as “a radical reformulation of the purpose and scope of the tort” (at [48]). In defence of the recorder one should mention that he reached an obviously just outcome without needing to reinterpret four centuries of case law, welcome as that reinterpretation might be.

Sir Terence’s view reflects economic research on property values that models house prices as an interaction between demand and supply for the services property provides, such as shelter and recreation, and, separately, demand and supply for houses as investments (see e.g. I. Mulheirn, *Forecasting UK House Prices and Home Ownership* (London 2016)). The former is reflected in rents, but the latter responds to, inter alia, mortgage interest rates, returns on other assets and financial regulation. Sir Terence’s position that nuisance is not designed to protect the part of property values created by the financialisation of housing seems a necessary correction for modern conditions.

But one should also issue a word of caution. Prompted by defendant’s counsel, Sir Terence characterised the recorder’s error as “extend[ing] the tort of nuisance to a claim for pure economic loss” (at [48]). The term “pure economic loss” is slippery. At home, in negligence, it usually means loss flowing from a reduction in value of existing contractual relationships. Contrary to Lord Denning’s infamous, and confused, judgment in *Spartan Steel & Alloys Ltd. v Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27, the physicality or otherwise of the damage is irrelevant. The damage to the embankment in *Cattle v Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453 and to the steel coils in *The Aliakmon* [1986] A.C. 785 was physical, but the loss was purely economic because the plaintiffs only had a contractual interest in them. What matters is the nature of the legal relationships, not the physicality of the harm. In *Williams*, the claimants undoubtedly had more than a contractual interest in their properties. None of their loss was “purely economic” in the negligence sense. The issue was instead what kinds of property damage nuisance protects against. Mr. Recorder Grubb went too far only in implying that nuisance might apply to reductions in property values unrelated to impairments to the usefulness of a property. He was not wrong that nuisance protects the value of property rights.

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FURTHER NARROWING THE SCOPE OF UNJUST ENRICHMENT

THE law of unjust enrichment continues to be shaped by the long wave of cases in which restitution is sought from the Revenue for unlawfully levied taxes. While earlier cases in the wave liberalised the scope of unjust
enrichment, the tide has now turned, and more recent cases in the same wave have begun narrowing it. That trend is continued by *Prudential Assurance Co. Ltd. v Revenue and Customs Commissioners* [2018] UKSC 39, [2018] 3 W.L.R. 652.

The taxpayer’s claim was in respect of taxes paid on dividends from its shares in non-UK companies. In breach of EU law, dividends from shares in non-UK companies had historically been the subject of less favourable treatment than dividends from shares in UK companies. It was common ground before the Supreme Court that restitution should be available in respect of taxes paid on the non-UK dividends to reflect the difference. However, there was a number of disputed issues relevant to the amount of restitution payable by the Revenue. Most were tax-specific and can be ignored for present purposes. But one issue was a matter of wider implication – the availability of compound interest in the law of unjust enrichment – and that is the subject of this note.

Towards the beginning of the tax wave of restitution cases, in *Sempra Metals Ltd. v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 A.C. 561, Lord Hope and Lord Nicholls recognised the availability of compound interest on the principal sum of money by which a defendant has been enriched. Their Lordships characterised compound interest not as an ancillary amount but as a principal remedy reversing the enrichment of the time or use value of principal sum that had been paid. However, in *Prudential Assurance*, the Supreme Court overturned the judgments of Lord Hope and Lord Nicholls in *Sempra Metals*. In a unanimous judgment, five reasons were given for no longer allowing a claim for compound interest for the use value of money:

1. The Court of Justice of the European Union has clarified since *Sempra Metals* that compound interest was not required as a remedy for taxes levied in breach of EU law: *Littlewoods Ltd. v Revenue and Customers Commissioners* [2017] UKSC 70, [2017] 3 W.L.R. 1401, noted R. Williams [2018] C.L.J. 468;

2. The House of Lords in *Sempra Metals* had not considered that the availability of compound interest at common law would conflict with statutory provisions stipulating that only simple interest should accrue on overpaid tax: section 78 of the Value Added Taxes Act 1994 and section 826 of the Income and Corporation Taxes Act 1988;

3. Parliament had introduced retrospective limitation periods to limit the Revenue’s exposure to vast claims for compound interest, and *Sempra Metals* was decided on that basis, but since then these retrospective limitation periods had been struck down as being incompatible with EU law;

4. Consequently, compound interest claims were causing enormous disruption to public finances; and
Reason (5) is the most important for the general direction of travel for the law of unjust enrichment. In his seminal judgment in *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29, [2018] A.C. 275, Lord Reed narrowed the scope of unjust enrichment by holding that it was concerned with reversing normatively defective transfers of value arising from direct dealings between a claimant and a defendant. Adopting this analysis in *Prudential Assurance*, the Supreme Court reasoned that the use value of money may have been enriching to the defendant in a way that might be calculated by reference to compound interest (but cf. [80]), any such enrichment cannot be regarded as being “at the expense” of the claimant. The result is a further narrowing of the scope of the law of unjust enrichment.

Two technical issues arising from *Prudential Assurance* should be noted. First, the rejection of restitution claims for the time or use value of money does not mean that no interest is available at all. Rather, so long as the principal sum has not been repaid before the commencement of proceedings, simple interest is available under section 35A of the Senior Courts Act 1981. However, as with other claims, a defendant can avoid paying interest at all under the 1981 Act if the principal sum is repaid before proceedings commence. Secondly, in *Prudential Assurance*, the Revenue did not contest paying compound interest on unlawfully levied advance corporation tax which was subsequently set off against lawfully levied mainstream corporation tax between the date of payment and the date of set off. Section 35A cannot apply to such a claim, but an interest claim (however calculated) is nonetheless required as a matter of EU law. The Supreme Court did not have to decide whether the Revenue’s concession to calculate this remedy on a compound rather than a simple interest basis in those circumstances was correct, but it made oblique reference (at [78]) to “a number of potential solutions” that could be adopted in this corner of the law. Only time will tell what that means.

