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Articles

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SYMPOSIUM ISSUE: TWELFTH REMEDIES DISCUSSION FORUM

ARTICLES

Current financial transaction and stock transfer taxes are ineffective and administratively complex. Developments in technology leading to high-frequency trading, increased speculation, and retail investor mobilization via digital trading platform are all concerns that are not accounted for through current statutory language. In response to these concerns, the United States government and legislature of New York propose legislation to re-enact or renew existing stock transfer taxes.

This Article first examines the history of financial transaction taxes both at the state and federal levels. Imprecise language, ineffective administration, and constitutional violations were the Achilles-heel of stock transfer taxes of the past. Clear guidance from the United States Supreme Court and insights gained over the past forty years will allow for a more effective approach.

Next, this Article examines the approach to financial transactions taxes in Europe, where implementation issues led to long-term successes or short-term failure. Taking lessons from three nations, The United Kingdom, France, and Sweden, will prove helpful in deciding the best approach and design for U.S. financial transaction and stock transfer taxes.

Third, this Article addresses high-frequency trading, a new phenomenon in the financial world which utilizes computer software and theoretical mathematics to execute trades in a matter of seconds. This technology was not a consideration when financial transaction taxes were first implemented and will be a key piece in effective legislative drafting. Effective legislation should minimize risks associated with high-speed, speculative trading and support traditional market functions.

This Article concludes by critically analyzing existing statutes and proposed legislation at both the federal and state level and proposes a course of action for New York given the recent developments in trading technology, society, and multijurisdictional taxation.

A fraud may induce the victim to sell an asset at undervalue to the fraudster, and that asset may increase in value in the period between the fraudulent transaction and the court's assessment of the damages for the fraud. In *Tuke v. Hood*, the English Court of Appeal held that this increase in value may be taken into account in assessing damages without at the same time credit being given for the "time value" of the money the claimant received from the defendant, in the period between the fraudulent transaction and the trial. In other words, the court held that the damages may reflect the higher value of the lost asset at the time of the trial without credit being given for the interest that the claimant could have earned in the period between the fraudulent transaction and the trial by placing the money received from the defendant on an interest-bearing bank account. In the course of justifying this rule, the court stated that an increase in value of the asset the defendant obtained from the claimant may be taken into account in assessing damages without credit being given even for actual interest earned on money the claimant received from the defendant or—in the case of an exchange of assets—for the increase in value of an asset the claimant received from the defendant. This article argues that the same valuation date ought to be used for assets given away and benefits received by a victim of fraud.

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

By John D. McCamus[1]*

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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

1. * FRSC, University Professor and Professor of Law Emeritus, Osgoode Hall Law School, York University; Davies Ward Phillips Vineberg LLP.

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.

THE VALUATION DATE OF BENEFITS RECEIVED BY A VICTIM OF FRAUD

Sirko Harder*

I. INTRODUCTION

In English law, damages for a fraudulent misrepresentation that has induced the claimant to enter into an unfavourable contract aim to place the claimant in the position as if the contract had not been made.[1] The measure of such damages was first laid down in cases in which the claimant was induced to purchase an asset from the defendant or a third party for an inflated price.[2] The basic amount is the difference between the contract price and the actual value (if any)[3] of the asset at the date of purchase.[4] Where the asset has since depreciated in value,

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1. Smith New Ct. Sec. Ltd. v. Citibank NA [1997] AC 254 (HL) 281 (approving Doyle v. Olby (Ironmongers) Ltd. [1969] 2 QB 158 (CA)).

2. Most cases involved the purchase of shares. *See, e.g.*, Peek v. Derry (1887) 37 Ch D 541 (CA); McConnel v. Wright [1903] 1 Ch 546 (CA). For assets other than shares, see, *e.g.*, Doyle v. Olby (Ironmongers) Ltd. [1969] 2 QB 158 (CA) (business); Butler-Creagh v. Hersham [2011] EWHC 2525 (QB) (real property).

3. If the asset had no value, the claimant could recover the contract price. *See* Twycross v. Grant (1877) 2 CPD 469 (CA); 4 Eng. Ltd. v. Harper [2008] EWHC 915 (Ch), [2009] Ch 91. This applies even if the contract cannot be rescinded. Burki v. Seventy Thirty Ltd. [2018] EWHC 2151 (QB) [174]-[175].

4. *E.g.*, Peek v. Derry (1887) 37 Ch D 541 (CA); McConnel v. Wright [1903] 1 Ch 546 (CA); Glossop Carton and Print Ltd. v. Contact (Print and Packaging) Ltd. [2021] EWCA Civ 639, [2021] 1 WLR 4297 [36]-[37], [42], [59]. Some scholars regard an award in the basic amount as a substitute for the right infringed and not as compensation for loss. *See* Jason W Neyers, 'Form and Substance in the Tort of Deceit' in FORM AND SUBSTANCE IN THE LAW OF OBLIGATIONS (Andrew Robertson and James Goudkamp eds., Hart, 2019) 326 (citing Robert Stevens, TORTS AND RIGHTS (Oxford University Press, 2007) 60). This makes no difference to the arguments advanced in this Article.

its value at a later date (such as the date of resale or the trial)[5] can be used if the depreciation is due to an inherent characteristic present at the date of purchase and not an external factor arising thereafter.[6] Consequential loss, such as money spent on running a business that was acquired as a result of fraud, can be recovered if it has directly flown from the fraud, even if it was not reasonably foreseeable.[7]

The converse scenario—where the defendant fraudulently induced the plaintiff to sell an asset to the defendant or a third party—has arisen far less frequently. In some of those cases, the measure of damages was the difference between the actual value of the asset at the time of the impugned transaction and the price paid.[8] In other cases, the measure of damages was the loss directly flowing from the fraud.[9]

The scenario of a claimant being fraudulently induced to sell an asset was present in *Tuke v. Hood*.[10] The defendant fraudulently induced the claimant to sell some of his classic cars to the defendant at undervalue.[11] In the absence of the fraud, the claimant would have kept the cars, whose value rose between the date of their sale to the defendant and the date of the trial. The English Court of Appeal identified two items of recoverable loss: basic loss constituted by the difference between the actual value of the cars at the date of their sale to the defendant and the purchase price, and consequential loss in the amount of the cars' appreciation in value in the period between the sale and the trial.

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5. Where it was unreasonable for the claimant to retain the asset, the relevant time is the time at which the claimant ought to have sold it. *See* Smith New Ct. Sec. Ltd. v. Citibank NA [1997] AC 254 (HL) 268.

6. *Id.* at 267, 285. An example was given by Cockburn CJ in Twycross v. Grant (1877) 2 CPD 469 (CA) 544-45 (where a racehorse bought by the claimant subsequently dies of a disease, the claimant can recover the full contract price if it was a latent disease inherent in the horse's system at the time of purchase, but not if the horse caught the disease thereafter).

7. Smith New Court Sec. Ltd. v. Citibank NA [1997] AC 254 (HL) 264-67, 282. It is not settled whether the court can award compound interest on money obtained by a fraudster. *See* James Edelman, MCGREGOR ON DAMAGES (21st ed., Sweet & Maxwell, 2021) [19-068].

8. Platt v. Platt [2001] 1 BCLC 698 (CA) [19], [43], [74].

9. Dadourian Grp. Int'l Inc. v. Simms (Damages) [2009] EWCA Civ 169, [2009] 1 Lloyd's Rep. 601 [145].

10. [2022] EWCA Civ 23, [2022] QB 659.

11. In fact, the claimant parted with his cars (which were undervalued by the defendant) in return for other cars (which were overvalued by the defendant) and cash.

Crucially, the Court of Appeal in *Tuke v. Hood* rejected the defendant's argument that the claimant was required to give credit for a notional amount of interest on the money he had received in return for the cars, for the period between the impugned transaction and the trial. This Article examines that aspect of the decision.

It should be said at the outset that the outcome was unobjectionable on the facts. The money the claimant received in return for his cars was used by him to repay a loan that he had been forced to obtain as a result of an earlier fraud by the defendant. It could therefore not be said that the claimant had received any benefit from obtaining the money.[12]

The Court of Appeal, however, used the occasion to pronounce a wider principle applying beyond the facts of the instant case. The court rejected taking account even of an actual benefit received from investing the money, or of the appreciation in value of an asset received by the claimant as part of the impugned transaction. This Article examines that wider principle.

This Article considers three scenarios, which differ in relation to what a victim of fraud received in return for parting with an asset that subsequently appreciated in value. Part II concerns an asset (not being money) which also appreciated in value in the period between the impugned transaction and the trial. Part III concerns money that has been invested by the claimant in some way and thereby generated some profit. Part IV concerns money that the claimant has left on a non-interest-bearing bank account.

This Article will refer to the tort of deceit as the cause of action.[13] In general, the arguments made in this Article apply equally to a claim under section 2(1) of the Misrepresentation Act 1967 (UK), which provides for an entitlement to damages where a person has been induced to enter into a contract by a misrepresentation of the contract-partner and the representor cannot prove the absence of fault. It has been held that the

12. However, care must be taken that the combined damages for the two frauds do not count the same loss twice.

13. For an overview of this tort including the measure of damages, *see* JOHN CARTWRIGHT, MISREPRESENTATION, MISTAKE AND NON-DISCLOSURE (6th ed., Sweet & Maxwell, 2022) ch. 5.

measure of damages under section 2(1) is in general the same as in the tort of deceit.[14] A difference does exist in that the Law Reform (Contributory Negligence) Act 1945 (UK) applies to a claim under section 2(1),[15] but not to a claim in the tort of deceit.[16] That difference has little relevance to the issue discussed in this Article.[17]

II. THE CLAIMANT RECEIVED AN ASSET THAT HAS APPRECIATED IN VALUE

This Part examines the scenario where the defendant fraudulently induced the claimant to part with an asset (the "lost asset") in return for another asset (the "gained asset"), neither asset being money. Both assets appreciated in value in the period between the fraudulent transaction and the trial, but the market value of the lost asset was always higher than that of the gained asset.

The Court of Appeal in *Tuke v. Hood* stated that the claimant is not required to give credit for the gained asset's appreciation in value.[18] Andrews LJ, with whom Baker LJ and Coulson LJ agreed, noted that an argument by the defendant that the claimant was required to give credit for an appreciation in value of the cars he had received from the defendant in part-exchange and still owned by the time of the trial would have failed.[19] Considering that the Court permitted the claimant to be debited with the appreciation in value of the cars he had transferred to the defendant, the court took the view that the amount of damages is the difference between the lost asset's value at the date of the trial and the gained asset's value at the date of the fraudulent transaction.

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14. Royscot Tr. Ltd. v. Rogerson [1991] 2 QB 297 (CA). This has been criticised on the ground that the very claimant-friendly remoteness test applying to a fraudster's liability should not be applied to a defendant who was merely negligent. *See, e.g.*, Richard Hooley, *Damages and the Misrepresentation Act 1967,* 107 L. Q. REV. 547 (1991).

15. Gran Gelato Ltd. v. Richcliff (Group) Ltd. [1992] Ch 560, 573-4; Taberna Europe CDO II plc v. Selskabet AF1 [2016] EWCA Civ 1262, [2017] QB 633 [51]-[52].

16. Alliance & Leicester Bldg. Soc'y v. Edgestop Ltd. [1993] 1 WLR 1462 (CA); Standard Chartered Bank v. Pakistan Nat'l Shipping Corp. (Nos 2 and 4) [2002] UKHL 43, [2003] 1 AC 959 [18].

17. The reason is set out in Part IV.

18. [2022] EWCA Civ 23, [2022] QB 659 [37].

19. *Id.* at [36]-[37].

Andrews LJ reasoned as follows: A distinction must be made between the basic loss and consequential loss.[20] The basic loss is the difference between the lost asset's value and the gained asset's value.[21] Authority had established that the date of valuation is generally the date of the impugned transaction.[22] A later date may be used, but only where this favours the claimant.[23] In the instant case, the date of the transaction was to be used.[24] The lost asset's appreciation in value between that date and the date of the trial is consequential loss.[25] The claimant must give credit for benefits received at the date of the transaction.[26] In the circumstances under discussion, the claimant had not received any benefits since the date of the transaction.[27]

In support of this line of reasoning, Andrews LJ quoted the following passage from Lord Browne-Wilkinson's speech in *Smith New Court Securities Ltd v. Citibank NA*: "[A]s a general rule, the benefits received by [a victim of fraud] include the market value of the property acquired at the date of acquisition; but such general rule is not inflexibly applied where to do so would prevent him obtaining full compensation for the wrong suffered . . . "[28]

Andrews LJ interpreted this passage as permitting a deviation from the general rule (valuation as at the date of acquisition) only where this favours the claimant, but not where this favours the defendant. In support, Andrews LJ relied on two cases in which a claimant, who had been induced by fraud to purchase an asset at overvalue, obtained damages in the amount of the difference between the price paid and the value of the asset at the date of the purchase, ignoring an increase in the asset's value.[29] It was said in one of those cases:

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20. *Id.* at [37]-[38].
21. *Id.* at [20].
22. *Id.* at [31].
23. *Id.*
24. *Id.* at [36].
25. *Id.* at [38].
26. *Id.* at [29].
27. *Id.* at [38].
28. [1997] AC 254 (HL) 267.
29. Great Future Int'l Ltd. v. Sealand Hous. Corp. [2002] EWHC 2454 (Ch) [29]; OMV Petrom SA v. Glencore Int'l AG [2016] EWCA Civ 778, [2017] 3 All ER 157 [39]. The same

> The purpose of the flexibility of approach about the valuation date to which Lord Browne-Wilkinson referred was to ensure that the person duped should not suffer an injustice by failing to recover full compensation in the type of circumstances to which he referred. There is no need to adopt such an approach in order to relieve the fraudster from the general rule as to damages . . . [30]

This rule, which has also been applied in cases involving negligent misrepresentation,[31] is justified.[32] An award in the difference between the price paid and the value of the asset at the date of acquisition rectifies the effects of the wrong as at the date of the wrong, and subsequent changes in the asset's value (in either direction) are on the claimant's own account.[33] It may be said that the claimant adopts the transaction and gives credit for the asset's value at the date of acquisition.[34] The effect of inflation in the period between the fraudulent transaction and the trial may be addressed through an award of pre-judgment interest.[35]

The same rule may be applied where a claimant was induced by fraud to part with an asset in return for another asset, by awarding damages in the amount of the difference in the assets' values at the date of the exchange and leaving subsequent changes in value out of account. But this requires ignoring value changes of both assets, not just one of them. The two cases on which Andrews LJ relied (or the cases applying the same rule to

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rule was applied in *MDW Holdings Ltd. v. Norvill* [2022] EWCA Civ 883, [2023] 4 WLR 33 [85].

30. OMV Petrom SA v. Glencore Int'l AG [2016] EWCA Civ 778, [2017] 3 All ER 157 [39] (Christopher Clarke LJ speaking for the court).

31. Primavera Ltd. v. Allied Dunbar Assurance PLC [2002] EWCA Civ 1327, [2003] PNLR 276; Quilter v. Hodson Devs. Ltd. [2016] EWCA Civ 1125, [2017] PNLR 7. *See also* JAMES EDELMAN, *supra* note 7 [9-143]-[9-152].

32. The argument made here assumes that the contract is not being rescinded.

33. It has been argued that gains and losses may not be ignored for the time before the claimant became aware of the wrong. *See* Andrew Summers and Adam Kramer, *Deceit, Difference in Value and Date of Assessment*, 133 L. Q. REV. 41, 43-44 (2017).

34. Great Future Int'l Ltd. v. Sealand Hous. Corp. [2002] EWHC 2454 (Ch) [29].

35. Pursuant to s 35A(1) of the Senior Courts Act 1981 (UK), the court has the discretion to award simple interest from the date when the cause of action arose. At common law, compound interest may be awarded as part of the damages (subject to mitigation and remoteness) where the claimant would have invested the money given to the defendant or was forced to borrow money. Sempra Metals Ltd. v. Inland Revenue Comm'rs [2007] UKHL 34, [2008] 1 AC 561. For interest awards at common law and under statute, see JAMES EDELMAN, *supra* note 7 ch. 19.

negligent misrepresentation) do not support the proposition that an increase in the gained asset's value must be ignored even when an increase in the lost asset's value is taken into account in assessing damages.

Nor does Lord Browne-Wilkinson's statement support that proposition. His Lordship merely pointed out that a court is not required to use the date of the transaction as the valuation date where this would lead to an under-compensation of the claimant. He did not say that a court must use the date of the transaction as the valuation date even when this leads to an overcompensation of the claimant. Indeed, just before the passage quoted above, Lord Browne-Wilkinson said that the claimant "must give credit for any benefits which he has received as a result of the transaction."[36] A benefit received after the transaction may still be received as a result of the transaction.

Lord Steyn in the same case said that the date of the transaction "is only prima facie the right date. It may be appropriate to select a later date. That follows from the fact that the valuation method is only a means of trying to give effect to the overriding compensatory rule."[37] The compensatory rule has two rules (each of which has exceptions): (1) all losses attributable to the wrong must be compensated; and (2) the amount of damages must not exceed the amount of those losses.[38] Lord Steyn's remark may therefore be understood as permitting the use of a later valuation date not only for the purpose of avoiding under-compensation, but also for the purpose of avoiding overcompensation.[39] After all, compensatory damages are compensatory and not punitive.[40]

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36. Smith New Ct. Sec. Ltd. v. Citibank NA [1997] AC 254 (HL) 267.

37. *Id.* at 284.

38. "The court in applying the compensatory principle is charged with avoiding under-compensation and also overcompensation. Justice is not achieved if a claimant receives less or more than its actual loss." Sainsbury's Supermarkets Ltd. v. Visa Eur. Servs. LLC [2020] UKSC 24, [2020] 4 All ER 807 [217]. However, overcompensation is accepted where the only alternative on the facts is under-compensation: Swift v. Carpenter [2020] EWCA Civ 1295, [2021] QB 339 [206]. See generally David McLauchlan, *Some Damages Dilemmas in Private Law*, 52 VIC. U. WELL. L. REV. 875 (2021).

39. In Gosden v. Halliwell Landau *(a firm)* [2021] EWHC 159 (Comm), [2021] PNLR 397 [26], where the defendant solicitors negligently failed to register the claimants' interest in the land registry, the judge said that the date of assessment should be chosen so as to avoid both overcompensation and under-compensation.

40. Ruxley Elecs. and Const. Ltd. v. Forsyth [1996] AC 344, 373 (Lord Lloyd); Morris-Garner v. One Step (Support) Ltd. [2018] UKSC 20, [2019] AC 649 [25].

