *See* McCamus, THE LAW OF CONTRACTS c. 12 (Toronto, Irwin Law, 3rd ed., 2020); Angela Swan, Jakub Adamski & Annie Y. Na, CANADIAN CONTRACT LAW c. 10 (Toronto, LexisNexis, 4th ed., 2018) c. 10; *S.M. WADDAMS, THE LAW OF CONTRACTS* 390 (Toronto, Thomson Reuters, 7th ed., 2017) c. 15.

93. Maddaugh & McCamus, Restitution, *supra*, note 14, at c. 15.

94. Holman v. Johnson [1775], 1 Cowp. 342, 343 (Gr. Brit. KB).

95. *See, e.g.*, Oom v. Bruce [1810], 12 East 225, 226 (UKKB).

member of a class of persons to be protected by the prohibition rendering a transaction illegal was entitled to restitution.[96] The third exception consisted of cases in which, for various reasons, the plaintiff was considered to be not equally at fault or not *in pari delicto* with the defendant, as where the defendant had engaged in some form of fraud, oppression, undue influence, or other form of wrongdoing when inducing the plaintiff into the illegal transaction.[97] The fourth exception applied in circumstances where the plaintiff had withdrawn from performance of the transaction before achievement of its objectives and was said to have a *locus poentitentia*, that is, a place from which to repent and seek restitution.[98] Finally, there was a splinter of equitable authority in both English and American law in which courts granted restitution in cases not fitting within the other four categories and might be characterized as cases where relief was considered to be in the public interest.[99] Such cases, however, were few and far between and in the middle of the twentieth century appear to have little or no visible presence in contemporary jurisprudence. In sum, then, the traditional doctrine denied restitutionary relief as a general matter but allowed such relief exceptionally where a plaintiff could be said to be innocent or less at fault than the defendant for these various reasons.

The denial of restitution to all other parties who participated in illegal transactions was plainly unsatisfactory and resulted in doctrinal manipulation of two kinds. The first was a complex body of jurisprudence that developed around the traditional exceptions. Thus, for example, the modern cases illustrated some confusion as to the nature of the *locus poentitentia* exception.[100] Secondly, courts granted relief to what might be considered to be guilty or more at fault parties by permitting them to assert "collateral" claims of various kinds.[101] Thus, relief would be available if such parties could assert proprietary rights with respect to benefits

96. *See, e.g.*, Kiriri Cotton Co. Ltd. v. Dewani, [1960] 1 EA 188, 192-93 (Uganda PC).

97. *See, e.g.*, Mohamed v. Alaga & Co., [1999] 1 Wkly. L. Rep. 1815, 1823 (UKAC).

98. *See, e.g.*, Tribe v. Tribe, [1995] 3 Wkly. L. Rep. 913, 938-939 (UKAC).

99. Robert Goff & Gareth Jones, THE LAW OF RESTITUTION 302-03 (Sweet & Maxwell eds., 1st ed. 1966); John J.W. Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 Univ. PA. L. REV. 261, 297-299 (1947).

100. For discussion of the authorities, see Maddaugh & McCamus, *supra*, note 14, at c. 15:7.

101. *See id.* at c. 15:9.

transferred[102] or could successfully argue that the defendant had committed a tort or breached a contractual duty, including a duty imposed by an implied collateral agreement.[103] Such claims were granted on the basis that they did not involve an explicit grant of restitution of benefits transferred under an illegal agreement. While the resulting rich and complex jurisprudence provided some relief to parties who were, in some sense, the principal party at fault, relief was not available in all meritorious cases of this kind and the historical doctrine was generally considered to be unsatisfactory by those who studied it.

In recent decades, English and other Commonwealth courts have gradually embraced a modern solution to this problem, which grants restitutionary relief to guilty parties in circumstances where either the granting of such relief in particular circumstances of the case does not offend the public policy reasons underlying the prohibition or common law doctrine that renders the transaction illegal or, alternatively, where the withholding of restitutionary relief is considered to constitute an inappropriately harsh sanction in light of the nature of the prohibition or the moral quality of the plaintiff's conduct.[104] Such a rule appears now to have been clearly adopted in both the United States[105] and Canada.[106] Recent developments in English law[107] have achieved a similar result by holding that in the context of restitutionary claims by guilty parties, such parties are subject to a presumption favouring relief which is, however, subject to a defence of illegality to be raised by the (typically less at fault) defendant, this being a defence that will not always succeed.[108] The defence will be withheld in cases where a similar shopping list of factors – the policies underlying the prohibition, moral quality of the plaintiff's conduct – indicate that the defence should be unavailable. In this rather complex and, in

102. Bowmakers, Ltd. v. Barnet Instruments Ltd., [1945] 1 K.B. 65, 65 (UKKB).

103. Archbold's (Freightage) Ltd. v. S. Spanglett Ltd., [1961] 1 Q.B. 374, 392 (UKAC) (describing an implied collateral agreement to obtain necessary permit).

104. *See* Patel v. Mirza, [2016] UKSC 42, ¶¶ 120-21 (UK).

105. American Law Institute, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 32 (Am. L. INST. 2011).

106. Maddaugh & McCamus, *supra* note 14,6, at c. 15:23. For discussion of Australian authorities to the same effect, see, *id.*

107. *See Patel* v. *Mirza*, [2015] UKSC2016UKSC 42; *see also* Maddaugh & McCamus, *supra* note 14, at c. 15:17 (discussing restitutionary claims by guilty parties).