There are three more general points that bear emphasis. First, *Prudential Assurance* requires us to take the “direct dealings” rule seriously. It follows that other doctrines said to be part of the law of unjust enrichment may have to be re-characterised as different types of claim. In particular, the so-called “secondary liability” and “ignorance” grounds for restitution will need to be reconsidered because it is artificial to regard those claims as reversing direct transfers of value. In secondary liability cases, the direct transfer of value is
to the person owed the liability not the person primarily owing that liability. And ignorance cases are concerned with property rights not value, and also need not involve direct dealing between the parties. See further W. Day [2017] L.M.C.L.Q. 588, at 594, 600–01. Courts and commentators should not shrink from further narrowing the scope of the law of unjust enrichment since it would result in a more coherent, stable and defensible set of principles. But if that is unpalatable, an alternative solution would be to recognise that not all unjust enrichment claims adopt the same principles for the questions of “enrichment”, “at the expense” and “defences”: see ibid., at pp. 602–05.

Secondly, it should be asked whether abolition of compound interest treats the symptom but misses an underlying cause: the overly wide approach taken to the mistake-based claim for unlawfully levied taxes by adhering to the declaratory theory of case law. This maintains the “fairy tale” that judges do not make or change the law, despite the powerful dissects of Lord Browne-Wilkinson and Lord Lloyd in Kleinwort Benson Ltd. v Lincoln City Council [1999] 2 A.C. 349 (HL). The application of this theory has the effect that a claimant is fictitiously deemed to have made a mistake even where payment of the taxes was in fact in line with the settled understanding of law at the time of payment. Consequently, the claimant can seek restitution of taxes beyond the six-year limitation period that would apply to an unjust enrichment claim based solely on ultra vires receipt by the Revenue. As noted above, it is the lack of a limitation period for certain mistake-based claims that causes such disruption to the public finances. Prudential Assurance rightly commented that the majority’s approach in Kleinwort Benson was “straining the premise of theory” (at [63]). If the Supreme Court is willing to revisit the correctness of the House of Lords’ majority decision in Sempra Metals, it is to be hoped that it will be equally willing to revisit Kleinwort Benson at an opportune moment.

Thirdly, it is worth reflecting on the Supreme Court’s relationship with academia over the law of unjust enrichment. The majority speeches in Sempra Metals heavily cited the writings of Professor Peter Birks. In contrast, the judgments in Prudential Assurance did not really engage with academic writings at all – despite a striking similarity between the Supreme Court’s application of Investment Trust Companies to the question of compound interest and the arguments contained in R. Stevens (2018) 134 L.Q.R. 574 (an unpublished version of which had been read by members of the Supreme Court). This is not the first time that a criticism has been made of the currently constituted Supreme Court for a lack of appropriate citation: see A. Burrows (2017) 133 L.Q.R. 537, at 541–42, and P.S. Davies [2018] L.M.C.L.Q. 433, at 437–38. While past judgments may have over-cited academic texts in the field of restitution, it goes too far
the other way not to cite commentary which may have contributed posi-
tively to the Court’s reasoning.

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A BONFIRE OF RELIGIOUS LIBERTIES?

IN Case C-414/16, ECLI:EU:C:2018:257, Vera Egenberger had applied for a job at “Evangelisches Werk”, an auxiliary organisation of the Protestant Church in Germany, and appeared to have been unsuccessful only on the grounds of her (lack of) religious belief. She then pursued a claim against that organisation for an infringement of section 7(1) of the German General Law on Equal Treatment (the General Law), because she considered that she had been discriminated against on the grounds of religion in the application process. The problem that she faced was that section 9(1) of the General Law allowed a derogation from this rule for religious organisations “if a particular religion or belief constitutes a justified occupational require-
ment, having regard to the self-perception of the religious society . . . con-
cerned”. The General Law itself was supposed to be the implementing legislation for Council Directive 2000/78 (O.J. [2000] L 303/16) – the Equality Framework Directive (the Directive) – but appeared to differ from the Directive by allowing the derogation outlined in Article 4(2) of the Directive to be determined by “self-perception”. In addition, according to the CJEU, the German Federal Constitutional Court (the Constitutional Court) appeared to have used this derogation in its case law to conduct a mere “plausibility” review as opposed to a more stringent standard of review, with plausibility in this context meaning a plausible link between the job advertised and the need to proclaim the “church’s message” (at [31]). The German Federal Labour Law Court made a preliminary reference to the CJEU and asked, first, whether the standard of review outlined in the General Law was compatible with the Directive. Secondly, it asked whether the General Law should be disapplied in the case of a dispute between pri-
vate parties.

The CJEU’s answer to the first question was that Article 4(2) of the Directive required substantive review of any decision of a religious organi-
sation based on that derogation. The CJEU then outlined the kind of sub-
stantive balancing exercise under the principle of proportionality that the national court should adopt, in effect ignoring the standard of review under section 9(1) of the General Law. The Court left the most controver-
sial question until the end and concluded that, in a dispute between two pri-
ivate individuals, the national court is obliged to “ensure . . . the judicial