To avoid a valuation of both the gained asset and the lost asset as at the date of the trial, Andrews LJ distinguished between basic loss (being the difference in value between the two assets at the date of the transaction) and consequential loss (being the lost asset's appreciation since the transaction) and argued that the claimant had not received any benefit since the transaction. It is true that there was no further transaction between the parties. However, the appreciation in value of the cars the claimant had received from the defendant in part-exchange does constitute a benefit received as a result of the fraud. Moreover, it is a benefit that accrues automatically without the need for the claimant to do anything. The benefit is intrinsically connected with the fraudulent transaction and not collateral.[41]

Both the gained asset and the lost asset have increased in value since their exchange. If the lost asset's appreciation is conceptualised as a loss resulting from the fraud, the gained asset's appreciation must, by the same token, be conceptualised as a benefit resulting from the fraud.

Andrews LJ somewhat undermined her argument by saying that there would be "a respectable argument" that any depreciation in value of the gained asset constitutes recoverable consequential loss.[42] If a depreciation in value of the gained asset is taken into account in assessing damages, so must be an appreciation in value.

III. THE CLAIMANT RECEIVED MONEY AND HAS DERIVED A BENEFIT FROM ITS USE

This Part is concerned with a claimant who received money from the defendant as part of the fraudulent transaction and has derived a benefit from using that money in the period between the fraudulent transaction and the trial. For example, the claimant may have bought shares in a company which have increased in value, or bought property that increased in value, or placed the money in an interest-bearing bank account.

41. The rules on when credit must be given for benefits resulting from a civil wrong are set out in Part III below.

42. [2022] EWCA Civ 23, [2022] QB 659 [36].

Andrews LJ in *Tuke v. Hood* expressed the view that such benefits cannot be taken into account in assessing damages even if the appreciation in the lost asset's value is taken into account.[43] Her Honour said that these benefits cannot be properly described as benefits conferred on the claimant by the sale transaction with the defendant.[44]

It is established for civil wrongs in general that a benefit attributable to the events which caused the claimant's loss must be taken into account in assessing damages unless the benefit is collateral.[45] A benefit may be taken into account even if it is not of the same kind as the loss.[46] An example is the benefit of the claimant and his wife living in part of the premises of the business that the defendant fraudulently induced the claimant to acquire at overvalue.[47] Examples of benefits that are collateral are a gift to the claimant,[48] and the payment out of a private insurance that the claimant had taken out.[49]

Difficulties arise where the benefit has arisen from a post-wrong action of the claimant that would not have been taken but for the wrong. In those circumstances, a benefit is not collateral if it is derived from steps the claimant took to mitigate the loss,[50] or if it can otherwise be properly attributed to the wrong. The demarcation line is difficult to define with precision. It is not sufficient that the benefit would not have accrued but for the

43. *Id.* at [40]-[47].

44. *Id.* at [40].

45. Tiuta Int'l Ltd. v. De Villiers Surveyors Ltd. [2017] UKSC 77, [2017] 1 WLR 4627 [12]; Swynson Ltd. v. Lowick Rose LLP. [2017] UKSC 32, [2018] AC 313 [11].

46. Fulton Shipping Inc. of Panama v. Globalia Bus. Travel SAU of Spain [2017] UKSC 43, [2017] 1 WLR 2581 [30].

47. Doyle v. Olby (Ironmongers) Ltd [1969] 2 QB 158 (CA) 169.

48. Tiuta Int'l [2017] UKSC 77, [2017] 1 WLR 4627 [12]; Swynson Ltd. v. Lowick Rose LLP [2017] UKSC 32, [2018] AC 313 [11].

49. Bradburn v. Great Western Ry. Co. (1874) LR 10 Ex 1; Tiuta Int'l [2017] UKSC 77, [2017] 1 WLR 4627 [12]; Swynson Ltd. v. Lowick Rose LLP. [2017] UKSC 32, [2018] AC 313 [11]. If the insurance is an indemnity (as opposed to contingency) insurance, the insurer will be subrogated to the insured's claim against the wrongdoer; *see* Caledonia North Sea Ltd. v. Brit. Telecomms. Plc [2002] UKHL 4, 2002 SC (HL) 117 [11], citing previous authority.

50. Brit. Westinghouse Electric and Mfg. Co. Ltd. v. Underground Electric Rys. Co. of London Ltd. [1912] AC 673 (HL); Bacciottini v. Gotelee & Goldsmith (a firm) [2016] EWCA Civ 170, [2016] 4 WLR 98; Swynson Ltd. v. Lowick Rose LLP. [2017] UKSC 32, [2018] AC 313 [11].

wrong.[51] The courts have made a distinction between a benefit that is "part of a continuous transaction" of which the wrong was the inception,[52] and a benefit that has arisen from an independent decision of the claimant[53] and is *res inter alios acta*.[54] A benefit resulting from a post-wrong action of the claimant may be ignored where the action had the potential to produce a loss and the defendant would not have been liable for such loss.[55]

Relying on these principles, Andrews LJ in *Tuke v. Hood* stated that where a victim of fraud uses the money received from the defendant to gamble and wins £1,000,000, those winnings will not be brought into account in assessing damages; nor will the increase in value of an investment car which the claimant has bought from a third party with the money received from the defendant.[56] This is convincing, not least because either scenario involves a chance that the claimant's spending decision results in a loss rather than a gain, and the defendant would not be liable for such loss.

Andrews LJ also observed that interest the claimant has earned by placing the money received from the defendant in an interest-bearing bank account is not to be taken into account in assessing damages.[57] This is not convincing. Being capable of producing interest is an inherent characteristic of money. The claimant received the money from the defendant with that potential in it. There does exist a difference to an asset that automatically increases in value, in that money does not produce interest unless the claimant places the money into an interest-bearing bank account. However, in the age of Internet banking, this takes only a few minutes. It is therefore appropriate to

51. Assetco plc v. Grant Thornton UK LLP [2019] EWHC 150 (Comm), [2019] Bus LR 2291 [895].

52. *E.g.*, Hussey v. Eels [1990] 2 QB 227 (CA) 241 (Mustill LJ speaking for the court); Needler Financial Servs. v. Taber [2002] 3 All ER 501 [24] (Sir Andrew Morritt VC).

53. *E.g.*, Koch Marine Inc. v. D'Amica Societa di Navigazione A.R.I. (The Elena d'Amico) [1980] 1 Lloyd's Rep 75, 89; Thai Airways Int'l Pub. Co. Ltd v. KI Holdings Co. Ltd [2015] EWHC 1250 (Comm), [2016] 1 All ER (Comm) 675 [46].

54. Swynson Ltd. v. Lowick Rose LLP. [2017] UKSC 32, [2018] AC 313 [11].

55. Assetco [2019] EWHC (Comm) 150, [2019] Bus LR 2291 [904]. *See also* Fulton Shipping Inc. of Panama v. Globalia Bus. Travel SAU of Spain [2017] UKSC 43, [2017] 1 WLR 2581.

56. [2022] EWCA Civ 23, [2022] QB 659 [47].

57. *Id.* at [40].

equate the earning of interest with an asset's appreciation in value. Furthermore, since interest paid on a loan that the fraud forced or induced the claimant to obtain is a recoverable loss,[58] interest earned on money received as part of the fraudulent transaction should equally be taken into account in assessing damages. Similar considerations apply where the claimant has used the money received from the defendant to repay a loan on which the claimant would otherwise have paid interest in the period between the fraudulent transaction and the trial.

However, the benefit of having earned interest or avoided paying interest should be taken into account only if the same is done with the increase in the lost asset's value. If the court assesses damages by taking the difference between the lost asset's value at the date of the fraudulent transaction (ignoring its subsequent increase in value) and the price paid, any benefit resulting from the use of the money must be ignored. As in the case of an exchange of assets discussed in Part II above, the claimant can adopt the transaction and give credit only for the value of the gained asset (which is now money) at the date of the transaction.

The arguments made here can be illustrated by reviewing two examples given by Andrews LJ in *Tuke v. Hood*. Her Honour was concerned with notional interest (i.e., interest that could have been earned), but since she treated actual and notional interest in the same way, the examples can be considered here.

Andrews LJ started with the following simple example:

> [I]f [the claimant] is fraudulently induced to sell an asset worth £10,000 for £4,000, he is compensated by an award of £6,000 because, by keeping the £4,000, he has received £10,000 in total. If he also had to give credit for interest notionally (or even actually) earned on the £4,000 he would be under-compensated, because he would receive less than the full £10,000 that the asset was worth at the time of sale.[59]

A claimant who has earned interest on the £4,000 received from the defendant would in fact be overcompensated by an award of damages in the amount of £6,000, as the claimant would

58. Archer v. Brown [1985] QB 401, 417.
59. [2022] EWCA Civ 23, [2022] QB 659 [40].

end up with £10,000 plus the interest earned. In the absence of the fraud, the claimant would now possess an asset worth £10,000 and would have earned no interest.

Andrews LJ then changed the scenario:

> Now suppose that the asset sold at an undervalue was bought as an investment, and by the time the balance of the £10,000 (i e the £6,000) is awarded, the asset is worth £25,000 and the injured party proves that he would have kept it . . . . The consequential loss is £15,000, which is the difference between the £25,000 . . . and the £10,000, which is what it was worth when he did sell it to the fraudster. If he receives the £15,000 on top of the £6,000 basic damages, he is put in the position in which he would have been but for the fraud . . . . There is . . . no logical basis for suggesting that the claimant would be over-compensated if he receives that additional £15,000 without credit being given for the 'time value' of the £4,000[.] [60]

A claimant who has earned interest on the £4,000 received from the defendant would in fact be overcompensated by an award of damages in the total amount of £21,000, as the claimant would end up with £25,000 plus the interest earned. In the absence of the fraud, the claimant would now possess an asset worth £25,000 and would have earned no interest.

As in the scenario of a gained asset that appreciates in value, Andrews LJ was seeking to justify her conclusion in the second example by distinguishing between the basic loss (the difference between the lost asset's value at the date of the fraudulent transaction and the purchase price) and consequential loss, i.e., the increase in the lost asset's value in the period between the fraudulent transaction and the trial. But this distinction is a technicality and cannot overcome the fundamental point that the same transaction through which the claimant lost an asset provided the claimant with an amount of money which has the inherent potential to earn interest, and if the lost asset's appreciation in value in the period between the fraudulent transaction and the trial is taken into account in assessing

60. *Id.* at [42]-[43].

damages, so must be any interest earned on the money received from the defendant.

IV. THE CLAIMANT RECEIVED MONEY BUT HAS DERIVED NO BENEFIT FROM IT

In *Tuke v. Hood*, the defendant argued that credit should be given for the "time value" of the money the claimant had received from the defendant in the period between the fraudulent transaction and the trial. The defendant did not assert that the claimant had actually derived a benefit from the use of the money (which the claimant might or might not have done), but simply relied on the fact that money has the potential to earn interest. The defendant suggested that the rate of such notional interest should be calculated in the same way as either compound interest in equity or discretionary pre-judgment interest under statute.[61] The Court of Appeal refused to deduct notional interest on the money for the period between the fraudulent transaction and the trial. As seen before, the Court expressed the view that even actual interest earned would not have been deducted.

It has been argued before that benefits flowing from what the claimant received as part of the fraudulent transaction may be ignored where the court uses the date of the transaction as the valuation date for both what the claimant gave away and what the claimant received. An award of damages in the difference between those two values rectifies the wrong as the date of the wrong and subsequent developments are on the claimant's account. Therefore, even if the "time value" of money can be characterised as a benefit, the decision in *Tuke v. Hood* to not give credit for such "time value" would have been unobjectionable if the increase in the value of the cars the claimant gave the defendant had equally been ignored. But the Court of Appeal took that increase into account in assessing damages, and the question arises whether this required a deduction of notional interest on the money the claimant had received from the defendant. The remainder of this Part is only concerned with the scenario where the appreciation in the lost asset's value is taken into account in assessing damages.

61. *See id.* at [2].

A claim that credit should be given for the "time value" of money is made in one of two scenarios. The first is that the claimant has actually derived a benefit from using the money received from the defendant, although the defendant is not relying on that fact. In those circumstances, the benefit received by the claimant should be treated in accordance with the rules suggested in Part III above. Credit ought to be given for interest earned or avoided but not for benefits derived from less secure investments. Since the defendant will seldom know what the claimant has done with the money, the onus of proof could potentially be reversed in that notional interest on money received may be deducted from the damages unless the claimant demonstrates that the money has been used for an investment the consequences of which are *res inter alios acta*, i.e., the benefit of which is collateral and not taken into account in assessing damages. However, Andrews LJ in *Tuke v. Hood* said that "a dishonest wrongdoer cannot expect the court to make 'tender presumptions' or to exercise discretions in his favour."[62]

The second scenario that may be present where credit for the "time value" of money is being claimed is where it is clear that the claimant has not made any use of the money but simply left it in a non-interest-bearing bank account that was always in credit (and would always have been in credit even without that amount). In those circumstances, the claimant has obtained no benefit from the money received from the defendant. The argument that notional interest on that sum of money should be deducted from the damages cannot be based on the fact that such interest has been earned because it has not. It can only be based on the notion that the claimant ought to have used the money to repay a loan or earn interest. Such an argument does not invoke the rules about benefits flowing from a civil wrong, but the rules about a claimant's contribution to the loss resulting from a wrong. Three doctrines cover this area:[63] mitigation[64] (more

62. *Id.* at [35].

63. *See* ANDREW TETTENBORN, CLERK AND LINDSELL ON TORTS (24th ed., Sweet & Maxwell, 2023) [2-125]. In some cases, loss resulting from unreasonable conduct of the claimant has been held to be too remote; *see, e.g.*, Baxendale v. London, Chatham, and Dover Ry. Co. [1874] LR 10 Exch. 35; Berryman v. Hounslow LBC [1997] PIQR P83.

64. In addition to the avoidable loss rule, which is concerned with unreasonable conduct of the claimant, the mitigation doctrine also encompasses the avoided loss rule and the rule that the plaintiff can recover for the cost of reasonable attempts to minimise

precisely, the avoidable loss rule),[65] intervening act (*novus actus interveniens*), and contributory negligence.

Under the avoidable loss rule, a wrongdoer is not liable for an item of loss that results from unreasonable conduct of the claimant (an item of loss that a reasonable person in the claimant's position would have avoided).[66] There is authority to the effect that this rule does not apply to a claimant's conduct that occurred before the claimant became aware of the wrong,[67] although awareness of the relevant facts may be sufficient.[68] In particular, it has been said that a victim of fraud must "mitigate his loss once he is aware of the fraud. So long as he is not aware of the fraud, no question of a duty to mitigate can arise."[69] The question therefore is whether, once the claimant has become aware of the fraud (or at least the facts disclosing the fraud), it is unreasonable for the claimant to let the money received from the defendant lie idly on a non-interest-bearing bank account. The answer should generally be affirmative unless the claimant had a reason for doing so, for example, keeping the money ready for an imminent expenditure. It will depend upon the individual circumstances of the particular claimant, and a court may be more lenient with a claimant who is a consumer.

A defendant's liability for an item of loss is also excluded where that item has resulted from conduct of the claimant that occurred after the wrong (even if before the claimant became

loss; *see* JAMES EDELMAN, *supra* note 7 [9-004]-[9-006]; quoted with approval in many cases, a recent example being E D & F Man Cap. Mkts. Ltd. v. Come Harvest Holdings Ltd. [2022] EWHC (Comm) 229 [582].

65. It has been said that the avoidable loss rule "is an aspect of the principle of causation that the contract breaker will not be held to have caused loss which the claimant could reasonably have avoided." Bunge SA v. Nidera BV [2015] UKSC 43, [2015] 3 All ER 1082 [81] (Lord Toulson); *see also* Hughes-Holland v. BPE Solics. [2017] UKSC 21, [2018] AC 599 [20]. However, it is useful to consider the avoidable loss rule as a doctrine separate from legal causation because the avoidable loss rule has developed its own rules and is more frequently applied to omissions rather than positive actions: ADAM KRAMER, THE LAW OF CONTRACT DAMAGES (3rd ed., Hart, 2022) [15-11].

66. *E.g.*, Sainsbury's Supermarkets Ltd. v. Visa Europe Servs. LLC [2020] UKSC 24, [2020] 4 All ER 807 [214]. The defendant bears the legal onus of proof, but the claimant may bear an evidential onus; *see* JAMES EDELMAN, *supra* note 7 [9-020].

67. Youell v. Bland Welch & Co. Ltd. (No 2) [1990] 2 Lloyd's Rep 431, 462; Cnty Ltd. v. Girozentrale Secs. [1996] 3 All ER 834 (CA) 857.

68. Cnty. Ltd. v. Girozentrale Secs. [1996] 3 All ER 834 (CA) 858.

69. Smith New Ct. Sec. Ltd. v. Citibank NA [1997] AC 254 (HL) 266 (Lord Browne-Wilkinson).

aware of the wrong)[70] and constitutes an intervening act (*novus actus interveniens*) breaking the chain of causation between the wrong and the item of loss.[71] To have this effect, the claimant's conduct must obliterate the effect of the defendant's wrong.[72] This requires something more than ordinary unreasonableness, such as recklessness, at least where the conduct occurred before the claimant became aware of the wrong.[73] It is unclear whether this doctrine can apply to a claimant's failure to obtain a benefit that would reduce the loss. Even if it could, it is unlikely that the decision to keep money on a non-interest-bearing bank account could be characterised as "reckless" or otherwise attaining the level of unreasonableness required for an intervening act.

The doctrine of contributory negligence has little relevance in the circumstances under discussion. It has usually (although not exclusively) been applied to unreasonable conduct of a claimant that occurred prior to the wrong, which is not the scenario under discussion, and it leads to an apportionment of the item of loss to which the claimant contributed rather than a total exclusion of the defendant's liability.[74] It is doubtful that the doctrine can be used to deduct from the damages a proportion of a benefit that the claimant ought to have obtained. As mentioned in the Introduction, the doctrine does not apply at all to liability in the tort of deceit.

In conclusion, where a victim of fraud has not made any use of the money received from the defendant, it is unlikely that account can be taken of interest that the claimant could have earned or avoided before the claimant became aware of the fraud. Interest that the claimant could have earned or avoided after the claimant became aware of the fraud ought to be taken into account in assessing damages if it was unreasonable for the claimant not to use the money to earn or avoid interest. This will

70. Stacey v. Autosleeper Grp. Ltd. [2014] EWCA Civ 1551 [14].

71. *E.g.*, Quinn v. Burch Bros (Builders) Ltd. [1966] 2 QB 370; M'Kew v. Holland & Hannen & Cubitts (Scotland) Ltd. 1970 SC (HL) 20; Clay v. TUI UK Ltd. [2018] EWCA Civ 1177, [2018] 4 All ER 672. *See* JAMES EDELMAN, *supra* note 7 [8-097], [8-203]-[8-209].

72. Stacey v. Autosleeper Grp. Ltd. [2014] EWCA Civ 1551 [14].

73. *See id.*; Cnty. Ltd. v. Girozentrale Secs. [1996] 3 All ER 834 (CA) 857.