108. *Patel*, UKSC 42 ¶ 121.

my view, unsatisfactory way,[109] English courts have come to the conclusion that restitutionary relief can be made available to guilty parties in appropriate cases.[110]

We may consider, then, whether these modern developments might provide a basis for granting restitutionary relief to Swindlers with respect to payments made to participants in a Ponzi scheme whether the participants have been merely partially reimbursed for their investments or, on the other hand, might be in the fortunate group that have enjoyed net profits from their Ponzi dealings. In a series of recent Canadian cases, restitutionary relief in favour of Swindlers has been granted.[111] The first decision was *Den Haag Capital LLC v. Correia*[112] in 1999 in which a successful claim was brought by the corporation that operated a Ponzi scheme against two of the scheme's Net Winners, ("NW1" and "NW2").[113] The relationship between the Swindler, Mr. Ogale, and the two Net Winners began at law school.[114] NW1 and Mr. Ogale were classmates at the University of Toronto Faculty of Law. NW2, who eventually married NW1, was a contemporary student at Osgoode Hall Law School.[115] After graduation and the marriage of NW1 and NW2, the three became fast friends.[116] Ogale developed what he described as a private hedge fund that he claimed was based on an ingenious investment mechanism of his own invention, which would provide unusually high yields.[117] The scheme was a complete sham.[118] Ogale fraudulently solicited investments and paid high returns to early investors with fraudulently solicited funds from later investors.[119] There was, the judge observed, "no enterprise, no business and no true wealth creation."[120] It was "simply a sham business resulting in the

109. *See* J.D. McCamus, *The New Illegality Defence in English Restitutionary Law: A Critical Approach*, *in* DAMAGES, INJUNCTIVE RELIEF AND OTHER REMEDIES IN TORT AND FREE SPEECH CASES 56 (R. Weaver and D. Fairgrieve, eds., (Newcastle upon Tyne, Cambridge Scholars Pub., 2023)).

110. *See id.*

111. Den Haag Cap. v. Correia, [2010] O.J. No. 4316 (Can. Ont. Sup. Ct. J.); Samji (Tr. of) v. Whitmore, [2017]

112. Den Haag Cap., COSCJ [2010] O.J. No. 4316.

113. *Id.* at paras. 1-2.

114. *Id.* at para. 12.

115. *Id.*

116. *Id.*

117. *Id.* at para. 14.

118. *Id.* at para. 78.

119. *See id.* at para. 10.

120. *Id.* at para. 72.

distribution of stolen funds."[121] Although NW1 initially resisted Ogale's overtures to invest in the scheme, she and her husband eventually succumbed and invested large amounts of money in the scheme.[122] Their winnings were very substantial.[123] From 1999 to 2001, they invested $341,000.00 and, after receiving substantial returns, they invested a further $174,000.00 from their winnings.[124] They ultimately received a total of $3,136,785.75 from the scheme.[125] The trial judge calculated their net winnings as $2,436,218.28 by deducting from the grand total both the initial investment made by NW1 and NW2 and, oddly, the winnings that they had reinvested in the scheme. Subsequent investors had contributed in excess of $20 million.[126]

When the fraudulent nature of Ogale's scheme was discovered in 2008, all of the invested money had been fully depleted.[127] Ogale was convicted and sentenced to prison in the United States where much of the scheme was conducted.[128] Acting on the advice of the U.S. Securities and Exchange Commission and the U.S. Department of Justice, three investors who were Losers, replaced Mr. Ogale as managers of the scheme and set about to recover money paid out by Ogale to earlier investors with a goal of reimbursing, to the extent possible, investors who had lost money in the scheme.[129] One of their initiatives was to launch litigation against NW1 and NW2 to recover the approximately $2.4 million.[130] The claim enjoyed success although we should note that the extent of that success was the recovery of the net winnings only and, again, oddly, the $174,000.00 of reinvested profits were not included in the award.[131]

The *Den Haag* decision, we should emphasize, did not arise in the context of insolvency proceedings and was plainly decided on the basis of whether or not the restitutionary claim by the Ponzi operator against Net Winners could succeed. The other two recent Canadian decisions allowing such relief did arise in the insolvency

121. *Id.*
122. *Id.* at para. 14.
123. *Id.* at para. 15.
124. *Id.*
125. *Id.* at para. 18.
126. *Id.*
127. *Id.* at para. 19.
128. *Id.* at para. 20.
129. *Id.* at para. 11.
130. *See id.*
131. *See id.* at para. 88.

context.[132] In both cases, however, the courts clearly indicated that it was their view that the award was based on principles that granted to the Ponzi operator restitutionary recovery of money paid by the Ponzi operator to successful investors.[133] In *Boale Wood & Company v. Whitmore*,[134] the investments had been solicited by a Notary Public, one Samji, on the basis that the money would be invested in a wine and liquor business operated by a third party and that the investment would yield very high promised returns.[135] There was no wine and liquor business and, again, the scheme was a complete sham.[136] The defendant, Whitmore, a former National Hockey League player, had received the repayment of his total investment of $605,500.00 and interest payments of $384,000.00.[137] The plaintiff, a trustee of the bankrupt estate of the Samji Group, sought recovery only of the profits.[138] The claim was structured on the basis of fraudulent preference legislation and, ultimately, as a claim in unjust enrichment.[139] The claim enjoyed success on unjust enrichment grounds.[140]

The third decision in *Doyle Salewski Inc. v. Scott*[141] was rendered in 2019. The scheme operated in the context of a "rent to own" real estate venture in a corporate vehicle, Golden Oaks Enterprises Inc. ("Golden Oaks") established by one Lacasse.[142] The scheme was promoted as an altruistic venture designed to make ownership available to individuals who could not qualify for mortgages.[143] Real estate would be made available to such customers on the basis of leases coupled with options to purchase.[144] The venture did not prove to be economically viable

132. *See generally* Samji (Tr. of) v. Whitmore, [2017] B.C.J. No. 2143 (Can. B.C. Sup. Ct.); (Can. Ont. Sup. Ct. J.).Golden Oaks Enters. Inc. (Tr. of) v. Scott, [2019] O.J. No. 4446.

