The dangers of this kind of conceptual malaise are vividly illustrated by the decision in *WWF* itself. Chadwick L.J. reached two seemingly contradictory conclusions in relation to the first ground of appeal: (i) that both account of profits and *Wrotham Park* damages are compensatory (at [59]); and (ii) that Jacob J.'s judgment only affected the availability of account of profits (at [69]). But why, if both measures of damages are compensatory, should one be available where the other is not? Is it not more likely that the differences in availability (which are relatively undisputed) point towards differences in juridical basis? Perhaps the differences exist because account of profits is gain-based while *Wrotham Park* damages are compensatory or alternatively it might be because the awards reflect two different measures of gain-based damages (the approach preferred by this author). These questions remain open for debate but regrettably the Court of Appeal's insistence that the two awards be treated as compensatory hindered any detailed discussion of these important matters.

RALPH CUNNINGTON

COMPOUND INTEREST MADE SIMPLE

IN *Deutsche Morgan Grenfell Group plc.* v. *I.R.C.* [2006] UKHL 49, [2007] 1 A.C. 558 (noted [2007] C.L.J. 24) the House of Lords recognised that a taxpayer which had been required to pay tax prematurely, in breach of EC law, could bring a claim in unjust enrichment for restitution, with the ground of restitution being mistake of law. In *Sempra Metals Ltd.* v. *I.R.C.* [2007] UKHL 34, [2007] 3 W.L.R. 354 the House of Lords considered the nature of the remedy for such a claim.

It had been accepted by the parties that the appropriate measure of restitution in the case was interest to reflect the Revenue's enrichment from having the use of the claimant's money until the time when the tax would have been lawfully received. But the key issue concerned how this interest should be assessed. It had been held in *Westdeutsche Landesbank Girozentrale* v. *Islington L.B.C.* [1996] A.C. 669 that only simple interest could be awarded for common law claims in unjust enrichment, with compound interest being confined to equitable claims. Although *Westdeutsche* was not formally overruled, since *Sempra* was concerned with interest *as* the measure of the principal sum rather than with interest *on* the principal sum, the House of Lords placed the law relating to the award of interest on a new footing.

Three distinct issues relating to the award of interest were considered. The first concerned the identification and valuation of

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the Revenue's enrichment. The majority assumed that the Revenue had been enriched by the receipt of the tax because it had the opportunity to use this money rather than borrow an equivalent amount from elsewhere, and it was not necessary for the claimant to prove that the Revenue would have done so. The minority, however, considered that a "wholly conceptual benefit" (Lord Scott, at [145]) could not constitute an enrichment. The approach of the majority is preferable, since it is surely appropriate to assume that the recipient of money has relied on it in some way, and the recipient is in the best position to show there was no reliance on receipt because, for example, it was credited to a non-interest bearing current account.

Consequently the majority presumed that the Revenue had been enriched, since if the Government had not had the tax money prematurely it would have borrowed an equivalent amount from another source. The objective value of this enrichment was considered to be the reasonable cost of borrowing an equivalent amount of money, which was to be assessed by reference to compound interest, this being the conventional interest for ordinary commercial borrowings. However, the majority also recognised that the Revenue could "subjectively devalue" this enrichment since it could show that the Government would have been able to borrow at a lower rate of interest. This is a significant analysis of the identification and valuation of enrichments. The approach of the House of Lords confirms that it is necessary to identify an objective enrichment first and then the question of subjective devaluation arises. Crucially, a majority accepted that compound interest was available as a measure of restitution as of right at common law, rather than through the exercise of discretion in equity. This is entirely consistent with compound interest being used to value the enrichment. Lords Mance and Walker, however, concluded that it should be available through the exercise of judicial discretion, but without any satisfactory indication as to why this was necessary or how the discretion would be exercised. But, as Lord Hope correctly identified at [26]: "To treat the choice of remedy in unjust enrichment as discretionary would…be inconsistent with the common law right that gives rise to it."

The decision in *Sempra Metals* is of more general significance to the law of unjust enrichment. The recognition that there is a claim in unjust enrichment for the defendant's use of money means that most claimants will have two distinct unjust enrichment claims at common law. For example, if the claimant has paid money by mistake, he or she can sue both to recover the value of the money paid and for the defendant's presumed use of that money, with compound interest typically being used to measure the value of that use.

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Some judges also considered the ancillary award of interest on the debt due once liability for an unjust enrichment claim has been established, so-called "interest on restitution". The claimant had conceded that this interest should be awarded under the Supreme Court Act 1981, s. 35A(1), which gives the court a discretion to award simple interest, apparently to compensate the claimant for the loss suffered in not having use of the money until the liability is discharged. However, Lords Nicholls and Walker recognised that compound interest could be awarded because the Revenue continued to benefit from the use of the money until the debt was discharged. The appropriateness of this conclusion depends on whether the defendant's continued benefit from the use of the money can be considered to have been obtained directly at the claimant's expense. Normally benefits which derive from the receipt of an enrichment are considered to be too remote. So, for example, interest earned on money paid by mistake cannot be recovered in unjust enrichment (see *Moses* v. *Macferlan* (1760) 2 Burr. 1005, 1010). However, claims for interest for the period from when the liability to make restitution arose until it was discharged should be treated as directly obtained at the claimant's expense, since the defendant was using money which should have been available for use by the claimant. This is consequently a benefit which should be valued with reference to compound interest, assuming that this is what the defendant would have had to pay to borrow an equivalent amount, although this does not sit easily with the statutory regime for simple interest under the Supreme Court Act.

Finally, some judges also considered the availability of interest at common law on damages arising from breach of contract or tort and concluded that compound interest should be generally available as damages to compensate the claimant for loss actually suffered due to the late payment of money, rejecting the rule in *President of India* v. *La Pintada Compania Navigacion SA* [1985] A.C. 104 that interest losses for late payment of a debt could only be recovered if the loss could be characterised as special damage within the contemplation of the parties.

This recognition of the significance of compound interest in the law of obligations is to be welcomed as being economically realistic, in that it accords with the commercial significance of compound interest rather than, as Lord Hope said at [33], the "artificial construct" of simple interest.

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