74. A reduction of the damages to nil is not possible under the Law Reform (Contributory Negligence) Act 1945 (UK): Pitts v. Hunt [1991] 1 QB 24 (CA) [48], [51], [52].

depend upon the circumstances of the individual case, and the court should not be too demanding of the claimant.

CONCLUSION

A transaction induced by fraud usually involves an exchange. The claimant purchases an asset at overvalue, or sells an asset at undervalue, or makes an unfavourable exchange of one asset for another. The basic amount of damages is the difference between the value of what the claimant gave away and the value of what the claimant received. Where either value has changed in the period between the fraudulent transaction and the trial, the question arises whether the values at the date of the fraudulent transaction or at a later date should be used to calculate damages.

It is established that while the date as at which damages for fraud are assessed is generally the date of the fraudulent transaction, there is flexibility in that the court may adopt a later date where this is required to give effect to the compensatory principle. This principle requires, as a general rule, that all losses attributable to the wrong be compensated and that the amount of damages not exceed the amount of those losses. Both overcompensation and under-compensation must generally be avoided.

This Article has suggested that the court has the choice between two approaches. One approach is to assess damages by reference to the values of all relevant items at the date of the fraudulent transaction and ignore any subsequent changes in such values. Thus, where the claimant purchased an asset that subsequently appreciated in value, damages may be calculated by reference to the difference between the price paid and the asset's value at the date of purchase—ignoring the subsequent appreciation in the asset's value. It may be said that the claimant adopts the transaction and gives credit only for the asset's value at the date of purchase. This approach has been taken in a number of cases involving fraudulent or negligent misrepresentation.

The other approach is to assess damages by reference to the values of all relevant items at a date that is later than the date of the fraudulent transaction, such as the date of the trial. Account

will be taken of an appreciation in value of an asset that the claimant gave away in the fraudulent transaction, but also of an appreciation in value of an asset that the claimant received in that transaction. A claimant who received money ought to give credit for a benefit obtained from using the money in the period between the receipt of the money and the date of assessment, unless the benefit is collateral. Credit should be given for interest avoided (by repaying a loan) or interest earned (by placing the money in an interest-bearing bank account), but not for benefits from using the money for a less secure investment that had the potential to result in a loss, such as the purchase of shares. A claimant who left the money in a non-interest-bearing bank account (that was always in credit and would always have been in credit even without that amount) might have to give credit for interest that could have been avoided or earned after the claimant became aware of the fraud, pursuant to the avoidable loss rule, but the court should not be too demanding of the claimant.

In *Tuke v. Hood*, the English Court of Appeal adopted a third approach, by taking the value of the lost asset at the date of the trial and the value of the gained asset at the date of the fraudulent transaction. An appreciation in the value of an asset given away is taken into account but not an appreciation in the value of a gained asset or interest earned on money received from the defendant. The court came to this result by distinguishing a basic loss, being the difference in the two values at the date of the fraudulent transaction, and consequential loss in the amount of the subsequent appreciation in the lost asset's value, and by arguing that benefits obtained from an asset or money received from the defendant have nothing to do with that consequential loss. This is not convincing. An appreciation in the value of a gained asset, or interest avoided or earned by using money received from the defendant, are intrinsically connected with the same transaction in which the claimant lost an asset, and an appreciation in the lost asset's value should not be taken into account unless the same is done for those benefits. The court's approach leads to avoidable overcompensation. It finds no support in either principle or authority.

SUSTAINING COUNTRY-SPECIFIC FACT-CHECKING REMEDIES: THE SIERRA LEONE EXPERIENCE

Michael M. Epstein, J.D., Ph.D. *

In Summer 2022, the author traveled to Africa on a Fulbright Foundation Specialist grant to develop fact-checking capacity and media information literacy in Sierra Leone.[1] Like many countries, Sierra Leone has been contending with social disruption caused by political disinformation and misinformation in legacy media and on social media platforms such as WhatsApp.[2] In recent years, fake news stories falsely alleging political corruption and inadequate COVID vaccine effectiveness have led to violence and loss of life.[3]

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1. Press Release, Fulbright, Michael Epstein Receives Fulbright Specialist Award to Sierra Leone at the Initiative for Media Development (June 7, 2022) (on file with author); Press Release, Sw. L. Sch., Prof. Epstein Named Fulbright Specialist to Sierra Leone, https://www.swlaw.edu/swlawblog/prof-Epstein-earns-Fulbright (last visited May 30, 2023); see also The Biederman Institute at Sw. L. Sch., *A Conversation With . . . Dr. Michael Epstein* SPOTIFY FOR PODCASTERS (Nov. 29, 2022), https://podcasters.spotify.com/pod/show/bemli/episodes/A-Conversation-With---Dr--Michael-Epstein-e1r62qd, to hear Dr. Epstein share about his work and experiences in Sierra Leone via the Biederman Institute podcast.

2. *See generally* Epstein, *infra* note 14.

3. *See* Neia Prata Menezes et al., *What Is Driving COVID-19 Vaccine Hesitancy in Sub-Saharan Africa?*, WORLD BANK BLOGS (Aug. 11, 2021), https://blogs.worldbank.org/africacan/what-driving-covid-19-vaccine-hesitancy-sub-saharan-africa; Press Release, Gov't of Sierra Leone Ministry of Health and Sanitation, Unsubstantiated Claims Made About the Chinese-Manufactured COVID-19 Vaccine by Two Newspapers in Sierra Leone (June 28, 2021), https://covidlawlab.org/wp-content/uploads/2021/08/Press-Release-Baseless-reports-about-Chinese-COVID-19-vaccine-28062021-1.pdf; Awareness Times Newspaper, *ACC Apologizes to the National Petroleum (SL-Ltd)*, FACEBOOK (Sept. 3, 2020), https://www.facebook.com/awarenesstimes/posts/over-4-billion-false-allegationacc-apologizes-to-the-national-petroleum-sl-ltdby/10158398391526343/.

The objective of this Fulbright project was to assist two Sierra Leone-based non-governmental organizations, Initiatives for Media Development ("IMdev")[4] and Media Matters for Women ("MMW"),[5] in building the capacity and reach of Salone Fact-Checker ("SFC").[6] SFC is a fact-checking operation developed on a trial basis by IMdev in 2020 but has since become inactive.[7] The timing for this project was set so that IMdev and MMW would be able to rollout a reconstituted SFC in advance of Sierra Leone's general elections in June 2023.[8] Sierra Leone's democracy remains fragile in the two decades since the end of its calamitous civil war, and there is concern that disinformation and misinformation, left unchecked, could cause significant unrest, extremism, and even violence in the run-up to future elections.[9]

The fact-checking project was predicated on two mandates articulated by IMdev and MMW: capacity building and content outreach. The first mandate was to develop capacity building strategies for SFC.[10] Central to this mandate was to increase SFC's staffing and training, both in Freetown, Sierra Leone's capital and principal urban area, and in its twenty-three provinces, which are less economically developed.[11] The second mandate focused less on the internal workings of SFC and more on increasing its audience to make it more effective.[12] This essentially was a media information literacy initiative that focused on strategies to make fact-checking content broadly

4. *What We Do*, INITIATIVES FOR MEDIA DEV., http://imdev.media/ (last visited May 31, 2023).

5. *Who We Are*, MEDIA MATTERS FOR WOMEN, https://mediamattersforwomen.org/our-work/ (last visited June 2, 2023).

6. *Salone Fact-Checker*, INITIATIVES FOR MEDIA DEV., http://imdev.media/ (last visited May 31, 2023).

7. *The Fulbright Specialist Project*, FULBRIGHT, https://fulbrightspecialist.worldlearning.org/the-fulbright-specialist-program (last visited June 2, 2023).

8. *See* Funding Solicitation, Initiatives for Media Development, Funding Solicitation for SFC Project Next Steps (2022) (on file with author).

9. *See* Epstein, *infra* note 14, at 1–2 (explaining the background of media and democracy in Sierra Leone), (construing Brian Ganson & Herbert M'cleod, *Private Sector Development and the Persistence of Fragility in Sierra Leone*, CAMBRIDGE UNIV. PRESS 602, 603 (2019); IBRAHIM BANGURA, BBC MEDIA ACTION, THE POLITICAL ECONOMY OF THE MEDIA IN SIERRA LEONE AND THE POTENTIAL FOR PRIVATE-SECTOR INVESTMENT ¶ 3 (2022) (noting unchecked past acts of violence against media actors in Sierra Leone suggests an ongoing threat).

10. *See* Funding Solicitation, *supra* note 8.

11. *Id.*

12. *Id.*

accessible to Sierra Leoneans, including those challenged by illiteracy and lack of infrastructure in rural "last mile" villages.[13]

One year out, the SFC project had born some promising results, though not necessarily as predicted. In a paper presented at the University of Paris Dauphine in June 2022, the author outlined the SFC project, broadly divided into initiatives intended to build the fact-checking operation's internal capabilities and increase public access to its fact-checking content.[14] Central to the project were initiatives conceived to meet the specific socio-economic realities and cultural understandings of the Sierra Leonean populace.[15] This paper will examine what aspects of the project worked—and did not work—as a result of the author's visit to Sierra Leone. In assessing the project's long-term impact, it is important to note that, as of this writing, the culturally syncretic SFC remains inactive. In its place, however, is a journalist-run Sierra Leone iteration of iVerify, a UN-funded initiative operated by some of the same stakeholders involved in the SFC project.

A. THE SFC FULBRIGHT PROJECT: WHAT WORKED AND WHAT DID NOT WORK

On April 26, 2022, the author met via Zoom with representatives from IMdev and MMW. The parties discussed how best to devise a country-specific program to train fact-checking professionals and use media information literacy principles to increase accessibility and impact of fact-checked

13. *See* Epstein, *infra* note 14, at 9 (construing *About Us*, INITIATIVES OF MEDIA DEV., http://imdev.media/about/ (last visited May 31, 2023)); Olusegun Abolaji Ogundeji, *Sierra Leone Grapples with Acute Digital Divide,* NETWORK WORLD (Apr. 10, 2008), https://www.networkworld.com/article/2277939/sierra-leone-grapples-with-acute-digital-divide.html; Jutta Haider & Olof Sundin, *Responsibility and the Crisis of Information, in* PARADOXES OF MEDIA AND INFORMATION LITERACY: THE CRISIS OF INFORMATION, 26, 26–45 (1st ed. 2022); *see also* Reaching the Last Mile: Challenges and Opportunities, GLOBAL WASH. (Mar. 4, 2016), https://globalwa.org/issue-brief/last-mile-delivery (explaining "last mile" is an international development term used to describe "often isolated . . . villages without paved roads, [and] with little access to communication and poor infrastructure").

14. Michael M. Epstein, *Fact-Checking Remedies in the Developing World: The Fight Against Misinformation and Disinformation in Sierra Leone*, CAMBRIDGE SCHOLARS (forthcoming 2023) [hereinafter 2022 Paris Paper].

15. *Id.* at 11 (discussing the proposed build-up program designed to increase internal capacity of the Salone Fact-Checker designed with Sierra Leonean media realities and cultural sensitivities in mind) (citing NATASHA MACK ET AL., QUALITATIVE RESEARCH METHODS: A DATA COLLECTOR'S FIELD GUIDE 8 (2005)) ("Whenever we conduct research on people, the well-being or research participants must be our top priority.").

content among illiterate, predominantly rural, populations. Entitled "Fact-Checking in the Fight Against Fake News and Disinformation in Sierra Leone," the Fulbright project solicitation was led by Yeama Sarah Thompson, the founder and director of IMdev, and Florence Sesay, the founder and CEO of MMW.[16] Both women are highly accomplished media advocates who parlayed their success as journalists to found public interest organizations committed to increasing media information literacy and empowering people in poverty, especially women and children living in rural areas.[17]

At the project solicitation meeting, Thompson and Sesay emphasized the need for SFC capacity-building to be part of a comprehensive media information literacy program that would deliver content to historically underserved rural areas, including "last mile" villages.[18] Such a program would build upon the strengths of IMdev, who sponsors training seminars for media professionals and is a distributor of media campaigns throughout Sierra Leone, as well as the more tightly focused mission of MMW, which developed a network for dispensing healthcare information to women in underdeveloped rural communities.[19]

Without an operational budget, the program would need to be budget neutral, or at least not add to the existing budget, to sustain its initiatives after the initial project period. Both IMdev and MMW are principally grant-funded organizations, with little or no opportunity to generate revenue to self-fund their

16. Virtual Meeting, Author with Yeama Thompson, Florence Sesay, Lisa Sebree & Ellen Marshall (Apr. 26, 2022) [hereinafter Zoom Meeting] (on file with author).

17. See *Yeama Thompson*, DIGIT. EARTH AFRICA, https://www.digitalearthafrica.org/about-us/governance/technical-advisory- committee/yeama-thompson (last visited May 31, 2023), for Yeama Thompson's biography and contribution to IMdev; see *Who We Are*, MEDIA MATTERS FOR WOMEN, https://mediamattersforwomen.org/about-us/who-we-are/ (last visited May 31, 2023), for Florence Sesay's biography and community involvement; *see also* 2022 Paris Paper, *supra* note 14, at 7–8 and accompanying notes (highlighting further the proposed development and implementation of the Salone Fact-Checker to fight fake news in Sierra Leone by building on the success of IMdev and MMW and their women leaders).

18. *See* Zoom Meeting, *supra* note 16 (recorded in author's meeting notes).

19. *See* 2022 Paris Paper, *supra* note 14, at 7–9 (discussing the role IMdev and MMW played in combating mis-dis prior to the 2018 Sierra Leone Presidential Election); *About Us*, INITIATIVES OF MEDIA DEV., http://imdev.media/about/ (last visited May 31, 2023) (for IMdev's Mission Statement, Challenges, and Objectives); *Our Impact*, MEDIA MATTERS FOR WOMEN, https://mediamattersforwomen.org/our-work/our-impact/ (last visited May 31, 2023) (highlighting MMW's role in advocating for women and girls in Sierra Leone).

activities.[20] SFC itself was initially funded in 2020 by the U.S. Embassy in Sierra Leone, and embassy funds were used in part to underwrite the Fulbright project in 2022. This funding, perhaps augmented by other funding sources, enabled IMdev to hire a team of six freelance journalists, with various experience, to staff SFC and post fact-checked stories on the IMdev website and its Facebook page.

The author's proposal for the project, summarized at the April solicitation meeting and elaborated upon in his June 2022 Paris Paper, was tailored to address the country-specific needs of IMdev and MMW.[21] At the core of the project proposal was a fact-checker training curriculum,[22] and a budget-neutral internship program in partnership with Sierra Leone universities that would train journalism students as fact-checker interns, in exchange for academic or professional credit.[23] With trained externs, SFC would be able to expand its operation with round-the-clock review of social media disinformation and misinformation, an important feature in Sierra Leone since fake news postings can spread virally on chat groups if not debunked quickly.[24]

To make SFC's fact-checked content more accessible to more people, the project proposed a text-based push notification

20. *See* 2022 Paris Paper, *supra* note 14, at 10–13 (Part B "Build-Up" Program Components); *Get Involved*, INITIATIVES FOR MEDIA DEV., http://imdev.media/ (last visited May 31, 2023) ("[d]onate, [w]ork with us, [v]olunteer, [s]pread the [w]ord"); *Donate*, MEDIA MATTERS FOR WOMEN, https://mediamattersforwomen.org/donate/ (last visited May 31, 2023) (to make a tax-deductible donation to MMW).

21. *See generally* 2022 Paris Paper, *supra* note 14.

22. *See* 2022 Paris Paper, *supra* note 14, at 10 (explaining that training materials would be aligned with best practices of other leading news organizations in identifying and analyzing mis-dis) (citing LUCAS GRAVES & FEDERICA CHERUBINI, REUTERS INSTITUTE, THE RISE OF FACT-CHECKING SITES IN EUROPE 1, 33 (2016), https://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/The%2520Rise%2520of%2520Fact-Checking%2520Sites%2520in%2520Europe.pdf), (explaining the history and evolution of fact-checking landscape outlets in Europe); *see also* Work-Product, Michael M. Epstein, Fighting "Fake News" in Sierra Leone: An IMdev Training Curriculum, FSP-P007690 Project Work-Product (Aug. 2, 2022) (on file with author).

23. *See* 2022 Paris Paper, *supra* note 14, at 12–13.

24. *See* 2022 Paris Paper *supra* note 14, at 10–11 (first citing LUCAS GRAVES & FEDERICA CHERUBINI, REUTERS INSTITUTE, THE RISE OF FACT-CHECKING SITES IN EUROPE 1, 12-13 (2016) (discussing how recent school curricula programs in European countries have been effective debunking disinformation and misinformation); and then citing CHERILYN IRETON & JULIE POSETTI, UNESCO, JOURNALISM, 'FAKE NEWS' AND DISINFORMATION: A HANDBOOK FOR JOURNALISM EDUCATION AND TRAINING, 30 (2018), https://unesdoc.unesco.org/ark:/48223/pf0000265552).

system[25] that would be an available feature on Sierra Leone's two dominant mobile telephone carriers, Orange and Africell.[26] Fact-checked content would also be distributed to women's health clinics and other familiar locations in the provinces, using MMW's established healthcare advisory networks.[27] A second, activity-based learning curriculum would also be made available to teach media information literacy to the greater Sierra Leonean population, including those challenged by illiteracy.[28]

The June 2022 Paris Paper was essentially a forward-looking document that envisioned collaborations with journalists, policymakers, academics, and media companies, based on extensive research into the media landscape and socio-political culture of Sierra Leone.[29] The planning helped the project move quickly during what would amount to about a month in the country. During that month, many of the initiatives outlined in the paper began to take different shapes, evolving into concrete initiatives that were more narrowly tailored to the reality of life in Sierra Leone.[30]

Even with these changes, the principal objectives of the project remained intact: building SFC capacity through training and budget-neutral staffing solutions and increasing access to SFC's content through media information literacy and media collaborations. In Sierra Leone, the author met with government ministers, university faculty and students, and leading journalists to get a better understanding of ordinary Sierra Leonean perspectives on media, politics, and, in particular, fake news.[31] The author also conducted interviews in makeshift

25. *See* 2022 Paris Paper, *supra* note 14, at 14 and accompanying notes 128-31.

26. *Id.*; *see also* ORANGE, https://www.orange.sl/ (last visited June 1, 2023); *About Us*, AFRICELL, https://www.africell.sl/about-us/ (last visited June 1, 2023) (for more information on Sierra Leone telephone carriers Orange and Africell).

27. *See* 2022 Paris Paper *supra* note 14, at 15 (citing IMdev's *About Us*, INITIATIVES FOR MEDIA DEV., http://imdev.media/about/ (last visited June 1, 2023)).