133. *See* Samji (Tr. of) v. Whitmore, B.C.J. No. 2143 at para. 116.

134. *Id.* at para. 1.

135. *Id.* at para. 7.

136. *Id.* at para. 11.

137. *Id.* at paras. 13 & 31.

138. *Id.* at para. 38.

139. *Id.* at para. 40.

140. *See id.* at paras. 110-16 (explaining the rejection of the defendant's argument and merits of plaintiff's claim).

141. Golden Oaks Enters. Inc. (Tr. of) v. Scott, [2019] O.J. No. 4446 (Can. Ont. Sup. Ct. J.) 2019 ONSC 5108 (Ont. S.C.J.), 76 C.B.R. (6th) 3 (Ont. S.C.J.), additional claim allowed, *sub nom.* Golden Oaks Enters. Inc. v. Scott (2022), 162 O.R. (3d) 295, 1 C.B.R. (7th) 53 (Ont. C.A.), leave to appeal allowed; Lorne Scott et al. v. Doyle Salewski in its capacity as Tr. in Bankr. of Golden Oaks Enters. Inc. et al. (2023), Carswell Ont. 4319 (S.C.C.).

142. Golden Oaks, ONSC 5108, at para. 3.

143. *Id.*

144. *Id.*

and eventually, Lacasse, to raise necessary capital, began to operate it as a Ponzi scheme, issuing promissory notes to investors at unusually high interest rates.[145] Indeed, the promised rates of return eventually exceeded sixty percent, thus violating the criminal rate of interest provisions of the Canadian Criminal Code.[146] Charging such rates constituted an offence.[147] Needless to say, such rates were paid to earlier investors with money acquired from later investors.[148] An additional and unusual feature of the Golden Oaks scheme was that Lacasse offered to pay commissions to individuals who recruited new investors, both with respect to their initial investments and to any "roll-over" investments that followed.[149] By the time of the ultimate collapse of the scheme, Golden Oaks had issued 504 promissory notes to 153 investors with respect to which Golden Oaks received $16.4 million dollars and disbursed $7.7 million dollars in interest and return of capital.[150] Golden Oaks and Lacasse maintained as many as seventeen different bank accounts at five different financial institutions.[151] In due course, the trustee, acting on behalf of Doyle Salewski Inc., brought claims against investors who had received interest payments at or above the criminal rate and a separate claim against recipients of commission payments.[152] Although the claim for criminal rate of interest payments against various investors largely enjoyed success, the claim for commissions paid was dismissed at trial.[153] The trial judge held that the agreements to provide recruiting services precluded restitutionary relief. On appeal,[154] however, the claim for the commissions was also allowed on the basis that the agreements to pay the commissions were also unlawful at common law as contracts designed to facilitate the commission of a fraud upon third parties and, accordingly, did not

145. *Id.* at paras. 4-5.
146. Canada Criminal Code, R.S.C. 1985, c. C-46, s. 347.
147. *Id.*
148. *See* Golden Oaks, [2019] ONSC 5108, at para. 6.
149. *Id.*
150. Doyle Salewski Inc. *ex rel* Golden Oaks Enter. Inc. v. Scott, 2022 ONCA 509, [2022] 162 O.R. 3d 295, para. 3 (Can. Ont.), *leave to appeal allowed*, Case No. 40399 (SCC Mar. 30 2023); Doyle Salewski Inc. v. Scott, 2019 ONSC 5108, para. 74 (Can.), *cross-appeal allowed in part*, 2022 ONCA 509, [2022] 162 O.R. 3d 295 (Can. Ont.), *leave to appeal allowed*, Case No. 40399 (SCC Mar. 30 2023).
151. Doyle Salewski Inc. v. Scott, ONSC 5108 at para. 7.
152. *Id.* at para. 8.
153. *Id.* at para. 12.
154. Doyle Salewski Inc. in its capacity as Tr. in Bankr. of Golden Oaks Enter. Inc. v. Scott, ONCA 509, [2022] 162 O.R. 3d 295, at paras. 83-84.

constitute a bar to relief. With respect to the interest claim, it became material, as a result of a limitations point, to determine whether the action was brought by the trustee for enforcement of the rights of the investors, or, rather, involved the assertion of a restitutionary right against the recipients of Golden Oaks itself.[155] The trial judge, Gomery J., concluded that the claim could be and was asserted on behalf of the operator of the Ponzi scheme. This holding was not challenged on the appeal.[156] A similar conclusion had been reached by the trial judge in the *Boale Wood* decision.[157]

Interestingly, it appears to have been assumed by all concerned in *Boale Wood* and in *Den Haag*, that the restitutionary claim asserted by the Ponzi operator would lie only for profits or winnings and not for capital returned to investors. Indeed, the point was simply not discussed in these two authorities. In *Doyle Salewski*, however, Gomery J. addressed this point.[158] The defendant had argued that the earlier authorities stood for the proposition that no claims would lie for the return of capital.[159] Gomery J. flatly rejected this proposition, however, on the basis that, "[t]he judges in these cases did not consider whether the claim could be made for all payments because the claims were made only for the excess."[160] And further, she stated that, "[t]here is nothing in these decisions that indicates that broader claims would have been rejected".."[161] In her view, then, the ability of the Ponzi operator to bring a restitution claim for return of investments made remained an open question.[162]

There are a number of difficulties with the reasoning advanced in each of these decisions.[163] For example, as intimated above, it is not obvious why, in *Den Haag*, NW1 and NW2 should have been allowed to retain some of the profits they made simply because they had reinvested them in the Ponzi scheme. There are, however, at least two issues of greater importance in which the reasoning of the courts in these cases appears unsound.

