The significant case of *Westdeutsche Landesbank v Islington*

A summary of the decision of the House of Lords in *Westdeutsche Landesbank v Islington* would be useful at this early stage because it underpins so much of the law in this area. The facts of *Westdeutsche Landesbank v Islington* were perfect as an arena for the debate which was at the heart of trusts law at the time. The issue was this: when WDL paid money to Islington on the basis of a contract which unbeknownst to either party was void, on what basis could WDL recover its money? It was held that because Islington did not know that the contract was void before all of the money was spent, then Islington's conscience had not been affected. Because a trust will only come into existence once the legal owner's conscience is affected, there was no trust (whether constructive or resulting) over the money before it was spent. (As is discussed in Chapter 19, WDL could not trace after the money passing into other people's hands because it was not possible to prove where the money went after it was paid into the authority's general bank account.) Therefore, the House of Lords held that the only recourse which WDL could have was to a personal claim at common law for "money had and received": this meant that WDL was entitled to be paid an amount equal to its original payment to Islington by Islington. Because it was a personal action, if Islington had gone into insolvency in the meantime then WDL would have had only a personal claim against an insolvent person and therefore would have been nothing in practice: fortunately, Islington was still solvent. In reading the case, it is apparent that the only issue remaining in front of the House of Lords was whether Westdeutsche Landesbank was entitled to compound interest on its money or only to simple interest. It was held by the majority of the House of Lords that under the law at the time, compound interest would only be available to the bank if it still had some proprietary interest in the money.[1] For a discussion of the issues arising before Hobhouse J and the Court of Appeal, and for a full discussion of the issues raised by each member of the House of Lords, see Alastair Hudson, *Swaps, Restitution and Trusts*.[2]

There had been an argument put forward by Prof Birks of the University of Oxford to the effect that if a person like Islington had been unjustly enriched (for example by receiving money under a contract that was actually void) then the payer (WDL) should be able to assert a proprietary claim on the basis of a massively enlarged resulting trust over the money. This argument had a number of academic supporters. This writer is not one of them. The argument was rejected by the House of Lords. The weakness in the argument is that it does not account for the unfairness of entitling the payer to have a property right in money which will put it at an advantage when compared to the payee's unsecured creditors. Furthermore, if the money has been spent then a resulting trust would not answer the question "which property are you claiming now it's gone?". What the majority of the House of Lords did was to re-establish our understanding of equity as being based on conscience. Among the other problems with Birks's argument were the following two issues: first, that it was predicated on a fallacious idea that it was based on Roman law but overlooked the fact that Roman law itself relied on a broadly-based equity ("aequitas"); and, secondly, that it was based on an elderly English case, *Moses v*

[1] The law on interest has changed significantly by virtue of a subsequent decision of the House of Lords in *Sempra Metals Ltd v IRC* [2008] Bus LR 49.
[2] Alastair Hudson, *Swaps, Restitution and Trusts* (Sweet & Maxwell, 1999).

Macferlan,[3] which was in fact based on equity and not on some Romanist model of unjust enrichment. So, *Westdeutsche Landesbank v Islington* is important because it is the most recent House of Lords case on trusts law which takes the trouble to explain the basics of English trusts law as being based on a central concept of "conscience", and because it resolved a key academic debate of its day.

[3] (1760) 2 Burr 1005, *per* Lord Mansfield CJ.