28. *See* 2022 Paris Paper, *supra* note 14, at 14–15 (citing Nina Sakhini & Dabaleena Chattopadhyay, *A Review of Smartphones Fact-Checking Apps and their (Non) Use Among Older Adults,* ASS'N FOR COMPUTING MACH. 2022, at 1 (discussing the idea of creating a Salone Fact-Checker app and exploring ideas to create engaging content to promote it)); *see also* Work-Product, Michael M. Epstein, Say "Kusheh" to Media Information Literacy!—An Interactive Experience for Sierra Leone, FSP-P007690 Project Work-Product (Aug. 2, 2022) (on file with author).

29. *See generally* 2022 Paris Paper, *supra* note 14.

30. Final Report, Michael M. Epstein, Fact-Checking in the Fight on Fake News and Disinformation, FSP-FR009708 (Aug. 31, 2022) (on file with author).

31. Project Itinerary, Michael M. Epstein, Itinerary FSP-P007690, Initiatives for Media Development, Sierra Leone (May 26, 2022) (on file with author).

teahouses known as Ataya Bases,[32] bus shelters, and other working class gathering places in Freetown and the provincial cities of Makeni and Bo.[33]

Within a few days of arrival in Sierra Leone, it became clear that mobile telephony was more advanced than the research had indicated. People of all income levels, including many living in urban poverty had 4G smartphones through Africell and Orange.[34] Data plans are cheap enough to be affordable for most people to use, and both Africell and Orange have invested heavily in cell towers throughout the country, including in provincial cities and along rural highways between cities.[35] Many tether laptops and home computers to mobile hotspots in professional settings like offices and hotels, as Wi-Fi service can be unreliable or unavailable.

Elites like journalists and government officials are active on Twitter and social media, but so are non-elites.[36] When asked how many men and women had smartphones in working class spaces like Ataya Bases or bus shelters, nearly everyone waved

32. Brima Gegbe et al., *Motivational Reasons of Consumers Behind Green Tea (Ataya) Consumption in Sierra Leone*, 22 INT'L J. OF SCI.: BASIC AND APPLIED RES., 367, 367–68 (2015), https://core.ac.uk/download/pdf/249334526.pdf ("Ataya bases are centres where people converge to drink a Chinese product call [sic] Green Tea. . . . The official name of this product is Green Tea but in Africa we call it ataya." As of 2015, there are over 1,500 Ataya Bases in Sierra Leone which are common congregation places for Sierra Leonean youth and adults alike, and many Sierra Leoneans support their families through ataya businesses).

33. *See Freetown*, *ENCYC. BRITANNICA* (2019), https://www.britannica.com /place/Freetown (explaining Freetown is Sierra Leon's capital, largest city, and chief port situated on a rocky peninsula at the seaward tip of wooded hills known as the "Lion Mountains"); see also *Sierra Leone Provinces and Districts,* MAPPR, https://www.mappr.co/counties/sierra-leone-provinces/ (last visited June 2, 2023), for more information on Sierra Leon's province structure and community make up; *see also* 2022 Paris Paper, *supra* note 14, at 11 (citing NATASHA MACK ET AL., QUALITATIVE RES. METHODS: A DATA COLLECTOR'S FIELD GUIDE 8 (2005)) (describing proposed training modules to increase effectiveness of fact-checking through community outreach and trust building).

34. *See Mobile Communications and Internet in Sierra Leone*, WORLDDATA.INFO, https://www.worlddata.info/59frica/sierra-leone/telecommunication.php (last visited June 2, 2023); 2022 Paris Paper, *supra* note 14, at 5 (highlighting author's previous research suggested most mobile telephony in Sierra Leone currently operated as 3G).

35. *See* Dustan Matekenya et al., *Using Mobile Data to Understand Urban Mobility Patterns in Freetown, Sierra Leone* 5 (The World Bank Grp., Working Paper No. 9519, 2021), https://openknowledge.worldbank.org/server/api/core/bitstreams/82fca6e3-afdf-5ee6-a2b6-0c5f48e2477f/content.

36. 2022 Paris Paper *supra* note 14, at 5 (citing Simon Kemp, *Digital 2022: Sierra Leone*, DATA REPORTAL (Feb. 16, 2022), https://datareportal.com/reports/digital-2022-sierra-leone) (explaining Sierra Leone had 927,088 social media users in 2022, comprising 11.3% of its population).

phones to signal confirmation. The few who did not have a smartphone indicated that they had access to someone else's phone. Roughly 90% of smartphones are Android, with 10% using more expensive Apple iPhones.[37]

It very quickly became clear that the alphanumerical text notification system for fact-checking, previously dubbed "truth-texting," was not the best way to disseminate SFC content. For one thing, the text-for-truth concept as originally proposed required buy-in from Africell and Orange, or at least from one of the companies. These companies would have to agree to give users an option or embed as a default a system that would allow SFC to distribute its fact-finding to phone customers. Although IMdev and MMW offered to arrange meetings to discuss text-for-truth with the phone companies, no meetings materialized.[38] It did not look like either company had an interest in partnering with SFC.

Without phone company participation, texting would not work. But texting would not have been the most effective way forward anyway. Given the widespread adoption of smartphones in the population, it became easy to see that a smartphone app would work better than texting.[39] A free Android app costs $25 to post on Google Play and there are upfront costs of developing the app's software, but the benefits are significant.[40] For one, an app does not require a collaboration with a reluctant phone company; it can be offered for free in Google Play to subscribers who would receive content, including optional push notifications, from SFC

37. *See Mobile Vendor Market Share Sierra Leone*, STATCOUNTER GLOBAL STATS, https://gs.statcounter.com/vendor-market-share/mobile/sierra-leone (last visited June 3, 2023).

38. *See* Project Itinerary, *supra* note 31.

39. *See* 2022 Paris Paper *supra* note 14, at 5 (citing Simon Kemp, *Digital 2022: Sierra Leone*, DATA PORTAL, https://datareportal.com/reports/digital-2022-sierra-leone (last visited June 3, 2023)), (explaining Sierra Leon has an apparent 9.3 million mobile connections, and internet users grew 12.5% from 2021 to 2022).

40. *See How to Use Play Console*, GOOGLE, https://support.google.com/googleplay/android-developer/ (search "Register for a Google Play Developer Account"; then select "Read More") (last visited June 4, 2023); *App Development Cost*, BUS. OF APPS, https://www.businessofapps.com/app-developers/research/app-development-cost/ (estimating the price of apps range from $16,000 for a simple development to over $100,000 annually for more complex models); *Nonprofits*, DEV. FOR GOOD, developforgood.org/for-nonprofits (last visited June 3, 2023), to learn more about the Develop for Good company that provides affordable app development and other web related services to non-profit organizations by connecting them with university students.

directly.[41] An app interface, unlike alphanumeric text, can also present content with more impact. Graphics, animation, and sound can be used to create narratives that are memorable and entertaining.

Thus, the "text-for-truth" initiative evolved into the "Salone Fact-Checker Smartphone App."[42] The app was designed to address the lack of reach for SFC's content. In its initial 2020 incarnation, SFC posted text-based summaries of fact-checked news stories, sometimes with an accompanying photo. The posts were uploaded onto a low-traffic webpage that was not search-optimized and thus hard to find. The content, while journalistically strong, was not distributed to readers with potential interest. The website offered a static reading experience. Users of the site would have to know to look for specific content or spend time scrolling through an array of content arranged by date. The site's static, text-based interface meant that users with low or no literacy skills would not benefit from it. Literate Sierra Leoneans with a casual interest in factual accuracy would likely not use a site that required them to scroll through content, even if they were able to find the website.

To address these challenges, the app was devised to create an image-based fact-checking notification system that would be distributed directly to users as a "push." Users of the app, which would be available for free for Android phones, would receive notifications through an animation known as the "Salone Fact-Chicken." [43] The chicken character was designed as a social media-friendly meme that would use audio and visual cues to denote whether a news story was true, false, or inconclusive. The app would push thirty to forty-five second clips that would depict the Salone Fact-Chicken starting to lay an egg. The animation would be accompanied by a voice-over summarizing the news story being investigated. At the conclusion of the clip, the chicken would lay a gray-brown rotten egg for fake news, a shiny golden egg for truth, or a white egg for indeterminate or more information needed.[44] The laying of the egg would coincide with a

41. *Set Up Your App's Prices*, GOOGLE, https://support.google.com/googleplay/android-developer/ (search "Set Up Your App's Prices"; then select "Read More") (last visited June 3, 2023).

42. *See* Final Report, *supra* note 30.

43. *Id.*

44. *Id.*

voiced pronouncement of the story as fake news, truth or indeterminate.

The animation itself would be basic; users need not be wowed by production quality—according to interviews conducted as part of the SFC Project, a sketched cartoon chicken would be sufficient to entertain most Sierra Leoneans. The timing of the voiced conclusory pronouncement to coincide with the appearance of the laid egg was conceived as a way to build up suspense. While the narrator summarizes the story, the chicken appears to be in the throes of labor. The chicken is meant to be comical in its appearance and actions, but the voice-over would be unembellished and factually accurate. Moreover, the voice-over would be in Krio, the indigenous patois spoken by more than 90% of Sierra Leoneans, and predominate especially among non-elites and the illiterate.[45] Literate users would have the option to click a link that would take them to the full text summary on SFC's website.

The app would also feature a "Contact SLC" button that would invite users to inquire about a fact-checked story. Additionally, users could use this button to flag possible fake news stories for SLC to investigate. This interactivity may help SFC identify stories that need to be fact-checked, especially in remote communities outside of Freetown. The "Contact SLC" button would also be marketed as a resource for legacy journalists who do not have the time or means to investigate a putative news story. Working with the Sierra Leone Association of Journalists ("SLAJ") and the Independent Radio Network ("IRN"), the SFC would encourage reporters and other media professionals to use the app to verify or debunk a story before it is published.[46] Reporters would be free to cite to SFC to verify or debunk the investigated content in their articles.

IRN, which distributes content to a large network of commercial radio stations in Freetown and throughout the provinces, would be a key player in broadening the appeal and

45. *The World Factbook*, CENT. INTEL. AGENCY, https://www.cia.gov/the-world-factbook/countries/sierra-leone/ (Dec. 12, 2023) ("Krio (English-based Creole, spoken by the descendants of freed Jamaican slaves who were settled in the Freetown area, a lingua franca and a first language for 10% of the population but understood by 95%.").

46. Meeting, Author with Ahmed Nasrallah, SLAJ President, and Ransford Wright, Coordinator Independent Radio Network (July 13, 2022) (on file with author); *see also* Project Itinerary, *supra* note 31.

reach of the SFC Smartphone App. IRN would help in two ways. First, it would be the primary source for marketing the app. SFC would partner with IRN and local radio stations to create and air public service announcements inviting listeners to download the app for free from Google Play. These ads would describe the app as a tool to fight fake news and would also allude to the entertainment value of the Salone Fact-Chicken. Using radio for this is especially important, since radio is the dominant form of media in Sierra Leone, with coverage that includes nearly the entire country.[47] Radio also reaches audiences who cannot read or who have low literacy, which makes it an effective marketing venue for an app that seeks to reach people challenged by literacy.

IRN would also be an appropriate means for augmenting the Salone Fact-Chicken clips themselves. At a meeting with the head of IRN, the idea of a weekly Salone Fact-Chicken program was discussed. The half-hour show, in its simplest form, could repeat the clips distributed that week on the app, perhaps with some additional commentary drawn from the full-text summaries on the SFC website.[48] Another option would be to create an in-depth spotlight on the most important fake news story debunked that week, with independent reporting impelled by SFC's work. At a minimum, IRN could run the thirty to forty-five second voice-over animations as audio spots, like public service announcements, in between programs or during commercial breaks. Since the voice-over contains all of the fact-checking content, it would provide listeners with the information they need. It would also be possible to rerecord the content to make audio reference to the chicken's labor and egg laying.[49]

Repackaging the clips as audio-only not only makes the content more accessible to radio audiences, but it also may help get the content to last mile villages in rural areas where there is

47. Annabelle Wittels & Nick Maybanks, *Communication in Sierra Leone: An Analysis of Media and Mobile Audiences*, BBC MEDIA ACTION, 1, 3 (May 2016), https://assets.publishing.service.gov.uk/media/57a0896040f0b6497400004a/mobile-media-landscape-sierra-leone-report.pdf, *noted in* 2022 Paris Paper, *supra* note 14, at 3 (explaining that radio's accessibility, portability, and affordability allow many Sierra Leoneans the opportunity to tune in, and because it does not require literacy like other forms of media such as newspapers, it can be an effective means of reaching a wider audience to fight fake news and disinformation).

48. *See* Meeting, *supra* note 46 (recorded in author's meeting notes).

49. *Id.*

little media infrastructure and literacy. MMW, one of the NGOs involved in the SFC Project, has developed a series of rotating Bluetooth-based podcasts that it plays at places where women gather in the provinces as part of its core mission to empower women throughout Sierra Leone.

At St. Joseph's Physio Center, a health clinic in the provincial city of Makeni that treats mostly rural women, an MMW representative will play short podcasts describing medical diagnoses and treatments for fistula, sexually transmitted diseases, breast cancer, and other women's health issues in the facility's waiting room. The audio plays in rotation over several days and is supplemented frequently with new and updated information. Women who would not otherwise gain access to this information not only receive it directly, but they bring it back to other women in their remote villages, which may be a day's walk from the clinic.

With MMW's support, the audio-only content of the SFC Smartphone App (or the repackaged radio version) would simply be added at the end of a podcast, making it accessible to the women waiting in the clinic and, through repetition, to women and presumably men back in the villages. Unlike the health information, the appended audio clips would be replaced with newly updated content as quickly as new fact-checked content becomes available. SFC would need to be selective in the clips it provides to MMW, since, as ancillary content, it may only be possible to incorporate two or three audio clips into the healthcare podcast. Still, this is a powerful way to get the content out to information-starved rural communities since the clinics and other MMW venues are sites that the women trust, and the information available at these sites would be seen as trustworthy.[50]

To the extent that MMW staff or associated providers travel to remote villages to provide basic healthcare, the podcasts, along with the SFC clips, could be played for villagers waiting to be seen by a healthcare provider. In an open-air setting such as a village, an alternative podcast featuring only SFC content,

50. *See* 2022 Paris Paper, *supra* note 14, at 17 (discussing the importance of determining local community standards in building trust for fact-checking within the community) (citing UNDERSTANDING MEDIA AND INFORMATION LITERACY (MIL) IN THE DIGITAL AGE, UNESCO, at 15 (Ulla Carlsson, ed., 2019), https://en.unesco.org/sites/default/files/gmw2019_understanding_mil_ulla_carlsson.pdf).

similar to the IRN weekly program discussed above, could be made available in a secondary location, allowing villagers to choose to listen to the SFC podcast in addition to, or in lieu of, the MMW health podcast.[51]

The clips available as push notifications on the Salone Fact-Checker Smartphone App would also be available for download and redistribution by users. This is an essential feature in the fight against social media disinformation in Sierra Leone since fake news stories are now commonly uploaded on social media chat sites like WhatsApp or Facebook. Often the fake content is reposted by users who find the original posting funny—no thought is given to gatekeeping the content for accuracy or to the possible consequences of its posting.

If users of the SFC app download the chicken clips and repost them on social media, it would provide a corrective to the fake news stories already present on the site by providing funny, meme-worthy content that also happens to have the benefit of being accurate. In some cases, social media users can post the SFC clips in reply to a fake news posting to debunk the inaccuracy before it spreads virally. Indeed, with augmented staffing, SFC would have a team in place to post SFC clips on chat groups known for spreading disinformation. The clips themselves will have to be watermarked to prevent spoofing by disruptors seeking to associate SFC with faked content. The link to the full SFC website would also be an indicator of the clip's authenticity. To increase the ease of clip redistributions, app users would have a one-click button for forwarding the content by text message or uploading it to leading social media sites. With luck, the topicality and entertainment value of SFC clips re-uploaded to social media may make some content go viral.

As disinformation becomes more widespread, the need for a fully staffed fact-checking system is critical. With more potentially fake news stories being released online by organized disinformation groups and pranksters, it is necessary to have a large, trained staff. It is also important to have staff reviewing and investigating stories as quickly as possible since disinformation that is not debunked swiftly may spread like a virus, making it harder to debunk later. To address the number of stories and the rapid response time, the SFC project proposed

51. *Id.*

three eight-hour shifts, seven days a week. Staff would not only be scouring social media and legacy media for disinformation and misinformation, but they would also be investigating stories, summarizing their conclusions in an article on the SFC website, and providing the voice-over script for the app. A separate group would be responsible for producing the Salone Fact-Chicken clips.

In its 2020 iteration, SFC was staffed by five or six journalists of various experience. While the exact number of staff needed is unknown, it would certainly exceed five or six journalists. The SFC Project estimated that a staff of seventy-five full-time and part-time fact-checkers would be sufficient to run a high-capacity twenty-four-hour, seven-day operation in the immediate runup to the 2023 elections. There would also need to be more standardized fact-checker and media information literacy training for new SFC staffers.

Insufficient funding for SFC has been an issue for IMdev. IMdev is a grant-supported NGO; there does not appear to be a steady income stream available to cover the costs of a dedicated professional staff of fact-checkers. While IMdev has sought public support and private partnerships to underwrite SFC, the only significant funding appears to be seed money provided by the U.S. Embassy in Freetown in 2020, and the SFC Project grant funded in 2022 by the embassy and the Fulbright Foundation.[52]

Without the ability to pay for professional SFC staff, IMdev would have to rely on unpaid workers. To address this, the 2022 Paris Paper proposed that IMdev partner with the department of communications at Fourah Bay College, the principal institution of higher education in Freetown, to bring on a cohort of student interns.[53] These students would be trained using a curriculum developed as part of the SFC Project; once trained, the students would work shifts at SFC, investigating suspected disinformation and writing summary articles for the SFC website. At the end of a semester or otherwise agreed-upon term, the student would receive academic credit and a professional credit, including a

52. *See* Funding Solicitation, *supra* note 8.