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155. Golden Oaks Enters. Inc. (Tr. of) v. Scott, [2019] O.J. No. 4446 (Can. Ont. Sup. Ct. J.), paras. 399 (Can.).

156. Doyle Salewski Inc. v. Scott, ONCA 509, [2022] 162 O.R. 3d 295, at para. 76.

157. Boale Wood & Company Ltd. v. Whitmore, 2017 BSCS 1917, at paras. 60, 126.

158. Doyle Salewski Inc. v. Scott, 2019 ONSC 5108, at para. 515.

159. *Id.* at para. 449.

160. *Id.*

161. *Id.*

162. *Id.* at paras. 541-542.

163. For more extensive treatment of these Canadian decisions, see John D. McCamus, *Ponzi Schemes and the Law of Restitution*, 66 Can. BUS. L.J. 1, 26–39 (2022).

First, in both *Den Haag* and *Boale Wood*, the courts precluded the possibility of a change of position defence in claims of this kind. In *Den Haag*, NW1 and NW2, who had married and started a young family, had relied on the receipt of their winnings in ways that were, to some extent, irretrievable.[164] They had given up their employment in Toronto and moved to Virginia where they purchased two residential properties, placed their children in private schools, incurred substantial medical expenses (some of which, at least, would have been absorbed by the provincial medicare plan if they had remained in Toronto) and made substantial charitable donations.[165] The trial judge withheld the defence of change of position on the basis that it was discretionary and, for reasons not entirely clear to this reader, that this discretion should not be exercised in favour of permitting the defence in this case.[166] In *Boale Wood*, the trial judge rejected the availability of the defence on the basis that it had neither been properly pleaded nor proven but that, in any event, Canadian authority was to the effect that the defence is simply inapplicable to overpaid investors in a Ponzi scheme.[167] As we have seen above, however, the defence of change of position is clearly available in a context of this kind. Thus, in *Lipkin Gorman*,[168] where a claim was brought by a victim of a theft against an innocent defendant to whom the proceeds had been paid by the third-party thief, the defence of change of position was given its first recognition in English law. Similarly, the Losers in a Ponzi scheme are victims of theft, seeking restitution from innocent recipients of their funds. In *Den Haag*, NW1 and NW2 had innocently received funds that they reasonably assumed they were entitled to spend as they wished.[169] To the extent that their detrimental reliance involved irretrievable expenditures that they would not otherwise have made, the defence should have been engaged.

Second, there is another idiosyncratic problem in Canadian restitutionary doctrine that infects the reasoning in these cases.

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164. Den Haag Cap. LLC v. Correia, 2010 ONSC 5339, para. 16 (Can.).
165. *Id.* at paras. 16-17.
166. *Id.* at para. 70.
167. Boale Wood & Company Ltd. v. Whitmore, 2017 CanLII 1917 (Can. B.C.S.C.), para. 124.
168. Lipkin Gorman v. Karpnale Ltd., [1988] UKHL 12 [21], [1991] 2 AC 548 (Appellate Committee of the House of Lords) (U.K.) from, for discussion of which, see *supra* text and accompanying notes 32-57.
169. Den Haag Cap. LLC v. Correia, 2010 ONSC 5339, paras. 11, 16 (Can.).

Briefly, the Canadian common law of restitution has been complicated by the unfortunate decision of the Supreme Court of Canada in *Garland* v. *Consumers' Gas Co*.,[170] in which the Court appeared to simply ignore the existing law of restitution of benefits conferred under illegal contracts and the law of mistaken payments and allow recovery on the basis of a somewhat idiosyncratic statement of the unjust enrichment principle. That principle appeared to be treated as if it constituted a new rule of law replacing all existing doctrine. In *Garland*, the Court repeated an earlier formulation of the principle by the Court that required three elements, the conferral of a benefit on the defendant together with a "corresponding detriment" suffered by the plaintiff and, finally, no "juristic reason" for the transfer.[171] For present purposes, it is not necessary to explore in detail the problematic nature of the *Garland* decision, nor the difficulties presented by this formulation of the general principle. It is sufficient to note that the Supreme Court itself has indicated a number of times, both before the decision in *Garland* and subsequently, that where there is existing doctrine that applies to a restitutionary claim – such as the law of mistake, duress, necessitous intervention, benefits conferred under ineffective transactions, and so on – courts are to apply that existing doctrine.[172] The general principle can properly be relied upon, however, as a means of correcting anomalies in the existing law or extending relief in novel situations so as to enable the law to "develop in a flexible way as required to meet changing perceptions of justice."[173] Nonetheless, there is a tendency among Canadian lawyers and judges who are both unfamiliar with the existing doctrine and with the role to be played by the general principle, to simply apply the tri-partite formula as if it were a new general rule applying to all unjust enrichment cases. The three decisions with respect to the Ponzi context recounted, above illustrate that tendency.