53. *See* 2022 Paris Paper, *supra* note 14, at 12 and accompanying notes 119-20 (highlighting past internship opportunities for students through programs partially funded by IMdev); *see also About Us*, FOURAH BAY COLL., https://fourahbaycollege.net/# (last visited Jan. 1, 2024) (for more information on Fourah Bay College's history, mission, and curriculum).

byline for their written work product.[54] On the ground in Sierra Leone, what had been envisioned as a Freetown-based initiative grew into a national program involving students at Fourah Bay College, but also at the University of Makeni (UniMak)[55] and Njala University in the provinces. With cooperation from journalism and communication professors at these universities and administrators, IMdev inaugurated what became known as the "Accuracy Fellows" program.[56]

As part of the SFC Project, the author met with Dr. Francis Sowa at Fourah Bay College[57] and a committee of faculty and staff led at UniMak by Matthew Kanu[58] and by Thomas Songu at Njala.[59] All expressed strong support for the internship initiative. As a result, the author was permitted to recruit for Accuracy Fellows during course visitations at all three universities, including two Njala campuses.[60] Student interest was high. A description of the program was incorporated into SFC Project lectures on media information literacy and fact-checking best practices. Students were invited to send an application and statement of interest to an email account set up for that purpose. Within two weeks, about twenty students had asked to be considered. This was better than had been anticipated, as it was

54. *See* 2022 Paris Paper, *supra* note 14, at 12 (for author's proposed initiatives to incorporate Salone Fact-Checker into an academic setting in the effort to fight disinformation in Sierra Leone, incorporating ideas from past successes, including, when a Ukrainian Kyiv School of Journalism founded a website to counter propaganda during the Russian occupation of Crimea in 2014 with student volunteer fact-checkers) (citing LUCAS GRAVES & FEDERICA CHERUBINI, REUTERS INSTITUTE, THE RISE OF FACT-CHECKING SITES IN EUROPE 1, 11 (2016), https://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/The%2520Rise%2520of%2520Fact-Checking%2520Sites%2520in%2520Europe.pdf).

55. *Background*, UNIV. OF MAKENI, https://unimak.edu.sl/background-2/ (last visited Jan. 1, 2024) (The University "[makes] great efforts to develop academic programmes that are rooted in the everyday reality of contemporary Africa.").

56. *See* Final Report, *supra* note 29; *see also* 2022 Paris Paper, *supra* note 14, at 11 (discussing IMdev's proposed training modules for students studying media and journalism, as well as other potential options for fact-checking training that can be incorporated into existing syllabi) (citing *Understanding Media and Information Literacy (MIL) in the Digital Age*, UNESCO, at 60 (Ulla Carlsson, ed., 2019), https://en.unesco.org/sites/default/files/gmw2019_understanding_mil_ulla_carlsson.pdf).

57. *See* Project Itinerary, *supra* note 31 (Author's meeting with Dr. Francis Sowa, Fourah Bay College, July 8, 2022).

58. *See* Project Itinerary, *supra* note 31 (Author's meeting with UniMak Faculty, July 15, 2022).

59. *See* Project Itinerary, *supra* note 31 (Author's meeting with Njala University faculty and administrators, July 26, 2022).

60. *See* Project Itinerary, *supra* note 31 (Author's SFC Project meeting with Dr. Francis Sowa, July 8, 2022).

July and the universities were in summer session. If the response rate increased during the Fall 2022 semester, there appeared to be a real possibility that IMdev would be able to staff SFC at full capacity for a 24/7 operation in Spring 2023, including the weeks immediately before the June elections.

Despite the initial promise of the Accuracy Fellows program, it did not appear to move forward in Spring 2023 as planned. Nor did the development of the Salone Fact-Checker Smartphone App. Indeed, in the months following the SFC Project's conclusion, IMdev appears to have ended work on SFC altogether.[61] IMdev showcases a number of activities on its current website splash page, but SFC is not one of them.[62] The reasons for this are unclear. It may be that IMdev recognized that, even with a team of unpaid interns, it would not have enough money to fund SFC. During the SFC Project visit, IMdev's leadership spent significant project time working on fundraising materials for next stages of the project, including additional fact-checker training and the design costs of the smartphone app.[63]

But money might not fully explain why SFC did not go forward. With the training curriculum developed in the SFC Project and even a small number of students willing to do internships, IMdev, in theory, could have staffed a modest iteration of SFC in advance of the 2023 election, even without the app or last mile initiatives. The reality, however, was that there seemed to be a disconnect between some of the professional fact-checking journalists on the SFC staff and IMdev leadership. One editor contended that the IMdev leadership was aloof from SFC, more interested in the funding it might bring in, and less interested in its day-to-day operation. The same staffer, who was a one-on-one SFC Project trainee, complained that the NGO's leadership did not have a plan to provide adequate pay for the on-staff journalists in the reconstituted SFC and asserted that some of the hired fact-checkers were not journalists. This editor left IMdev in Fall 2022. Whether this is a case of a disgruntled

61. E-mail from Ophaniel T. Gooding, to Author (May 9, 2023) (on file with author).

62. *Our Work*, INITIATIVES FOR MEDIA DEV., http://imdev.media/ (last visited Jan. 1, 2024) (IMdev's current activities include "increasing media capacity in Sierra Leone to monitor and oversee health care services." Although, a couple links to Salone Fact Checker articles remain on the site's existing blog, selecting to read the article leads the user to an inactive link with a page not found error.).

63. *See,* e.g., Funding Solicitation, *supra* note 8. (for project next steps).

worker who felt undervalued or something more is hard to know. Thompson, IMdev's leader, indicated in an October 2022 Zoom meeting that the editor, who was regarded as a fact-checking authority, would be replaced, but it is unclear if that happened. What is clear is that a tech-savvy journalist who had also received one-on-one SFC Project training in fact-checking best practices also left SFC.

Whatever the reason, SFC, the focus of the SFC Project, does not appear active in advance of the 2023 elections. This was confirmed in April 2023 in a WhatsApp message by Ophaniel T. Gooding, a tech-savvy journalist and former one-on-one trainee. Gooding is now working at iVerify-Sierra Leone, a different fact-checking operation based in Freetown.

iVerify-Sierra Leone, according to Gooding, is the only Sierra Leone fact-checking group operating in advance of the 2023 elections. iVerify is a fact-checking platform designed and funded by the United Nations Development Program (UNDP).[64] The UNDP makes iVerify available to journalistic organizations in the developing world as part of a global effort to combat disinformation and misinformation.[65] Other iVerify operations are active in several African countries, including Kenya, Liberia, and Zambia, as well as in Honduras.

Through the iVerify program, UNDP provides vetted professional organizations with a "support package" that includes "digital tools, capacity building modules, partnership opportunities, and communication and outreach strategies."[66] The UNDP iVerify webpage describes an "in-depth assessment" of subscribing organizations in each country to ensure that UNDP fact-checking architecture is not used to repress press freedoms and individual rights.[67]

The iVerify program provides a template for in-country fact-checking.[68] The methodologies promote journalism best practices in fact-checking. The template focuses on distinguishing fact from non-fact-based opinion, source consultation and investigation, using three reviewers to triple fact-check, and transparency for

64. *iVerify*, UNITED NATIONS DEV. PROGRAMME, https://www.undp.org/digital/iverify (last visited June 3, 2023).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

deadline-limited reporting and updates for new findings.[69] A link inviting webpage visitors to "read more" about how iVerify is implemented in a specific country does not work; the webpage does describe an "assessment mission" to each country that would incorporate a survey of the country's political, legal, and information-based landscape.[70] The site also refers generally to iVerify as a multi-stakeholder operation in each country and includes efforts to "propose partnerships" and "operational structure."[71]

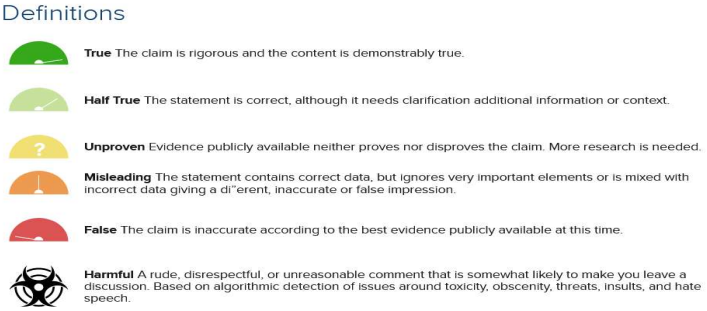
In Sierra Leone, the local iteration of iVerify is run by SLAJ, the journalist group, in collaboration with IRN.[72] BBC Media Action, a Freetown-based media research and advocacy organization, is responsible for "leading on research and learning, supporting capacity building, and producing social media content."[73] Funding is provided by Canada, the EU, Ireland, and Iceland; the UNDP and UN Peacebuilding Fund; and Orange, the telecom giant.[74]

SLAJ appears to be focused on the fact-checking process. Gooding indicated in correspondence that iVerify-Sierra Leone has journalists on staff, some of which participated in the SFC Project, including SLAJ's president, Ahmad "Monk" Nasralla, and Gooding himself. Other SLAJ-affiliated journalists participated in fact-checking training during the course of the SFC Project as well. SLAJ members mostly seem to be experienced print journalists working in Freetown and other major cities. As a general matter, legacy newspapers are owned by publishing "houses" with political agendas and profit motives that can skew accuracy. SLAJ appears to work within this industry reality to bring best practices to the profession.

The iVerify-Sierra Leone website classifies fact-checked stories into five color-coded categories, four based on the degree of falsity.[75] A fifth category denotes speech deemed harmful based

69. *Id.*
70. *Id.*
71. *Id.*
72. *About Us*, IVERIFY SIERRA LEONE, https://sl.i-verify.org/about-us/ (last visited June 3, 2023).
73. *Id.*
74. *Id.*
75. *Methodology*, IVERIFY SIERRA LEONE, https://sl.i-verify.org/methodology/ (last visited June 3, 2023).

on "toxicity, obscenity, threats, insults, and hate speech."[76] This classification system is consistent with the mandate of the UNDP iVerify program, which encompasses not only falsity but also hate speech and misinformation that may not be provably false.[77] The classification system is the same, with minor variations, on the Kenya, Liberia, and Zambia iVerify sites.[78]



https://sl.iverify.org/methodology/

The methodology described on the Sierra Leone website is nearly identical to the four steps on the UNDP site, except that iVerify-Sierra Leone guarantees only double verification, not triple.[79] Whether that indicates funding limitations or a lack of available, trained fact-checkers is unclear. Questions emailed to Gooding about the funding and operation of iVerify in Sierra Leone have not been answered as of this writing.

What is clear is that iVerify-Sierra Leone appears to be functioning well. Between March 27, 2023, and May 30, 2023, the site has investigated and drawn conclusions on thirty-seven stories.[80] Story topics are diverse; topics include assessments of claims made about the economy, alleged statements made about or attributed to political candidates, and investigations into the authenticity of photographic or video evidence.[81] All the stories relate to content that would have a direct or indirect impact on the political climate in advance of the election.

The interface on the Sierra Leone website is user-friendly, though search capability is limited. Fact-checked stories are

76. *Id.*
77. *See* iVerify, *supra* note 64.
78. *Where We Work*, *iVerify*, UNITED NATIONS DEV. PROGRAMME, https://www.undp.org/digital/iverify (last visited June 3, 2023).
79. *Methodology*, *supra* note 75.
80. *Home*, IVERIFY SIERRA LEONE, https://sl.i-verify.org/ (last visited June 3, 2023).
81. *Id.*

arranged in successive pages in groups of twelve.[82] Pages are arranged by date, from most recent to oldest.[83] Users cannot use search terms to find a specific story, but stories can be displayed in four of the six content categories: false, misleading, true, and unproven.[84] In the period studied, prior to the June 2023 election, there were sixteen stories denoted as false, eleven as misleading, seven as true, and three as unproven.[85] Although other country-specific sites permit searches by date and subjects, the SLAJ site does not. This could be a drawback once the number of stories increases.

Clicking on a story button brings the user to a page that describes the asserted claim, the investigatory sources, and methods used to justify the assigned content classification.[86] The identity of the fact-checker is not disclosed, other than as "SLAJ-iVerify" or the "iVerify Network of Fact-Checking Desks."[87] Even so, transparency appears to be the objective, with a focus on facts known and not known, without any embellishment or political partisanship.

For example, in a story classified as "unproven" on May 30, 2023, the fact-checkers concluded that they could not confirm a high death toll in a roadside accident involving the president's motorcade.[88] The story's dedicated page details iVerify's investigation into the assertion, describing an interview with a named government press official who confirmed the accident, but with only one fatality, and a subsequent confirmation of an unidentified victim at Freetown's principal hospital morgue.[89] Curiously, in what appears to be a lack of transparency, the page identifies a second fatality by name, though it does not detail the sources and methods used to verify this claim. Also missing are the known facts of the accident itself, when it occurred and why, though an uncaptioned photo is included. The investigation

82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. IVERIFY SIERRA LEONE, https://sl.i-verify.org/no-slaj-i-verify-has-not-yet-confirmed-the-claim-that-over-seven-to-eight-individuals-died-in-the-accident-involving-the-presidential-convoy-at-mile-91-however-we-have-verified-the-involvement-of-t/ (last visited June 3, 2023).
89. *Id.*

concludes that the accident did occur, but that only the two casualties can be confirmed.[90]

The story page also describes the source of the high death toll claim in an audio message on WhatsApp.[91] This suggests that the iVerify staff may be scouring social media in search of possible disinformation and misinformation. If so, it may be that the fact-checkers are responding rapidly to verify or debunk asserted claims on social media, which reduces the impact of fake news by preventing false stories from spreading virally. This type of rapid response may be especially important in the final weeks before the next election.

Ultimately, iVerify-Sierra Leone is doing much of the work that was contemplated by the SFC Project—and that is great news. Indeed, the active stakeholders, SLAJ, IRN, and BBC Media Action all expressed interest in a revitalized SFC, and specifically the SFC Project's goal of making fact-checked content accessible throughout Sierra Leone, including those without literacy in last mile villages.

How much of the SFC Project's media information literacy mandate is present in iVerify's operation is an open question—one asked but not yet answered. BBC Media Action, apparently involved in the in-country training of iVerify's fact-checkers, is described as committed to media literacy.[92] But there is no equivalent of the graphical Salone Fact-Chicken notification system; nor is there any reference to podcasts being distributed in rural areas without media infrastructure.[93]

On the other hand, the participation of IRN, the radio network, would increase the accessibility of iVerify's fact-checking to more people, to people without digital access, and to those who cannot read. Although the operation is frequently referred to as SLAJ-iVerify, the website's splash page co-brands IRN alongside SLAJ.[94] IRN, however, does not appear to bear any responsibility for fact-checking. Its role, according to the website, is to air a weekly radio program on its member stations.[95]

90. *Id.*
91. *Id.*
92. BBC MEDIA ACTION, https://www.bbc.co.uk/mediaaction/ (last visited June 4, 2023).
93. *Id.*
94. *Home*, *supra* note 80.
95. *About Us*, *supra* note 72; *see also About Us*, INDEP. RADIO NETWORK, https://irnsierraleone.org/about-us/ (last visited June 3, 2023).

Referred to as "iVerify Radio," the IRN program is described as focused on "verified elections-related content, media literacy and electoral education."[96] The site envisioned airing the program more frequently four weeks before the June 2023 election.[97]

In the immediate run-up to the election, it was unclear if the iVerify Radio program was airing frequently. Indeed, it may not have aired at all. In Sierra Leone, plans that are far along on paper have a way of not materializing if funding is not in place. If the program was being produced, it would have been prudent to describe each week's installment with a link to the audio or to a transcript. Information on when it airs and on what stations would also help people access the content. Without specific information and links, the description of iVerify Radio looks like placeholder content—two sentences without crucial identifying detail. Still, the description used the present tense.[98] During the SFC Project, Dr. Ransford Wright, IRN's director, showed particular interest in fact-checking programming based on the chicken concept. It is quite possible that, with ongoing funding through UNDP and its partners, IRN was indeed producing a regularly scheduled show before the election.

One has to ask: why iVerify and not SFC? After all, the organizations at the helm of iVerify—SLAJ, IRN, and BBC Media Action—were also supportive of the SFC Project. The answer ultimately may have to do with funding disbursement. SFC was funded essentially by two tranches of seed money provided by the U.S. State Department in 2020 and 2022.[99] Without ongoing funding, IMdev could not sustain SFC, even with budget-neutral initiatives like the Accuracy Fellows internships. The overhead associated with running the operation, including staffing and office costs, is too high.

iVerify appears to have access to UNDP support and funding partners sufficient to sustain its fact-checking operation for the 2023 elections and a few months beyond. According to Ophaniel Gooding, iVerify received enough funding to operate for eight

96. *About Us*, *supra* note 72.

97. *Id.*

98. *Id.*

99. *See* Media Matters for Women, https://mediamattersforwomen.org/apc-interim-chairman-appear-court-for-contempt/ (last visited June 3, 2023); *About Salone Fact-Checker,* FACEBOOK, https://www.facebook.com/salonefactchecker/about (last visited June 3, 2023).

months.[100] New sources will be needed in Fall 2023 for operations to continue.[101] But the money is sufficient to cover current operating costs through the election and its aftermath, which appeared not to be the case with IMdev's SFC.

In many respects, iVerify addresses the same country-specific needs that the SFC Project was designed to address. The principal difference may be that the SFC Project had a much larger media information literacy focus, a reflection perhaps of the organizational missions of both IMdev and MMW. Like iVerify, the SFC Project focused on fact-checking capacity building; but it was also impelled by an anthropological inquiry to make fact-checking content more accessible to the public by making it more meaningful and digestible.[102]

The SFC Project was created to address the Sierra Leone experience in a culturally specific way. This is reflected in the chicken notification system, the rural distribution of podcast content, and in two media information literacy curricula, one for media professionals and a second for the general public. iVerify appears to be more of a top-down approach that uses an international best practices template that can be adapted to address some country-specific needs. It may not be culturally resonant as SFC would have been, but perhaps it does not need to be.

100. WhatsApp message from Ophaniel T. Gooding, to Author (Apr. 14, 2023) (on file with author).

101. WhatsApp message from Ophaniel T. Gooding, to Author (Apr. 15, 2023) (on file with author).

102. *About Salone Fact-Checker,* FACEBOOK, https://www.facebook.com/salonefact checkpoint/about (last visited June 3, 2023).

INJUNCTIONS IN PUBLIC LAW: CIVIL ENFORCEMENT INJUNCTIONS AND DISPENSING WITH CONVENTIONAL REQUIREMENTS

Margaret Allars*

I INTRODUCTION

Injunctions and declarations have long been available as remedies in judicial review, in the same way that these equitable remedies have been issued to enforce duties of fiduciaries and charitable trusts.[1] The court's discretion to grant the remedies is the main limitation upon their availability. As the High Court of Australia explained in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd*,[2] the common rationale for the availability of the remedies is "to vindicate the public interest in the maintenance of due administration." Despite its equitable roots, the availability of an injunction in judicial review to restrain unlawful government action is limited by principles that structure the court's

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1.*Bateman's Bay Loc Aboriginal Land Council v Aboriginal Cmty. Benefit Fund Pty Ltd.* (1998) 194 CLR 247, 257-8[24]-[27] (referring to Sir Anthony Mason "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 1 *LQR* 238, 280[93] (per McHugh J) (taking a different view as the implications for the role of the Attorney-General in connection with standing rules)).