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170. (2004), 237 D.L.R. (4th) 325, [2004] 1 S.C.R. 629, para. 30 (Can. S.C.C.) for discussion of which, see J.D. MCCAMUS, AN INTRODUCTION TO THE CANADIAN LAW OF RESTITUTION AND UNJUST ENRICHMENT (Toronto, Thomson Reuters, 2020) ch. 3:200.45 "'Unjust Factors', 'Existing Categories and the Scope of the Garland Test'"; Maddaugh & McCamus*, supra*, note 14, at ch. 2:4.

171. This version of the unjust enrichment principle was articulated by Dickson J. in Rathwell v. Rathwell, [1978] 2 S.C.R. 436, 455 (Can. S.C.C.) and in Pettkus v. Becker, [1980] 2 S.C.R. 834, 847 (Can.).

172. For discussion of the relevant authorities, see Maddaugh & McCamus, *supra* note 14, at ch. 2:4.

173. Peel (Reg'l Mun.) v. Canada, [1992] 3 S.C.R. 762, 788 (Can.).

In *Den Haag*, for example, the trial judge simply relied upon the tri-partite principle drawn from *Garland* as if it were a rule of law.[174] In her view, the defendants had clearly received a monetary benefit, the plaintiff corporation had suffered a corresponding deprivation in making the payments, and the unenforceable contracts under which the moneys were paid did not constitute a juristic reason for the transfer.[175] Similar analyses were offered by the judges in *Boale Wood* and *Doyle Salewski*.[176] This approach requires one to ignore the views of the Supreme Court of Canada on the question of the role of the general principle. Further, a major, indeed, fatal, flaw in this reasoning as applied to this context is that the Ponzi would invariably have a right to recover payments made even if the Ponzi's motives for seeking recovery were nefarious. The illicit investment agreements could never count as a juristic reason for the payments by the Ponzi. The more appropriate basis for granting recovery would be to consider whether the benefits conferred by the Ponzi operator under agreements, which were plainly illegal at common law could be recovered in the particular circumstances of the claim under the modern approach to such questions outlined above.

Historically, as we have seen, restitutionary claims by perpetrators would not have enjoyed success.[177] Under the modern rule, however, such claims may succeed where doing so does not undermine the prohibition rendering the transaction illegal or where denying restitution would constitute a disproportionate penalty in light of the nature and quality of the defendant's conduct. Accordingly, a preferable explanation for the relief in these three cases would be that such relief is appropriate in the particular circumstances of each case. In each case, recovery was being sought to achieve an equitable distribution of the misappropriated funds to all victims of the scheme. It may appear unusual that the ability of the perpetrator to recover rests on subsequent developments, that is, the fact that the affairs of the Ponzi operator are now being conducted by parties with noble

174. Den Haag Cap. LLC v. Correia, 2010 ONSC 5339, para. 68 (Can.).

175. *Id.* at paras. 68–70.

176. Boale Wood & Co. Ltd. v. Whitmore, 2017 BCSC 1917, para. 97 (Can.); Doyle Salewski Inc. *ex rel* Golden Oaks Enter. Inc. v. Scott, 2019 ONSC 5108, para. 437 (Can.), *cross-appeal allowed in part*, 2022 ONCA 509, [2022] 162 O.R. 3d 295 (Can. Ont.), *leave to appeal allowed*, Case No. 40399 (SCC Mar. 30 2023).

177. Holman v. Johnson [1775] 1 Cowp 342, 343 (Gr. Brit. KB).

intentions. There is nothing in the modern authorities, however, that would preclude taking into account the circumstances of the parties in light of subsequent developments. If authority is needed, we may note that the traditional *locus poenitentiae* exception grants relief to a plaintiff on the basis of a subsequent decision of that party to withdraw from the scheme thus preventing the achievement of its illicit objective.[178] Granting relief to the perpetrator in *Den Haag* may be considered to have a similar objective.

In sum, then, and notwithstanding the reservations one might reasonably have concerning the reasoning in these recent Canadian authorities, it now appears to be well-established Canadian law that, in appropriate circumstances, a restitutionary claim by a Ponzi operator may enjoy success against parties who have received payments from the operator.[179] Such relief is plainly available with respect to payments in the form of profits. Whether such a claim would lie for payments in the form of return of capital remains an open question in Canadian law.

4. CLAIMS BY LOSERS AGAINST SWINDLERS

A variety of claims may be brought by Losers against Swindlers with a view of recovering the value of the investments they have made in a Ponzi scheme. Losers may have claims in contract or tort. Where, in the likely event that the Swindler conducted a Ponzi scheme through a Ponzi corporation, tort claims may lie against both the Swindler and the corporation. Losers may also have a claim in restitution, which will be the focus of the discussion here.

Two different types of restitution claims may be envisaged. Payments made by Losers to Swindlers are likely to be made pursuant to transactions entered into by the parties as a result of fraudulent inducement by the Swindler. This is familiar territory, and we may be brief. The transaction that has been fraudulently induced by the making of a false statement of the material facts is

178. *See, e.g.*, Tribe v. Tribe, [1995] EWCA (UK) 20.