2. (1998) 194 CLR at 257[25] (per Gaudron, Gummow and Kirby JJ) (contra per McHugh J) at 276[81] (taking the view that the function of the civil courts is to enforce rights of individuals rather than the public law of the community). Followed in *Abebe v Commonwealth* (1999) 197 CLR 510, 55[104] (per Gaudron J); *Smethurst v Comm'r of Police* (2020) 272 CLR 177, 247-8[172] (per Gordon J).

discretion. The court may decline to grant an injunction to restrain a public authority if it is not satisfied that the authority intends to continue to engage in the unlawful conduct, if there is no imminent danger of damage to another person, or if such relief would have no utility. The position is very different in civil enforcement proceedings. The cause of action and the remedies are specifically provided for as an integral component of a regulatory scheme. Many of the discretionary limitations upon the availability of an injunction are expressly dispensed with.

To capture the radical nature of the remedy in civil enforcement regimes, this paper commences in Part II by describing the historical background and rationale for the injunction in public law. By way of illustration, Part III describes the use of the injunction in civil enforcement proceedings under a statutory scheme regulating credit activity. Part IV raises some questions. The regulatory schemes providing for civil enforcement injunctions evince a legislative intent that the public interest in stamping out unlawful contraventions is to be pursued by lifting some discretionary limitations upon the availability of relief. Yet, in the general public law arena, no such relaxation of conventional equitable principles has evolved so as to facilitate the restraint of unlawful government action.

II HISTORICAL SCOPE AND RATIONALE OF INJUNCTION IN PUBLIC LAW

A. In judicial review in Supreme Courts of States and Territories

Relying on its jurisdiction to restrain municipal corporations from misapplying funds held by charitable or statutory trusts, Chancery restrained statutory authorities from exceeding their powers to apply their funds.[3] This jurisdiction was subsequently extended to the restraint of statutory authorities from exceeding their statutory powers to interfere with public rights, the Attorney General at that time being regarded as the appropriate plaintiff to bring such proceedings.[4] Embodying the fundamental

3. *Bateman's Bay* (1998) 194 CLR 247, 258-9[29].

4. *London Cnty. Council v Attorney-General* [1902] AC 165, 168. For earlier English authority, see *Smethurst v. Comm'r of Police* (2020) 376 ALR 575 (n 231) [172], discussed

idea of the Judicature Acts, the power in s 24(7) of the *Supreme Court of Judicature Act* 1873 (Eng) enabled the grant of all remedies to finally determine the controversy in proceedings and avoid multiplicity of legal proceedings. This included power to grant injunctions, exercisable by force of s 25(8) of that Act, in all cases in which it appeared to the Court to be just or convenient that such order should be made.[5] Power to grant an injunction was equivalent to that exercised by courts of equity and later by courts of law, pursuant to s 79 of the *Common Law Procedure Act* 1854 (Eng).[6] The formula for conferring power to grant remedies, in particular injunctions, was quickly adopted for Supreme Courts in Australia.[7]

The Crown, as distinct from its officers or authorities, was not amenable to the remedy of injunction, a situation that was rectified by the enactment of Crown proceedings legislation.[8] While historically injunctive relief was granted to protect a right that was proprietary in nature, where damages would not be an adequate remedy, in public law there is no need to establish that a proprietary legal right is threatened, as was confirmed in *Bateman's Bay*.[9] Equitable remedies in public law are subject to the same discretionary considerations as equitable remedies in private law,[10] but the settled requirement in private law that the plaintiff must have a legal right which the injunction will protect,

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in W Gummow, "The Scope of Section 75(v) of the Constitution: Why Injunction but no Certiorari?" (2014) 42 *Fed L Rev* 24, 247-8.

5. 36 & 37 Vict c 66. *See Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd.* (1981) 148 CLR 457, 489; *Plaintiff S297/2013 v Minister for Immigr. and Border Prot. (no 2)* (2015) 255 CLR 231, 249[45]; *Smethurst* (2020) 272 CLR at 237-8[145] (per Nettle J).

6. *Mayfair Trading Co Pty Ltd. v Dreyer* (1958) 101 CLR 428, 454; *Smethurst* (2020) 272 CLR at 237-8[145] (per Nettle J).

7. *See Aon Risk Servs Austl. Ltd. v Australian Nat'l Univ* (2009) 239 CLR 175, 184-5[12]. It was not adopted in NSW until the enactment of the Supreme Court Act 1970 (NSW). However, relief by injunction was available in NSW against statutory authorities that exceeded their power. See generally *Jeanneret v Hixson* [1890] NSWLR 8; *Attorney-General v Borough of N Sydney* [1893] NSWLR 49 (where the Owen CJ in Eq in the Supreme Court of NSW issued an injunction to restrain a municipality from borrowing funds for gasworks without the necessary authorisation by the Governor).

8. See generally *Claims Against the Government and Crown Suits Act* 1912 (NSW) ss 4, 9 (Austl.), followed by the *Crown Proceedings Act* 1988 (NSW) s 5 (Austl.).

9. (1998) 194 CLR 247, 258[27]. *See also Egan v Willis* (1998) 195 CLR 424, 438[5]; *Cardile v LED Builders Pty Ltd.* (1999) 198 CLR 380, 395[30]; *Minister for Immigr. and Multicultural and Indigenous Affairs v VFAD of 2002* (2002) 125 FCR 249 at 267[100]; *Smethurst* (2020) 272 CLR at 237-8[145] (per Nettle J, 250-1[179] per Gordon J).

10. *Corp. of the City of Enfield v Dev Assessment Comm'n* (2000) 199 CLR 135, [58] (per Gaudron J)('*City of Enfield)*'.

should find expression in different, public law requirements.[11] This received scant recognition in the opinion on this issue that prevailed in *Smethurst v Commissioner of Police*,[12] considered below. The availability of the injunction is still the subject of development in courts exercising equitable jurisdiction, generally, and in public law.[13]

B. In the High Court

Jurisdiction to issue an injunction against an officer of the Commonwealth is expressly conferred in the Australian High Court's original jurisdiction under s 75(v) of the Commonwealth Constitution. The inclusion of the remedy of injunction, alongside the constitutional writs of prohibition and mandamus, calls for an explanation. The remedy of injunction did not appear in the original drafting of s 75(v). Following the Constitutional Convention debates in 1897 and 1898, s 75(v) was removed from the draft Constitution in 1898 but promptly re-inserted in an expanded version that included injunction, in addition to prohibition and mandamus.[14] It is "not quite apparent"[15] why the

11. *Austl. Broad Corp v Lenah Game Meats Pty Ltd.* (2001) 208 CLR 199 (n 153), 232[6] (per Gaudron J); *Smethurst* (2020) 272 CLR at 225-6[113] (per Gageler J), 250-1[179] (per Gordon J), 269-70[235]-[238] (per Edelman J). *See also* Sykes "The Injunction in Public Law" (1953) 2 *UQLJ* 114.

12. (2020) 272 CLR 177, 214[77], 216-7[85] (per Kiefel CJ, Bell and Keane JJ), 237-8[145] (per Nettle J).

13. *Cardile v LED Builders Pty Ltd.* (1999) 198 CLR 380, 395[30]; *Truth About Motorways Pty Ltd. v Macquarie Infrastructure Inv. Mgmt. Ltd.* (2000) 200 CLR 591, 628-9[97]-[98]; *Austl. Broad Corp v Lenah Game Meats Pty Ltd.* (2001) 208 CLR 199, 241[90] (per Gummow and Hayne JJ).

14. *Off Rec of the Debates of the Austl. Fed Convention* (Melbourne, 4 March 1898) 1885; J M Williams, *The Australian Constitution: A Documentary History* (MUP, 2005) 846.

15. J Quick and R Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 783 (one suggested explanation is that injunctive relief was available at that time in the United States and the United Kingdom to restrain threatened ultra vires activity of the executive branch interfering with public rights, in contrast to certiorari which was available only with respect to judicial acts rather than acts of an administrative or ministerial nature) Quick and Garran took a narrow view of the injunctions as a remedy in private suits and otherwise being analogous to mandamus, overlooking the use of the injunction in England to enforce public trusts and protect private property against abuse by public authorities. *Id.*; *see also* W Gummow, "The Scope of Section 75(v) of the Constitution: Why Injunction but no Certiorari?" (2014) 42 *Fed L Rev* 241 at 248, 250-1. Another suggestion is that the objective of the framers of the Constitution was to ensure no narrow view could be taken of the High Court's jurisdiction to ensure Commonwealth officers adhered to the limits of their power as determined by the High Court, allowing equity to supplement the deficiencies of the common law remedies. M Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (2nd ed, Federation Press, 2020) 249.

remedy of injunction was added, although one member of the 1898 Convention described the provision as a "safeguard," and another said that it only gave rights against an officer of the Commonwealth as arose out of "known principles of law."[16]

The general purpose of s 75(v) was to ensure that officers of the Commonwealth act within the scope of the authority conferred on them by the Constitution or by statute.[17] To further that purpose, the remedy of injunction was included to ensure that an officer of the Commonwealth could also be restrained from acting inconsistently with an applicable legal constraint, even when acting within the scope of the authority conferred on the officer by the Constitution or by statute. The High Court has accepted at least that the framers of the Constitution included the injunction to address concerns that the basis for the issue of prohibition and mandamus might be too narrow. Technicalities associated with the prerogative remedies rendered them inadequate in some respects, and equitable relief might be available when a prerogative remedy was not.[18]

The jurisdiction of the High Court under s 75(v) to grant injunctions included jurisdiction like that in England, where the Attorney General could bring proceedings with or without a relator to protect the public interest, by restraining a statutory authority from exceeding its power by actions interfering with public rights.[19] An injunction lies to prevent the implementation of an unlawful exercise of power.[20] As is the case with the "constitutional writs" of prohibition and mandamus under s 75(v), the injunction mentioned in s 75(v) should be described as the "constitutional injunction" to give appropriate emphasis to the generality of the Court's jurisdiction to issue it and the absence of

16. *Off Rec of the Debates of the Austl. Fed Convention*, Melbourne, 4 March 1989, pp 1877, 1883-4. For discussion see *Smethurst v Comm'r of Police* (2020) 376 ALR 575, 619-620[174]-[175] (per Gordon J), 634[229] (per Edelman J).

17. *See Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 363 (per Dixon J); *Smethurst v Comm'r of Police* (2020) 272 CLR 177, 221[97].

18. *Smethurst* (2020) 272 CLR 177, 220[95] (per Kiefel CJ, Bell and Keane JJ), 269[234] (per Edelman J).

19. *London Cnty Council v A-G* [1902] AC 165; *Attorney-General (NSW) v Brewery Emp Union of NSW* (1908) 6 CLR 469, 550-553, 598; *Bateman's Bay Loc Aboriginal Land Council v Aboriginal Cmty. Benefit Fund Pty Ltd.* (1998) 194 CLR 247, 258-9[29].

20. *Fed Comm'r of Tax'n v Futuris Corp Ltd.* (2008) 237 CLR 146, 162[47]; *Smethurst* (2020) 272 CLR at 220-1211[96]. The express provision for the issue of injunctions in s 75(v) apparently overcame, at least in the federal context, the doctrine of Crown immunity from civil proceedings. *See Commonwealth v Mewett* (1997) 191 CLR 471, 545-551.

implied limitations as to its availability derived from historical limitations applying when the Constitution was framed.[21] This is consistent with the constitutional injunction having been included in s 75(v) with a content known and governed by existing principles as to the issue of injunctions, rather than some undefined new content, whilst allowing for evolution of the principles rather than their being frozen according to practices as to grant of such relief that prevailed in 1900.[22]

Section 32 of the *Judiciary Act* 1903 (Cth) gives the High Court, in the exercise of its original jurisdiction in a matter pending before it, power to grant:

> absolutely, or on such terms and conditions as are just, all such remedies whatsoever as any of the parties thereto . . . are entitled to in respect of any legal or equitable claim properly brought forward by them respectively . . . so that as far as possible all matters in controversy between the parties regarding the cause of action or arising out of connected with the cause of action, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters may be avoided.

Section 32 in part reproduces s 24(7) of the *Judicature Act* 1873 (Eng).[23] Provided that there is a matter in the original jurisdiction of the Court, this includes power to grant injunctions.[24]

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21. *Re Minister for Immigr and Multicultural and Indigenous Affs; Ex parte Lam* (2003) 214 CLR 1 at [65]; *Smethurst* (2020) 272 CLR at 225-7577[112]-[114], 235[140] (Gageler, J., dissenting as to the availability of the remedy), 269[235] (per Edelman J).

22. *Smethurst* (2020) 272 CLR at 238[146] (per Nettle J), 252[182] (per Gordon J), 266-9699[227]-[233], [235] (per Edelman J); W Gummow, "The Scope of Section 75(v) of the Constitution: Why Injunction but No Certiorari?" (2014) 42 *Fed L Rev* 241, 247-8, 249-250.

23. This provision is modelled on s 24(7) of the *Judicature Act* 1873 (Eng), which empowered the common law courts and courts of Chancery combined by the Judicature Acts to grant all remedies to which any of the parties appeared to be entitled so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning such matters avoided. *See also Phillip Morris Inc v Adam P Brown Male Fashions Pty Ltd.* (1981) 148 CLR 457, 489; *Aon Risk Servs Austl. Ltd. v Australian Nat'l Univ* (2009) 239 CLR 175 at 184-85[11]-[12]; *Plaintiff S297/2013 v Minister for Immigr and Border Prot (No 2)* (2015) 255 CLR 231, 249[44]. Section 32 also bears some affinity to the *Judiciary Act* 1789 (US) ("All Writs Act") s 14. *Re* McBain; *Ex parte Austl. Cath Bishops Conf* (2002) 209 CLR 372, 403[56], 410[80], 411-2[84], 467-8[268]-[270].

24. *Smethurst* (2020) 272 CLR at 236-88388[144]-[145] (per Nettle J), [182], 633[227] (per Edelman J). *See also Phillip Morris Inc* 148 CLR at 477; *Edwards v Santos Ltd.* (2011) 242 CLR 421, 425[4]-[5], 427-88288[15]-[16], 441-22422[56],[58], 444[64].

In *Abebe v Commonwealth*,[25] Gaudron J said that while "in general terms" mandamus and prohibition are available only to correct jurisdictional error, as distinct from errors within jurisdiction, "it may well be" that an injunction lies under s 75(v) to prevent an officer of the Commonwealth from giving effect to a decision involving legal error, even if that error is not a jurisdictional error. The High Court had previously held, and since *Abebe* has consistently confirmed, that an injunction may issue under s 75(v) for non-jurisdictional error.[26] The "entrenched minimum provision of judicial review" enshrined in s 75(v) of the Constitution must include injunctive relief for legal error that is not jurisdictional.[27] This promotes the purpose of s 75(v), with availability of the injunction compensating for the technicalities of the prerogative remedies, as discussed in *Bateman's Bay*.

An injunction is available not only to restrain a non–jurisdictional error but also on grounds including fraud, bribery, dishonest or other improper purposes.[28] Procedural error that does not result in invalidity of a decision may attract injunctive relief to restrain the decision-maker from proceeding until the procedural error is rectified.[29] An example is *Project Blue Sky Inc*

25. (1999) 197 CLR 510 at 551-2[103], [105]. *See also Re Refugee Rev Tribunal; Ex parte Aala* (2000) 204 CLR 82, 91[16] (per Gaudron and Gummow JJ): "prohibition in s 75(v) is concerned with the prevention of ultra vires activity by officers of the Commonwealth," followed by the conclusion (CLR 91[17]) that a denial of procedural fairness may result in a decision made in excess of jurisdiction in respect of which prohibition will issue under s 75(v).

26. *Church of Scientology v Woodward* (1982) 154 CLR 25, 57, 64-5; *Muin v Refugee Rev Tribunal* (2002) 76 ALJR 966, 977-88788[47]; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 508[82] (per Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Fed Comm'r of Tax'n v Futuris Corp Ltd.* (2008) 237 CLR 146, 162[47]-[48] (per Gummow, Hayne, Heydon and Crennan JJ); *Plaintiff M68/2015 v Minister for Immigr and Border Prot* (2016) 257 CLR 42, 95[126] (per Gageler J); *Smethurst* (2020) 272 CLR at 236-77677[144] (per Nettle J), 246[169], 250-11511[178], [180] (per Gordon J), 269[234] (per Edelman J).

27. *Re Minister for Immigr and Ethnic Affs; Ex parte Miah* (2001) 206 CLR 57, 122-3[210]-[211] (per Kirby J) (discussing Gaudron J's dictum in *Abebe*). In *Plaintiff S157/2002 v Commonwealth* the court nonetheless held that the constitutional writs of prohibition and mandamus were available only for jurisdictional error. (2003) 211 CLR 476, 508[83].

28. *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR at 508[82]. *See also Smethurst* (2020) 272 CLR at 220-11211[96] (per Kiefel CJ, Bell and Keane JJ), 270[237] (per Edelman J, referring to "abuses of public power").

29. *Project Blue Sky Inc v Austl. Broad Auth* (1998) 194 CLR 355, 393[100]; *Muin v Refugee Rev Tribunal* (2002) 76 ALJR 966 at 977-88788[46]-[47] (per Gaudron J) (the relief actually granted in *Muin* being prohibition, certiorari and mandamus).

v Australian Broadcasting Auth,[30] where a regulatory agency's failure to comply with a statutory requirement did not result in invalidity of its decision for procedural ultra vires. However, since the non-compliance was a breach of the statute and therefore unlawful, relief was available by declaration and, in an appropriate case, by injunction, to restrain the agency from taking any further action based on its unlawful action.

C. Availability of Injunctions

Equitable relief may be available where a prerogative remedy is not in particular in the case of a challenge to a recommendation made by an investigative authority. Equity proceeds on the footing of the inadequacy of the prerogative remedies to achieve that task, on account of technical rules as to their availability, and compensates for that inadequacy.[31] It should not be surprising or incongruous that equitable relief is available when prerogative relief is not.[32] While equitable remedies in public law are subject to discretionary considerations as they are in private law, other limitations on their availability, such as those applying to prerogative remedies, are not imported.[33] This in part explains why it is in the context of injunctions and declarations that the rules of standing to seek judicial review have undergone liberalisation.[34]

Frequently, injunctions are sought to restrain a threatened breach of some regulatory requirement. A court may grant an injunction to protect benefits and advantages that could not be regarded as having any resemblance to proprietary rights. That

30. (1998) 194 CLR at 393[100] (per McHugh, Gummow, Kirby and Hayne JJ in obiter). *Project Blue Sky* was commenced in the High Court under s 75(iii) of the Constitution and remitted to the Federal Court, which exercised its general law judicial review jurisdiction.

31. *Bateman's Bay Loc Aboriginal Land Council v Aboriginal Cmty. Benefit Fund Pty Ltd.* (1998) 194 CLR 247, 257[25] (per Gaudron, Gummow and Kirby JJ); *Abebe v Commonwealth* (1999) 197 CLR 510, 551-52[104] (per Gaudron J); *Corp of the City of Enfield v Dev Assessment Comm'n* (2000) 199 CLR 135, 144[18]-[19] (per Gleeson CJ, Gummow, Kirby and Hayne JJ), 156[54], 157-8[56]-[58] (per Gaudron J); *Truth about Motorways Pty Ltd. v Macquarie Infrastructure Inv. Mgmt. Lt.d* (2000) 200 CLR 591, 628[96]-[97] (per Gummow J); *Smethurst* (2020) 272 CLR at 220[95] (per Kiefel CJ, Bell and Keane JJ), [172] (per Gordon J). See also Hanbury "Equity in Public Law" in *Essays in Equity* (1934) 80, 112; Sykes "The Injunction in Public Law" (1954) 2 *UQLJ* 114, 117.

32. *Corp of the City of Enfield v Dev Assessment Comm'n* (2000) 199 CLR 135, 157-58[58] (per Gaudron J).

33. *City of Enfield* (2000) 199 CLR at 158[58] (per Gaudron J).

34. *Bateman's Bay* (1998) 194 CLR at 267[50]-[51], 275[78].

is understandable. Statutory prohibitions in regulatory schemes directed to protecting public health and safety, or to planning, are imposed not for the benefit of particular individuals but for the benefit of the public, or at least sectors of the public. For example, in *Cooney v Ku-ring-gai Corporation*[35] equitable relief was sought to restrain an apprehended breach of prohibitions under planning laws.

The breadth of equitable relief to restrain contravention of laws enacted for the benefit of the public is accompanied by a wide discretion of the court. Yet, in circumstances where a decision has already been made in breach of a statutory prohibition, condition, or requirement, the absence of any apprehension of further breach may stand in the way of equitable relief. In other cases, the respondent may change its stance, leaving the proceedings futile. Futility arises as one of the discretionary grounds for refusing relief that applies across all remedies in judicial review. The grounds on which such discretion may be exercised are delay;[36] bad faith such as misleading the court;[37] acquiescence;[38] futility;[39] the existence of an equally convenient and beneficial avenue of review;[40] and hardship to the respondent that is disproportionate to the ends sought to be achieved by the statute.[41] The concern in this paper is not with

35. (1963) 114 CLR 582, 603-05 (per Menzies J with Kitto, Taylor and Windeyer JJ agreeing); *Bateman's Bay* (1998) 194 CLR at 258[27], 267[49]-[51]. Prior to *Cooney*, see *Ramsay v Aberfoyle Manufacturing Company* (1935) 54 CLR 230, with Starke J in dissent holding that while the principle on which the equitable jurisdiction of English courts was exerted by way of injunction in public law was ill-defined, the Attorney-General could sue for an injunction to restrain a breach of provisions enacted for the benefit of or in the interests of the public generally, such as provisions for public health or safety, planning or keeping statutory authorities within the ambit of their powers. (discussed by W Friedmann, "Declaratory Judgments and Injunctions as Public Law Remedies" (1949) 22 *ALJ* 446, 448-52).

36. *Associated Mins Consol v Wyong Shire Council* [1975] AC 538 at 560; *Day v Pinglen Pty Ltd.* (1981) 148 CLR 289, 300-01; *see also Day v. Pinglen Pty Ltd.* (1981) 45 LGRA 168 at 179.

37. *Fairfield City Council v Djurdjevic* (1990) 72 LGRA 140 at 142-43; *Mulcahy v Blue Mountains City Council* (1993) 81 LGERA 302, 304-45.

38. *Cf. Kuringai Mun. Council v Arthur H Gillott Pty Ltd.* (1968) 15 LGRA 116 at 122-23.

39. *R v Nixon; Ex parte Protean Holdings Ltd.* (1982) 43 ALR 460 at 463-34. *Cf. Ryde Mun Council v Wagemaker* [1970] 1 NSWR 487, 489.

40. *Saitta Pty Ltd. v Commonwealth* (2000) 106 FCR 554, 575[104].

41. *Attorney-General v Greenfield* [1960] 62 SR (NSW) 393, 396 (per Myers J), *aff'd*, [1961] NSWR 824 (Austl.); *Attorney-General v JN Perry Constrs Pty Ltd.* [1961] NSWR 422, 429; *Attorney-General v BP (Australia) Ltd.* [1964-1965] NSWR 2055 at 2064; *Devonport Municipality v Spence Prods Pty Ltd.* [1970] Tas SR 264, 278; *ACR Trading Pt Ltd. v Fat-Sel* (1987) 11 NSWLR 67, 82; *Warringah Shire Council v Sedevcic* (1987) 10

that discretion, exercised at the end of the day, but with the more general substantive discretionary principles applying in relation to the availability of an injunction. However, futility is a discretionary factor that seems to belong to both contexts.

Equitable relief may be sought in proceedings that are not judicial review proceedings, but that raise judicial review issues collaterally. In State and Territory Supreme Courts, which have inherent broad equitable jurisdiction, injunctions and declarations may be sought in proceedings brought in the equity division of the Court rather than in the Court's common law division, where judicial review proceedings are brought. An example is *Corporation of the City of Enfield v Development Assessment Commission*,[42] where a local council brought proceedings against a planning authority and a developer seeking a declaration that a provisional development plan issued by a planning authority was ultra vires by reason of failure to obtain the council's consent. The council also sought an injunction to restrain the developer from taking action pursuant to the consent or in reliance upon it. The ground argued was a jurisdictional error by reason of the absence of a jurisdictional fact, and the council invoked the jurisdiction of the South Australian Supreme Court in equity rather than its judicial review jurisdiction.[43] The relief sought "to restrain apprehended breaches of the law and to declare relevant rights and obligations", was held to be appropriate.[44]

Outside judicial review proceedings, equitable relief is also important in relation to disciplinary decisions of domestic bodies. Certiorari is not available against these bodies. However, equitable relief is regularly granted in actions for breach of contract brought against domestic bodies. Equitable relief lies in respect of a threatened or actual breach of an express or implied term of the contract between the body's members. This allows for enforcement of terms requiring compliance with the hearing rule

NSWLR 335, 340; *Strathfield Mun Council v Alpha Plastics Pty Ltd.* (1988) 66 LGRA 124, 129-30. *Cf. Parramatta City Council v Locker* (1989) 68 LGRA 334, 340; *NRMCA (Qld) Ltd. v Andrew* [1993] 2 Qd R 706, 713 (holding that in some circumstances it is proper to weigh against the grant of an injunction the defendant's having made efforts to arrange to bring the illegality to an end by obtaining planning consent).

42. (2000) 199 CLR 135, 143-35[16]-[20].

43. Supreme Court Act 1935 (SA) s 17(2), not Supreme Court Rules 1987 (SA) r 98.01.

44. (2000) 199 CLR 144[18]-[19], 157-59[55]-[60] (*City of Enfield).*

and the bias rule of procedural fairness or that the domestic body is to act reasonably.[45]

D. Threatened Breach of the Criminal Law

Whether the action is brought by the Attorney General of his own motion, by a related action, or by an individual, the courts have displayed restraint in exercising civil jurisdiction of judicial review to grant an injunction to restrain an actual or threatened breach of the criminal law.[46] In *Gouriet v Union of Post Office Workers*,[47] Lord Wilberforce said that the civil jurisdiction to enforce the criminal law was one of great delicacy, to be used with caution. To disobey an injunction is contempt of court, carrying a discretionary penalty which may exceed that applicable to the threatened crime. The standard of proof in granting the injunction is the civil one. The defendant is deprived of other protections afforded in criminal proceedings, which, if they later ensue, may be prejudiced. The situations where the courts are more likely to grant relief are those where the statutory penalty for the offence is inadequate, and there is persistence in offending, in flagrant disregard of the statute, or in a case of emergency.[48] Nor will an injunction be granted where it

45. *See Dixon v Austl. Soc'y of Accts.* (1989) 87 ACTR 1 (although the remedies were not granted here because the ground was not established). Other causes of action include "actions for recovery of moneys exacted colore officii or paid by mistake, and those for trespass, detinue and conversion where the plaintiff challenges the validity of the authority relied upon by the defendant as an answer to the allegedly tortious acts."; *Comm'r of Austl. Fed Police v Propend Fin Pty Ltd.* (1997) 188 CLR 501, 558 (per Gummow J); (2000) 199 CLR at 143-34[17] (*City of Enfield*).

46. *A-G v Harris* [1961] 1 QB 74 (Austl.); *Ramsay v Aberfoyle Mfg. Co. Pty Ltd.* (1935) 54 CLR 230 *(*Austl.*)*; *Cooney v Ku-ring-gai Mun Council* (1963) 114 CLR 582 *(Austl.)*; *Gouriet v Union of Post Off Workers* [1978] AC 435, 481 (per Lord Wilberforce); *Commonwealth v John Fairfax & Sons Ltd.* (1980) 147 CLR 39, 49-50; *Oatmont Pty Ltd. v Austl. Agric. Co. Ltd.* (1991) 75 NTR 1, 10; *Bateman's Bay* (1998) 194 CLR 247 (Gaudron, Gummow and Kirby JJ); *Cf. Onus v Alcoa of Austl. Ltd.* (1981) 149 CLR 27, 57, 63, 65-6666.

47. (1978) AC 435, 481 (*Gouriet). See also* at 498-99 (per Lord Diplock), 491 (per Viscount Dilhorne).

48. *Ramsay v Aberfoyle Mfg. Co. Pty Ltd.* (1935) 54 CLR 230 *(*Austl.*)*; *A-G v Harris* [1961] 1 QB 74 (Austl.); *Cooney v Council of Ku-ring-gai* (1963) 114 CLR 582 (Austl.); *Commonwealth v John Fairfax & Sons Ltd.* (1980) 147 CLR 39 at 50 (Austl.); *Peek v NSW Egg Corp* (1986) 6 NSWLR 1, 3 (Austl.); *ACR Trading Pty Ltd. v Fat-Sel Pty Ltd.* (1987) 11 NSWLR 67, 82-83; *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335; *Cf. Civ Aviation Auth v Repacholi* (1990) 102 FLR at 270-71; *A-G v Huber* (1971) 2 SASR 142, 181, 198-99, (refusing to exercise the discretion and granting an injunction to restrain production of the theatre performance "Oh! Calcutta" on the ground that it might involve

is unjustifiable to assume the defendant would be convicted of any offence.[49]

If refusal of relief would result in irreparable damage or destruction of the very items for whose protection the statutory offence has been created, the court is more inclined to grant relief.[50] In *Onus v Alcoa of Australia Ltd*,[51] an injunction was sought to restrain a threatened commission of an offence under a South Australian statute protecting aboriginal relics. The respondent company proposed to construct an aluminium smelter under a development consent on land that it owned. The construction work would have caused irreparable damage to the relics. Where it is unjustified to assume that a conviction could be secured, and injunctive relief would involve an intrusion upon personal liberty and privacy, relief will be refused.[52] Where the only injury alleged is to the moral well-being of the public, a court is more likely to exercise its discretion to decline to grant an injunction.[53]

E. Mandatory Injunctions

In cases of failure to perform a public duty, mandamus is ordinarily the appropriate remedy. The courts are reluctant to grant mandatory interlocutory injunctions against administrators. In this respect, declarations are more readily granted. Since a respondent administrator can be expected to

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the commission of offences against decency or morality); *Potato Mktg Corp of Austl. v Galati* [2015] WASC 430; *Sec. Dep't of Educ. v Joys Child Care Ltd.* [2017] NSWSC 749.

49. *A-G (Qld) (ex rel Kerr) v T* (1983) 57 ALJR 285 (Austl.); *A-G v Huber* (1971) 2 SASR 142 (Austl.).

50. *Onus v Alcoa of Austl. Ltd.* (1981) 149 CLR 27,63 (Wilson J) (*Onus*); *Central Queensl Speleological Soc'y Inc v Central Queensl Cement Pty Ltd. [No. 1]* [1989] 2 Qd R 512 (Thomas J, dissenting).

51. *Onus* (1981) 149 CLR 27 at 35, 36, 46.

52. *A-G (Qld); Ex rel Kerr v T* (1983) 46 ALR 275 (Austl.)(where an injunction sought to restrain an abortion, would have involved an intrusion upon personal liberty and personal privacy in the pursuit of moral and religious aims).

53. *A-G v Mercantile Inv. Ltd.* (1920) 21 SR (NSW) 183,187, 189; *A-G v Huber* (1971) 2 SASR 142 at 162, 169 (Bray CJ., dissenting) (holding that the discretion to decline an injunction should be exercised where no civil or material interest of any individual and no material interest of the public is alleged to be affected); *A-G (ACT) v ACT Minister for the Envt Land and Planning* (1993) 43 FCR 329, 332-4; *Bateman's Bay Loc Aboriginal Land Council v Aboriginal Cmty. Benefit Fund Pty Ltd.* 1998) 194 CLR 247 (per Gaudron, Gummow and Kirby JJ).

abide by an order of the court as to the law, a declaration may suffice so that there is no necessity to issue mandamus.[54]

Nonetheless, a mandatory injunction lies against a public authority which owes a private statutory duty to a plaintiff, irrespective of whether mandamus lies in the circumstances and irrespective of whether the duty is entirely private rather than public.[55] A mandatory injunction may, in an exceptional case, be granted even "where the injury sought to be restrained has been completed", and may issue if the injury is so serious that there is interference with the liberty of the plaintiff, damages are inadequate, and restoring matters to their former condition is the only remedy that will meet the requirements of the case.[56]

The availability of injunctions in public law was partially reviewed in *Smethurst v Commissioner of Police*,[57] where the focus was on mandatory injunctions. The High Court held that the Australian Federal Police acted under an invalid search warrant when its officers searched a journalist's home and downloaded data from her mobile phone. Certiorari was issued to quash the warrant. The Court was divided as to whether a mandatory injunction should be granted. The opinion of the plurality prevailed that since the excess of power was not continuing, and the journalist had no legal right to the return of the data, no relief was available in equity's auxiliary jurisdiction by way of mandatory injunction to require delivery up of the data, nor an injunction restraining the police from providing the data to prosecuting authorities.

The plurality's opinion lost sight of two principles. The first is that equitable relief in public law is available to protect fundamental common law rights where the executive branch lacks statutory power to interfere with those rights.[58] In the classic case of *Entick v Carrington*,[59] equitable relief was available in respect of trespass to personal property when police

54. *See generally Quin v A-G* (NSW) (1988) 16 ALD 550 (Austl.).

55. *Bradley v Commonwealth* (1973) 128 CLR 557, 586-94; *John Fairfax & Sons Ltd. v Austl. Telecomm. Comm'n* (1977) 2 NSWLR 400 at 405-6; *Della-Vedova v State Energy Comm'n of W Austl.* (1990) 2 WAR 561,568.

56. *Smethurst v Comm'r of Police* (2020) 272 CLR 177 at 270[238], 276-9[251]-[260] (per Edelman J)(quoting *Official Record of the Debates of the Australasian Federal Convention* (Melbourne), 4 March 1898 at 1875-1876.

57. (2020) 272 CLR 177.

58. *Id.* at 225[111]-[112], 230-2[123]-[130] (per Gageler J).

59. *Entick v Carrington* (1765) 19 St Tr 1029 (Austl.)(per Lord Camden).

officers entered and seized personal goods without statutory authority. According to the minority opinion in *Smethurst*, the invasion of the journalist's common law personal property rights and of her home by a trespasser should be remedied by the issue of a mandatory injunction for the delivery up of the copied data. The second principle is that in public law, equitable relief is available not only to restrain a threatened breach of a private legal right but also, and pre-eminently, to restrain a threatened breach of statutory provisions enacted for the benefit of the public.[60] Here, equity interferes not to protect a particular proprietary or legal right advanced by an individual plaintiff, but to protect the public interest, including the public interest in the due administration of law and the proper application of public funds. The evolution of the test of standing in public law, derived from a public nuisance case, later reformulated and relaxed to refect a rationale appropriate for public law, is instructive.[61] In the specific context of *Smethurst*, a statutory regime regulating police powers to search and seize is enacted for the benefit of the public, protecting liberty. Equitable relief should be available to prevent the continuation of a public wrong or, in an appropriate case, to remedy the consequences of an excess of power.

III CIVIL ENFORCEMENT PROCEEDINGS

A. Provisions in General

While commonly assumed to be the same as judicial review, civil enforcement proceedings are significantly different, involving particular statutory causes of action, with the court enjoying flexibility as to relief. Remedies are specifically provided for in statutory provisions providing for the regulator or any other person, with an open standing rule, to bring proceedings to remedy or restrain a contravention of the statute. In such civil enforcement proceedings, it is not necessary to establish that the breach of the statute constitutes jurisdictional error in order for a grant of relief to be appropriate. The court is not constrained by

60. *Cooney v Ku-ring-gai Corp* (1963) 114 CLR 582, 603-605 (Austl.); *Smethurst v Comm'r of Police* (2020) 272 CLR 177 at 249-50[176]-[179] (Gordon J), 274-5[248] (Edelman J touched upon this aspect of the equitable relief in public law).

61. *Boyce v Paddington Borough Council* [1903] 1 Ch 109,113 (Austl.); *Smethurst v Comm'r of Police* (2020) 272 CLR 177 at 225-6[113].

common law principles as to the legal effect of jurisdictional error, which form the backdrop to the issue of certiorari or prohibition. In civil enforcement proceedings, injunctions and declarations are a means for identifying and restraining actions which constitute a public wrong in the sense that a regulatory provision enacted in the public interest has been or may be about to be infringed.

Such regulatory schemes ordinarily make specific provisions as to the injunctive or declaratory orders that the relevant court is empowered to make. Some of the discretionary requirements for the availability of equitable relief may be expressed to be unnecessary. These include the need for a threat that the conduct will be repeated or that the applicant gives an undertaking as to damages to obtain an interlocutory injunction. This apart, in determining whether to grant an injunction or declaration, the court has a general discretion.[62]

The discretionary caution as to injunctions or declarations to enforce the criminal law becomes inapplicable. The court is expressly empowered to grant injunctions and declarations in its civil jurisdiction as to contravention of a civil penalty provision where such conduct also constitutes a statutory offence. Here, absent statutory indication to the contrary, it is appropriate for the court to take into account the public interest in exercising its discretion. A declaration of contravention marks the court's disapproval of the contravening conduct.[63]

A statutory injunction may have utility of an educative nature in reinforcing in the marketplace that the restrained

62. *See generally Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335, 338-341, (summarising the relevant considerations in exercise of the discretionary power of the Land and Environment Court to make such order as it thinks fit under the *Environmental Planning and Assessment Act* 1979 (NSW) s 124); *ACR Trading Pt Ltd. v Fat-Sel Pty Ltd.* (1987) 11 NSWLR 67, 82-83; *Liverpool City Council v Roads and Traffic Auth and Interlink Roads Pty Ltd.* (1991) 74 LGRA 265, 281 (where an injunction was refused on the basis of futility); *Turnbull v Chief Exec of the Off of Env't and Heritage* (2017) 223 LGERA 81 at [46]-[48]; *Raedel v Shahin* [2019] SASCFC 141 at [138]-[145].