179. *See, e.g.*, Den Haag Cap. LLC v. Correia, 2010 ONSC 5339; Boale Wood & Co. Ltd. v. Whitmore, 2017 BSCS 1917; Doyle Salewski Inc. *ex rel* Golden Oaks Enter. Inc. v. Scott, 2019 ONSC 5108 (Can.), *cross-appeal allowed in part*, 2022 ONCA 509, [2022] 162 O.R. 3d 295 (Can. Ont.), *leave to appeal allowed*, Case No. 40399 (SCC Mar. 30 2023).

subject to an equitable decree of rescission. As we have seen,[180] the voidable transaction may support equitable proprietary relief to the extent that contributions of the Losers remain in the possession of the Swindler. It is very likely that investments in Ponzi schemes will be induced by false statements of fact. The *Den Haag*[181] and *Boale Wood*[182] cases, for example, likely involved false statements concerning non-existent businesses – but it is also possible that such investments would be induced by promises made by the Swindler or statements of opinion rather than fact. From a definitional perspective, promises and opinions are not statements of the fact. The concept of misrepresentation of fact is, however, to some extent manipulable. Thus, a promise may be interpreted as containing an implicit and false statement of current intent.[183] A statement of opinion may be characterized as an implicit statement that the opinion is genuinely held or is grounded on facts known or reasonably believed to be true.[184] The concept of misrepresentation may capture instances of non-disclosure of various kinds, such as the statement of "half-truths," the "active concealment" of material facts, and a failure to correct previous statements in light of changing circumstances which render them false.[185] Cases like *Doyle Salewski*[186] raise the conceivable possibility that the Swindler might be so naïve as to believe that promises being made can be fulfilled on the basis of unduly optimistic projections concerning the success of the business being conducted by the Swindler. The more likely scenario, however, is that a Ponzi scheme will involve the making of fraudulently false statements to prospective investors.

Alternatively, and even in the absence of a fraudulent inducement, if the investment agreement constitutes an *illegal*

180. *See supra* discussion in text accompanying notes 62-93.

181. Den Haag Cap. LLC v. Correia, 2010 ONSC 5339.

182. Boale Wood & Co. Ltd. v. Whitmore, 2017 BSCS 1917.

183. Edgington v. Fitzmaurice [1885], 29 Ch. D. 459 (Can.); Prather v. King Res. Co. [1972], 33 D.L.R. (3d) 112, 118 (Can. Alta. C.A.).

184. *See, e.g.*, Ballard v. Caskill, [1954] 4 D.L.R. 427 (B.C.C.A.) at 431; Smith v. Land & House Prop. Corp. [1884] 28 Ch. D. 7 (C.A.) at 15; Esso Petrol. Co. Ltd. v. Mardon, [1976] 1 Q.B. 801 (C.A.).

185. Nottingham Patent Brick & Tile Co. v. Butler [1886] All ER Rep 1075, (CA), at 1083 (CA); Gronau v. Schlamp Invs. Ltd. [1974] 52 D.L.R. (3d) 631, 636 (Can. Man. Q.B.); With v. O'Flanagan, [1936] All ER 727, 733-34 (CA).

186. Doyle Salewski Inc. *ex rel* Golden Oaks Enter. Inc. v. Scott, 2019 ONSC 5108, paras. 339, 360 (Can.), *cross-appeal allowed in part*, 2022 ONCA 509, [2022] 162 O.R. 3d 295 (Can. Ont.), *leave to appeal allowed*, Case No. 40399 (SCC Mar. 30 2023).

contract given its illegal purpose, the Loser would obviously be entitled to bring a restitution claim for moneys paid to the Swindler under the traditional exceptions to the *Holman* v. *Johnson* rule.[187] As an innocent victim, the Loser would fit comfortably within one or more of those traditional exceptions. It is much less clear whether constructive trust relief would be available in this type of restitution claim. The American concept of the remedial constructive trust deployed to prevent unjust enrichment has been adopted in Canadian common law and it is therefore conceivable that such relief could be available in Canadian law.[188] The remedial constructive trust has not yet been clearly adopted, however, in other Commonwealth jurisdictions.

5. IS AN IDEAL SOLUTION POSSIBLE AT COMMON LAW?

Formulating the answer to this question requires some speculation as to the nature of the ideal solution to the problems created by the collapse of Ponzi schemes. Reasonable observers may differ on the characteristics of such a solution.[189] One possible solution against which to test the capacities of the common law to achieve such a result would be to rule out the apparent unfairness of permitting early investors to enjoy the benefits of moneys paid to them by Swindlers, which have been essentially stolen by the Swindler from later investors. A comprehensive solution of this kind would permit Swindlers, or others, such as trustees in bankruptcy, acting on their behalf, to add to the funds remaining in the Ponzi's hands by recovering all payments made to early investors – including both profits and return of capital – and distribute the accumulated fund on a *pro rata* basis to all investors in the scheme.

There are a number of barriers created by common law to the achievement of a full rateable distribution of this kind. Some movement in this direction, however, has been achieved in the recent Canadian cases which allow restitution claims by a Swindler against Net Winners.[190] Such claims are likely to be permitted, as the Canadian cases illustrate, only where the

187. John D. McCamus, *supra* note 170, at 10.
188. *See generally* Maddaugh & McCamus, *supra* note 14, at c. 5:2–:15.
189. John D. McCamus, *supra* note 170, at 57.
190. *See supra* discussion in text at notes 51–67.