63. *See generally Corporations Act* 2001 (Cth) ss 1317, 1324*; Blacktown Mun Council v Friend* (1974) 29 LGRA 192,200-201; *Trade Prac. Comm'n v Mobil Oil Austl. Ltd.* (1984) 4 FCR 296,300; *F Hannan Pty Ltd. v Electricity Comm'n of NSW [No. 3]* (1985) 66 LGRA 306,313; *Austl. Sec. and Inv. Comm'n v Sweeney* [2001] NSWSC 114 at [34]-[35]; *Re McDougall; Austl. Sec. and Inv. Comm'n v McDougall* (2006) 229 ALR 158 at 170[57]-[58]; *Austl. Sec. and Inv. Comm'n v FUELbank Austl. Ltd.* (2007) 162 FCR 174, 184[61]; *Austl. Sec. and Inv. Comm'n v Dunjey* [2023] FCA 361 at [136]; *Cf. Austl. Sec. and Inv. Comm'n v HLP Fin Planning (Austl.) Pty Ltd.* (2007) 164 FCR 487, 504[58]; *Stirling v Dueschen* [2011] WASC 126 at [89]; *Cando Mgmt. and Maint Pty Ltd. v Cumberland Council* (2019) 237 LGERA 128.

conduct is unacceptable.[64] The fact that such an injunction may prove difficult or even impossible to enforce is a material consideration to be weighed against other circumstances relevant to the court's exercise of its discretion, but is not necessarily a bar to the grant of the injunction.[65] An injunction is not refused on the ground that it would not have a practical effect where the reason for the failure to have a practical effect is that the defendant disobeys it.[66]

Some civil enforcement schemes may provide for orders that do not share all of the features of injunctions or declarations at general law. For example, under the *Land and Environment Court Act* 1979 (NSW) the Land and Environment Court of NSW has power, "instead of declaring . . . that a development consent" is invalid in whole or in part, to make an order "suspending the operation of the consent," or an order specifying terms that will validate the consent.[67]

An overarching procedural mandate for obtaining injunctive relief is now in place in relation to federal civil enforcement proceedings. Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) ("RPSP Act") provides a framework for enforcement of duties that are expressly stated in another enactment to be "enforceable provisions" for the purposes of the RPSP Act. Pursuant to ss 121 and 122 of the RPSP Act an "authorised person" may apply for an injunction or interim injunction to restrain a person from engaging in conduct in contravention of an enforceable provision or require action to be taken by a person who has refused or failed to act, in contravention of an enforceable provision. For example, the provisions of the *Privacy Act 1988* (Cth) are enforceable provisions and the Privacy Commissioner and "any other person"

64. *Australian Competition and Consumer Comm'n v 4WD Sys Pty Ltd.* (2003) 200 ALR 491 at [217]; *Humane Soc'y Int'l Inc v Kyodo Senpaku Kaisha Ltd.* (2006) 154 FCR 425, 432[24]-[26].

65. *Austl. Competition and Consumer Comm'n v Chen* (2003) 132 FCR 309; *Humane Soc'y Int'l Inc v Kyodo Senpaku Kaisha Ltd.* (2006) 154 FCR 425,432[25].

66. *Humane Soc'y Int'l Inc v Kyodo Senpaku Kaisha Ltd.* (2008) 165 FCR 510, 525[51]-[53] (NSW) (citing *Vincent v Peacock* (1973) 1 NSWLR 466, 468); *see also Humane Soc'y Int'l Inc v Kyodo Senpaku Kaisha Ltd.* (2015) 238 FCR 209 (NSW) (where the respondent was later found guilty of wilful contempt of court in breaching an injunction restraining it from taking Antarctic minke whales in the Australian Whale Sanctuary in contravention of the *Environmental Protection and Biodiversity Conservation Act* 1991 (Cth) (Austl.)).

67. *Land and Environment Court Act* 1979 (NSW) s 25B; *see GPT Re Ltd. v Belmorgan Prop Dev Pty Ltd.* (2008) 72 NSWLR 647, 669[90].

is an "authorised person" in relation to those enforceable provisions.[68]

B. An Example: National Consumer Credit Regulation

A useful illustration is the regime for civil enforcement proceedings in the Federal Court of Australia with respect to contraventions of the *National Consumer Credit Protection Act 2009* ("NCCP Act"). The key proceeding is for a declaration under s 166, which need not be a precondition to, but lays the groundwork for proceedings for other relief. Additional causes of action may be brought, with the proceedings for a declaration or injunction, or subsequently. These are proceedings for compensation or a civil penalty.[69] The proceedings for civil penalties usually attract the most attention. The basis for calculating a penalty and the proper role of the court in scrutinising the adequacy of a penalty order by consent may generate public debate.

Pursuant to s 166(1) of the NCCP Act, within six years of a person contravening a civil penalty provision, the Australian Securities and Investments Commission ("ASIC") may apply to the Federal Court for a declaration that the person contravened the provision. For example, such proceedings may be brought against a pay-day lender operating without holding an Australian Credit Licence and in breach of the prohibitions in the National Consumer Credit Protection Code that limit the maximum fees and charges that may be imposed in providing credit.[70] Section 166(2) of the Act provides that if the Court is satisfied that a person has contravened a civil penalty provision, the Court "must make" a declaration to that effect. Thus, in contrast to the usual discretionary nature of equitable relief, it is mandatory for the Court to make a declaration of contravention if the Court is satisfied that there is a contravention.[71]

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68. *Privacy Act 1988* (Cth) s 80W (Austl.); *see Knowles v Sec'y, Dep't of Defence* [2020] FCA 1328, [50]–[51] (Vic) (where contravention of the *Privacy Act 1988* was not established and so injunctive relief under the RPSP Act was not available).

69. *National Consumer Credit Protection Act 2009* (Cth) ss 178, 179 (compensation), 167 (civil penalty). Criminal proceedings may follow: NCCP Act s 173.

70. Section 29(1) of the NCCP Act is a civil penalty provision (s 5 of the Act defines "civil penalty provision"), which provides that a person must not engage in a credit activity if the person does not hold a licence authorising the person to engage in the credit activity.

71. *Austl. Sec. and Inv. Comm'n v Fin Circle Pty Ltd.* (2018) 131 ACSR 484, [153]–[159] (Vic) (O'Callaghan J) (referring to the mandatory nature of a declaration under s 166

The critical principles governing the permissible scope and content of a declaration under s 166(1) is set out in s 166(3).The declaration must be formulated in a way that specifies the conduct that constitutes the contravention with sufficient particularity to enable the declaration to stand on its own.[72] It must be sufficiently time specific, and must accurately describe the conduct that gave rise to the contravention.[73] The declaration should be informative as to the basis on which the Court declares that a contravention has occurred, and contain appropriate and adequate particulars of how and why the conduct is a contravention of the Act.[74] The declaration should avoid using defined terms which are effectively meaningless to anyone who does not have access to the agreed facts for the purposes of the Court proceedings.[75]

Separately, s 177(1)(a) of the NCCP Act empowers the Federal Court to grant an injunction, on such terms as it considers appropriate, if it is satisfied that a person has engaged or is proposing to engage in conduct that constitutes or would constitute a contravention of the NCCP Act. In contrast to the declaration under s 166, relief under s 177(1)(a) is discretionary. However, s 177 contains express modifications to the generally applicable requirements affecting the exercise of the discretion to grant an injunction in judicial review.

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and contrasting discretionary declarations made under other provisions, such as the *Federal Court of Australia Act* 1976 (Cth) s 21 or the *Corporations Act* 2001 (Cth) s 1101B(1)(a)(i)); *see also Austl. Sec. and Inv. Comm'n v Warrenmang Ltd.* (2007) 63 ACSR 623, [32] (Vic) (Gordon J) (referring to s 1317E of the *Corporations Act 2001* (Cth)); *Austl. Sec. and Inv. Comm'n v Westpac Banking Corp* [2019] FCA 2147, [239]–[240] (NSW) (referring to s 961K of the *Corporations Act 2001*).

72. *See Warrenmang Ltd.* (2007) 63 ACSR 623, [32] (Gordon J) (referring to the similarly drafted power to make a declaration of contravention under s 1317(1),(2)(a)-(d) of the *Corporations Act* 2001 (Cth)).

73. *Warrenmang Ltd.* (2007) 63 ACSR 623, [48]; *see, e.g.*, declarations under s 166 made in *Austl. Sec. and Inv. Comm'n v Thorn Austl. Pty Ltd.* [2018] FCA 704 (NSW) (Jagot J).

74. *BMW Austl. Ltd. v Austl. Competition and Consumer Comm'n* (2004) 207 ALR 452, 465[35] (Vic) (Gray, Goldberg and Weinberg JJ), (citing *Rural Press Ltd. v Austl. Competition and Consumer Comm'n* (2003) 216 CLR 53, 91[90] (Austl.)); *Austl. Sec. and Inv. Comm'n v Monarch FX Grp Pty Ltd.* (2014) 103 ACSR 453, [64] (Vic); *Westpac Banking Co* [2019] FCA 2147 at [1], [152–53] (Allsop CJ) (in proceedings seeking declarations under s 166 and civil penalties for contravention of other provisions of the Act); *Austl. Sec. and Inv. Comm'n v Austl. and NZ Banking Grp Ltd.* [2018] FCA 155 (Vic) (Middleton J.)

75. *Westpac Banking Corp* [2019] FCA 2147 at [216] (Jagot J). For examples, *see Austl. Sec. and Inv. Comm'n v ACN 092 879 733 Pty Ltd.* [2012] FCA 923 (declaration 1) (NSW); *Fin Circle Pty Ltd.* (2018) 131 ACSR 484 (declaration 9).

The modifications indicate that s 177 is not limited by considerations relating to the grant of injunctive relief in equity.[76] Section 177 is remedial in that it is designed to minimise the risk of further damage to members of the public. The key principles governing its issue are as follows. First, s 177(1)(a) makes it clear that an injunction may be granted not only where the Court is satisfied that a person is proposing to engage in conduct that constitutes a contravention, but also where the Court is only satisfied that a person *has engaged* in the contravention. In the example of the pay-day lender, in order for an injunction to issue, ASIC need not prove that the lender is proposing to engage in further conduct constituting a contravention. Therefore, there is no need to establish the lender's intent to continue to engage in the credit activity under its existing business model.

This is reinforced by s 177(5)(a) of the NCCP Act, which provides that the Court has the power to grant an injunction whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind. In effect, s 177(5)(a) makes it immaterial that a respondent to the civil enforcement proceedings intends to, or can, engage in the contravening conduct in the future. The injunction may be issued regardless of whether there is a likelihood of future contravention because the underlying legislative policy is that where a contravention has occurred, an injunction will serve a purpose of deterrence.[77] Provisions such as s 177(5)(a) are "designed to ensure that once the condition precedent to the exercise of injunctive relief has been satisfied (ie contraventions or proposed contraventions . . .), the court should be given the widest possible injunctive powers, devoid of traditional constraints, though the power must be exercised judicially and sensibly."[78]

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76. *Austl. Sec. and Inv. Comm'n v Cassimatis [No. 9]* [2018] FCA 385, [118] (Qld) (Dowsett J).

77. *ICI Austl. Operations Pty Ltd. v Trade Pracs Comm'n* (1992) 38 FCR 248, 256 (Lockhart J) (French J agreeing), in relation to s 80(2),(4),(5) of the former *Trade Practices Act* 1974 (Cth). Followed in *Re McDougall; Austl. Sec. and Inv. Comm'n v McDougall* (2006) 229 ALR 158, 174–75[70]–[72] (Young J) in relation to s 1324 of the *Corporations Act* 2001 (Cth).

78. *ICI Austl. Operations Pty Ltd.* (1992) 38 FCR 248 at256, followed in *Foster v Austl. Competition and Consumer Comm'n* (2006) 149 FCR 135, 147–48[27]–[31] (Ryan, Finn and Allsop JJ), in relation to ss 80(2),(4),(5) of the former *Trade Practices Act 1974*. In relation to s 1324 of the *Corporations Act 2001*, see *McDougall* (2006) 229 ALR 158 at174[70] (Young J) and *Cassimatis [No. 9]* [2018] FCA 385 at[117]–[119].

In a particular case, there may be evidence as to the scale of contravention beyond the declaration made, and as to the likelihood of future contraventions by the respondent. However, it is not necessary to establish that an injunction will ensure deterrence because the policy underlying s 177(5)(a) is that by granting the injunction, "deterrence is effected by attaching to the repetition of the contravention the range of sanctions available for contempt of court."[79] The contravention, and the declaration of contravention, enliven the power to grant the injunction.[80]

The power to grant an injunction under s 1324(1)(a) of the *Corporations Act 2001* is in similar terms to s 177(1). In relation to that power, it has been said that "[i]n circumstances where a contravention has been identified, it is appropriate for the Court to restrain the defendants from committing future contraventions of a similar kind."[81] The authorities that developed in relation to that civil enforcement provision apply to the exercise of the power in s 177(1)(a) of the NCCP Act. The injunction is framed in terms of the activities which gave rise to the contravention rather than being directed to all of the activities in which the respondent might engage. In *Australian Securities and Investments Commission v ACN 092 879 733 Pty Ltd*,[82] the Court made a declaration that a company contravened s 166 of the NCCP Act and granted an injunction under s 177 restraining it from engaging in any further holding out of that kind.[83] The grant of the injunction followed from the declaration, with no further justification required, so that the injunction operated to restrain the contravening conduct the subject of the declaration.

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79. *ICI Austl. Operations Pty Ltd.* (1992) 38 FCR 248, 268 (French J); *see also BMW Austl. Ltd.* (2004) 207 ALR 452, 466[39] (Gray, Goldberg and Weinberg JJ).

80. *Austl. Sec. and Inv. Comm'n v Secure Inv. Pty Ltd. [No. 2]* (2020) 148 ACSR 154, 172[73] (Qld) (Derrington J).

81. *Austl. Sec. and Inv. Comm'n v Marco [No. 6]* [2020] FCA 1781, [122] (WA) (McKerracher J) (where s 1324(6)(a) and (c) of the *Corporations Act 2001* are in similar terms to s 177(5)(a) and (c) of the Act respectively).

82. *Austl. Sec. and Inv. Comm'n v ACN 092 879 733 Pty Ltd.* [2012] FCA 923, [36]–[37] (NSW).

83. *Id.* This was a contravention by breach of s 30(2) of the NCCP Act, in holding out that it engaged in the business of providing home loans in circumstances where it was not authorised to do so. *Id; see also Austl. Sec. and Inv. Comm'n v BHF Sols Pty Ltd.* (2022) FCR 330 (NSW) where the contraventions by pay-day lenders were established on appeal to the Full Federal Court and the matter remitted to the trial judge to make orders by way of relief. The remitted proceedings, in which declarations and injunctions were sought under ss 166 and 177, has been heard and is reserved.

Secondly, s 177(5)(c) of the NCCP Act provides that an injunction may be granted whether or not there is an imminent danger of substantial damage to another person if the person engages in conduct of that kind. In light of this provision, there is no room for a contention by a respondent to the civil enforcement proceedings that it would be futile to grant the injunction because the respondent claims to have ceased to engage in the contravening conduct. In *ACN 092 879 733 Pty Ltd,* the Court observed that "the conduct giving rise to the relevant contravention appears to have ceased,"[84] making it plain that cessation of the contravening conduct did not stand in the way of an exercise of the discretion to grant the injunction. There was no need for ASIC to prove the scale of contravention beyond the declaration made or the likelihood of future contraventions.[85]

IV SOME QUESTIONS

In *Bateman's Bay*,[86] the purpose of the grant of injunctive relief to restrain ultra vires commercial activity by a statutory authority was expressed to be vindication of "the public interest in the maintenance of due administration." Yet, there was no suggestion that the limitations upon the availability of this equitable relief should be relaxed in the public law context. The purpose of the relaxation of the limitations in civil enforcement proceedings is the more effective pursuit of the public interest in securing relief against contravention of a regulatory scheme. Civil enforcement proceedings are proceedings in public law. Many kinds of unlawful government activity, exposed in judicial review, could be characterised as contraventions of a regulatory scheme. Here, the respondent is a public authority rather than a non-compliant private sector entity. However, the objective in

84. *ACN 092 879 733 Pty Ltd.* [2012] FCA 923 at[37].

85. *See, e.g.*, *ACN 092 879 733 Pty Ltd.* [2012] FCA 923 (Order 3); *Austl. Sec. and Inv. Comm'n v Fin Circle Pty Ltd. [No. 2]* (2018) 353 ALR 137 (Vic) (Order 2); *Austl. Sec. and Inv. Comm'n v Rent 2 Own Cars Austl. Pty Ltd.* [2020] FCA 1312, 682[436] (Qld) (Orders 5, 6).

86. *Bateman's Bay Loc Aboriginal Land Council v Aboriginal Cmty. Benefit Fund Pty Ltd.* (1998) 194 CLR 247, 237[25] (NSW) (Gaudron, Gummow and Kirby JJ). Followed in *Abebe v Commonwealth* (1999) 197 CLR 510, 551–52[104] (Austl.) (Gaudron J); *Smethurst v Comm'r of Police* (2020) 272 CLR 177, [172] (Austl.) (Gordon J). *Contra Bateman's Bay Loc Aboriginal Land Council* (1998) 194 CLR 247 at 176[81] (McHugh J) (taking the view that the function of the civil courts is to enforce rights of individuals rather than the public law of the community).

granting relief is the same— the public interest in ensuring that the unlawful conduct is identified and restrained.

The function of a court in judicial review is to grant relief that keeps the executive branch within the boundaries of power. In judicial review, equitable relief should be fashioned to meet the requirements of the case. The rules of standing to seek judicial review have, over time, been relaxed. This evolution recognised that an effective representative of the public interest who has participated in an issue has a special interest in the subject matter of the action, giving standing to bring judicial review proceedings to right a public wrong. That evolution may have been influenced by courts observing that open standing provisions for bringing civil enforcement proceedings had no untoward consequences.[87] It is surprising that the statutory reforms reflected in provisions for civil enforcement proceedings have not worked as a source of learning as to the parallel path on which equitable constraints upon the grant of injunctions in judicial review may gradually be relaxed.

87. *Truth About Motorways Pty Ltd. v Macquarie Infrastructure Inv. Mgmt Ltd.* (2000) 200 CLR 591 (Austl.).

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