moneys recovered are to be utilized in a rateable distribution of this kind, either conducted by new management of the Swindler corporation or by insolvency trustees. Nonetheless, the apparent assumption in some of these cases that Net Winners should be permitted to retain any sums that amount to the return of their investment would stand in the way of a fully rateable distribution. Moreover, even though the judge in *Doyle Salewski*[191] suggested that a restitution claim by the Swindler for the moneys paid to Net Winners may be possible, there would be some difficulty in achieving this result in many cases. First, as has been suggested above,[192] Net Winners should have available to them a defence of change of position, which could defeat such claims in whole or in part. Further, as we have seen, Net Winners are, like other investors, entitled to bring restitution claims against Swindlers for return of the moneys invested. Putting to one side the difficult question as to whether Commonwealth courts ought to adopt the American *bona fide* payee defence and the further difficult question as to whether the defence ought to apply where the claimant is a victim of the plaintiff's fraud,[193] the Net Winners' obvious entitlement to restitution of the moneys invested can be asserted as a counterclaim to the Swindler's claim for full recovery. This may be one explanation for the reluctance of American law to award recovery by trustees in the insolvency context of moneys paid to earlier investors as a reimbursement.[194] Another possible justification may be that courts have assumed that in the context of large Ponzi schemes, it would be simply impractical to adjudicate the various change of position arguments that may be made by scores, indeed, thousands of investors.[195] It thus seems likely that the ability of Net Winners to resist claims for reimbursement of their investments will continue to stand in the way of a fully rateable distribution.

A further barrier to a completely equitable solution rises in the context of claims by Losers against Net Winners. As we have seen,[196] two different types of claims are possible. The *Lipkin*

191. Doyle Salewski Inc. *ex rel* Golden Oaks Enter. Inc. v. Scott, 2019 ONSC 5108 (Can.), *cross-appeal allowed in part*, 2022 ONCA 509, [2022] 162 O.R. 3d 295 (Can. Ont.), *leave to appeal allowed*, Case No. 40399 (SCC Mar. 30 2023).

192. *See* the text, *supra* discussion in text at notes 60-62.

193. For an illuminating discussion of the problem, see A. Kull, *op. cit., supra* note 26.

194. *Id.*

195. *Id.*

196. *See supra* Part 2.

Gorman line of authority would allow Losers to bring a claim for all of their moneys that were paid to Net Winners. The success of such claims would advantage later investors and achieve a higher level of reimbursement than that available to Net Winners. Such cases, as we have seen,[197] do face significant hurdles. Under *Lipkin Gorman* itself, it is expected that the moneys must be traceable into the hands of the Net Winners.[198] If we assume that tracing is possible, the Net Winners may have available a change of position defence. Thus, the *Lipkin Gorman* claim, for various reasons, can provide too much or too little relief for the Losers.

Similar problems would beset the alternative claim for equitable proprietary relief. Although the equitable tracing rules, as we have seen,[199] create a higher prospect for the recovery of moneys stolen from the Losers and paid to the Net Winners, success in such a claim may be considered to create an unfair advantage for Losers at the expense of Net Winners. Further, as we have seen, there are barriers to equitable tracing such as the lowest intermediate balance rule and what remains of the rule in *Clayton's Case* that may restrict or render unavailable this form of relief.[200]

Finally, we may consider whether, if courts were to be persuaded of the merits of the fully rateable solution, there are adjustments to the common law doctrine that could be envisaged that might either achieve or come closer to an ideal solution of this kind. With respect to the problems created by a counterclaim by the Net Winners for retention or reimbursement of their investment (either as a defence or set-off counterclaim in response to the Swindler's claim, for instance), we might consider whether a novel defence to the Net Winner's counterclaim for restitution (or set-off or defence to that end) could be to recognize a new "equity" that would protect the Swindler from such a counterclaim on the basis of Lord Mansfield's ancient dictum in *Moses* v. *Macferlan*,[201] observing that with respect to a common law claim for moneys had and received, the defendant "may defend himself by everything which shows that plaintiff *ex aequo et bono* is not entitled to the

197. *See supra* Part 2.
198. Lipkin Gorman v. Karpnale Ltd., [1988] UKHL 12 (U.K.).
199. *See supra* text accompanying notes 21–34.
200. *Id.*
201. Moses v. Macferlan (1760), 2 Burr. 1005, 97 E.R. 676 (Eng. K.B.).

whole of the demand or to any part of it".[202] The argument would be that a counterclaim (or, indeed, a set-off or defence) should be disallowed on the basis that the moneys should be repaid to the Swindler and distributed on an equitable basis to all investors in the scheme. A plausible response to such an argument, of course, would be to suggest that in the centuries that have elapsed since the decision in *Moses* v. *Macferlan*, this idea has not been raised or explored. And yet the capacity of common law doctrine to evolve over time is undiminished.

Another possibility for a fruitful reform has been suggested by Andrew Kull and relates to the application of tracing rules to co-mingled funds.[203] In his view, it would be attractive to hold that where the fund contained assets contributed by common victims of the fraud, the various contributions, whether traceable or not, should be presumed to be "part of the commingled fund belonging to all victims in proportion to their contributions."[204] The proposed reform is novel, of course, and is supported by Kull on the basis that the traditional tracing rules themselves constitute equitable variations of the common law rules to achieve just results and that his proposed reform is well within this traditional role of equitable doctrine.[205]

Some inspiration for reform in the direction of achieving a more equitable distribution in the context of common victims of fraud might be drawn from American sources. Although American law has not adopted the precise reforms suggested above, American law dealing with the distribution of assets in the context of Ponzi insolvencies has moved in the direction of permitting something closer to the ideal distribution. The reforms have developed essentially in the context of insolvencies under the guise of a general judicial discretion to achieve equitable results.[206] Although the richness of American jurisprudence on point cannot be easily summarized, the various solutions adopted by the courts assume that the investors may retain any reimbursement, in part or in whole, of their investment made prior to the insolvency.[207]

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202. *Id.* at 676 (E.R.).

203. Andrews Kull, *Victim v. Victim Restitution: The Commingling Fictions*, 51 ST. MARY'S L.J. 309, 312 (2020).

204. *Id.* at 342.

205. *Id.* at 312.

206. *See generally* A. Kull, *supra* note 6; *see also* M.A. Sullivan, *op. cit. supra*, note 7.

207. *See* Kull, *supra* note 6, at section C "Ownership of Funds Withdrawn from the Scheme."

Winnings, on the other hand, must be returned. For those who have not been fully reimbursed, then, the question becomes one of determining how they are to share in the distribution by the trustee relative to their unreimbursed investment. The majority or "orthodox" position, according to Kull, usually referred to as the "net loss" method, allows the partial loser to retain reimbursement moneys and then deduct them from their total investment in the scheme.[208] The remaining net investment is subject to a *pro rata* portion of the assets to be distributed by the trustee.[209] Under this approach, the partially reimbursed parties retain their reimbursed moneys on a "dollar for dollar" basis and share in the trustee's *pro rata* distribution only to the extent of their net loss.[210]

A variation on the "net loss" method referred to as a "rising tide" calculates the partially reimbursed party's claim on a slightly, but importantly, different basis.[211] Under "rising tide," such investors calculate their *pro rata* entitlements on the basis of their entire investment and then deduct the amount already received from that entitlement.[212] Thus, where two investors have invested the same amount and one only has been partially reimbursed, in an amount less than the ultimately distributed *pro rata* share, the two investors will be treated equally. Under both "net loss" and "rising tide," however, investors who have received full reimbursement will be better off than others. Nonetheless, "rising tide" has the advantage of bringing some non-reimbursed parties closer to some other reimbursed parties. The "net loss" method has a similar but diluted effect. Thus, supporters of a full rateable distribution would favour "rising tide" over "net loss."

In terms of doctrinal innovations needed to achieve either "net loss" or "rising tide," it appears that American courts have simply ignored the proprietary claims that might otherwise be available to losers under the American (and Commonwealth) law and assumed that there is no other restitutionary claim that might be pursued on the Losers' behalf against the Net Winners that might disrupt the Net Winner's ability to retain their prior

208. *Id.*
209. *Id.*
210. *Id.*
211. Various possible methods for calculating the distribution are set out CFT v. Franklin, 652 F. Supp. 163 at 169 (W.D. Va. 1986), rev'd on other grounds *sub nom*; Anderson v. Stephens, 875 F. 2d 76, 77 (4th Cir. 1989).
212. Franklin, 652 F. Supp. at 164.

reimbursements.[213] Any such claim, however, could be defended on the basis that the Net Winner would have a defence of having given value for the reimbursed moneys.

Judge Posner[214] has defended the "net loss" solution on the basis that investors who have been reimbursed have probably spent the money returned and "may find themselves with all or most of their savings in the Ponzi scheme." Under "rising tide" the reimbursed moneys will count against their claim to a share in the remaining pot whereas the "net loss" approach maximized "the overall utility of the investors."[215] Saul Levmore,[216] on the other hand, favours a rule that permits Net Winners to retain both reimbursement and any winnings on the theory that such a rule encourages early exit by investors. Early exit, in his view, should be encouraged as a device which will result in earlier collapse of Ponzi schemes with resulting benefits to other potential investors.

Those who favour a general or full rateable solution are not likely to be persuaded by such arguments. They rest on an assumption concerning an awareness of the applicable legal regime that may exceed that of many practicing lawyers. We may note, in passing, that the defendant lawyers in *Den Haag*[217] appeared to be induced by their early success to remain in the scheme. Moreover, one can fashion incentive arguments in favour of a full rateable solution. If potential investors know that any payments received could be "clawed back" in restitution claims by the trustee or later investors, would this make them less likely to invest in such schemes?

Notwithstanding such reservations about current American doctrine, it nonetheless remains the case that American courts have developed innovative approaches that tend to ameliorate the somewhat random and occasionally harsh results that obtain by simply applying existing common law doctrine.

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213. *See* Kull, *supra* note 6, in which the author identifies five basic principles of property and restitution law that are ignored by American courts in their search for an equitable distribution.

214. SEC v. Huber, 702 F. 3d 903, 907 (7th Cir. 2012).

215. *Id.* at 907.

216. Saul Levmore, "Rethinking Ponzi-Scheme Remedies in and out of Bankruptcy" (2012), 92 B.U. L. REV. 969, 982–83 (2012).

217. Den Haag Cap., LLC v. Correia, 2010 ONSC 5339, para. 15 (Can. Ont. Super. Ct.).

6. CONCLUSION

The law of restitution can make a valuable contribution to the solution of the problems created in the wake of Ponzi schemes. More particularly, Commonwealth restitutionary doctrine demonstrates that claims by Losers against Net Winners should enjoy prospects for success either on the basis of the *Lipkin Gorman* doctrine or equitable principles of proprietary relief. Nonetheless, this article has attempted to demonstrate that the solutions offered under current Commonwealth law are far from ideal. The cardinal feature of the difficulties created in the collapse of such schemes is that all of the victims or investors who have contributed to the scheme are innocent victims of the Ponzi operator. Thus, common law doctrines that benefit one group of investors at the expense of another may be fairly characterized as unfair and inequitable. More particularly, solutions that give preference to the interests of early investors who have been paid by the Swindler with moneys stolen by the Swindler from later investors are difficult to justify in policy terms. Arguably, a more just solution would be to gather in all of the assets funnelled through the Ponzi's hands and distribute them on a *pro rata* basis to all investors. Such a solution would involve substantial adjustment of current common law doctrine.