NCLR 2026/9

Condictio Indebiti – From a Protective Rule for the Payer to a Protective Rule for the Recipient over Three Decades

♦ *The article examines whether the Swedish doctrine of condictio indebiti has evolved from a framework for handling payments made by mistake into a framework for dealing with transfers without legal ground. It considers what such a transformation would entail, including the doctrine's relationship to contract law, principles governing the acquisition of ownership, and two distinct reliance principles. It also addresses whether the doctrine of condictio indebiti serves to protect the payer or the recipient. Above all, it focuses on developments in case law over the past three decades, as well as on the meaning and function of words. The article was originally published in Juridisk tidskrift 2024–25 pp. 406–446, under the title »Condictio indebiti – från skyddsregel för betalaren till skyddsregel för mottagaren på tre decennier«.** [*]

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1.1 Introduction

Descriptions of the doctrine of *condictio indebiti* found in Swedish legal literature generally state that its scope of application concerns payments made by mistake, primarily – but not necessarily exclusively – in the form of the payer's misconception regarding the existence or amount of a debt.[1] It is further generally stated that restitution constitutes the principal rule, but that exceptions may arise where the recipient, in justified good faith, has received and relied upon the payment, or where the payment constituted a legally binding disposition. The established account gives the impression that a mistake – or some other relevant error – on the part of the payer constitutes a requirement that must be satisfied for the principal rule on the right to restitution to be engaged.[2] Otherwise, the recipient is entitled to retain the funds. In that case, the mistake may be regarded as a specific ground of invalidity, and *condictio indebiti* as a particular rule governing the avoidance of an otherwise binding legal act.[3] On this view, it is reasonable to describe *condictio indebiti* as primarily affording protection to the payer, rather than, in the first instance, to the recipient.[4]

This view may be said to be consistent with the doctrine's Roman-law background. In Roman law, an erroneous payment was referred to as *solutio indebiti*, while *condictio indebiti* denoted the action by which the amount was reclaimed. A precondition for the right

* This text has originally undergone peer review.

1 See, inter alia, Aagaard, M. M. Rødvei, Obehörig användning av e-legitimation och läran om misstagsbetalning [Unauthorized Use of Electronic Identification and the Doctrine of Mistaken Payments], Juridisk tidskrift (JT) 2021–22 p. 868 f.; Andersson, J., Mindre reklamationsplikt – mer »allmän passivitetsverkan«? [Less Duty to Give Notice – More »General Effects of Passivity«?], Svensk juristtidning (SvJT) 2022 p. 396 note 32; Danielsson, C., *Condictio indebiti*: Vad krävs för att en misstagsbetalning skall bli bestående? [*Condictio Indebiti*: What Is Required for a Mistaken Payment to Become Final?], JT 2008–09 p. 432; idem, *Condictio indebiti* igen [*Condictio Indebiti* Again], JT 2011–12 p. 878; Gorton, L., *Condictio indebiti* i nyare svensk rättspraxis [*Condictio Indebiti* in Recent Swedish Case Law], Tidskrift utgiven av Juridiska Föreningen i Finland (JFT) 2005 p. 452 ff.; Hellner, J., Betalning av misstag [Mistaken Payment], JT 1999–2000 p. 413 f.; idem, Om felaktiga utbetalningar och liknande misstag vid försäkring [On Erroneous Payments and Similar Mistakes in Insurance], Rättsvetenskapliga studier ägnade minnet av Phillips Hult, Uppsala 1960, p. 176 f.; Herre, J. & Johansson, S. O., Svensk rättspraxis: Avtals- och obligationsrätt 2005–2019. Om förmögenhetsrättsliga förpliktelsers uppkomst, innehåll och avveckling [Swedish Case Law: Contract and the Law of Obligations 2005–2019. On the Formation, Content and Discharge of Obligations in Private Law], SvJT 2020 p. 841; Hult, P., *Condictio indebiti*, Juridisk debatt, Uppsala 1952, p. 48; Ingvarsson, T., *Condictio indebiti*. Fordringsrättsliga studier 01 [*Condictio Indebiti*. Studies in the Law of Obligations 01], Uppsala 2016, p. 21; idem, Fordringsrätt. En lärobok [The Law of Obligations. A Textbook], 2 ed., Stockholm 2021, p. 133 ff.; Lennander, G., Misstagsbetalning och kvittning i konkurs [Mistaken Payments and Set-Off in Bankruptcy], Festskrift till Torgny Håstad, Uppsala 2010, p. 435 f.; Mellqvist, M. & Persson, I., Fordran & skuld [Claims and Debts], 12 ed., Uppsala 2022, p. 36 f.; Oulis, M., Värdeersättning vid återgång [Compensation for Value upon Restitution], Uppsala 2021, p. 139; Schultz, M., *Condictio indebiti* och obehörig vinst vid felaktiga antaganden om momssatser [*Condictio Indebiti* and Unjustified Enrichment in Cases of Erroneous Assumptions about VAT Rates], Svensk Skattetidning (SvSkT) 2016 p. 578 f.; Schöldström, P., *Condictio indebiti* – ett tankeexperiment [*Condictio Indebiti* – A Thought Experiment], Festskrift till Jan Kleineman, Stockholm 2021, p. 761 ff.; and Åkerman, R., Hur dum får man vara? – något om rättsordningens syn på misstag [How Stupid May One Be? – Some Reflections on the Legal System's View of Mistakes], SvJT 2022 p. 13 f.

2 See, for example, Ingvarsson, Fordringsrätt [The Law of Obligations], 2021, p. 135; Lennander, Festskrift till Torgny Håstad, p. 436; Schultz, SvSkT 2016 p. 577 ff.; and Åkerman, SvJT 2022 p. 13. Compare also Hellner's statement in JT 1999–2000 p. 413, to the effect that the Swedish rule on *condictio indebiti* is »constructed as a mistake rule«.

3 Compare Danielsson, JT 2011–12 p. 885 ff., and Lennander, Festskrift till Torgny Håstad, p. 442. Compare also the Supreme Court's statement in *Royal* NJA 2008 p. 392 (at p. 401), to the effect that »the protection of good faith is in other respects no more far-reaching in the case of receipt of a payment made by mistake than in the case of *other so-called weak grounds of invalidity*« (emphasis added)

4 Lennander, Festskrift till Torgny Håstad, p. 442, thus states: »The starting point in the doctrine of *condictio indebiti* is that a payment made by mistake may be reclaimed, and from this perspective it is therefore, in essence, a rule in favour of the payer«.

to restitution was that the payment had been made as a result of an excusable mistake on the part of the payer.[5]

The doctrine of *condictio indebiti* has been developed in case law, albeit with due regard to policy considerations and other arguments advanced in the legal literature.[6] This entails that an accurate account of the doctrine must, of necessity, be based on a study of case law. Although the established account of *condictio indebiti* set out above appears in several decisions of the Supreme Court of Sweden, the Court has also, in cases connected with *condictio indebiti* over the past 30 years, almost invariably emphasised that the applicability of the doctrine depends on a payment or transfer of wealth having taken place without legal ground.[7] It has been questioned whether these statements merely constitute a form of boilerplate language lacking any underlying depth of intention;[8] they have been said to represent non-essential superstructures imposed upon a legal institution that stands on its own,[9] and have moreover been regarded as conceptualist reasoning that cannot readily be reconciled with common sense.[10] On the other hand, it has been contended that these statements contain keys that may be employed to resolve issues of delimitation,[11] and it has even been argued that it is not the mistake, but rather the absence of legal ground, that founds the payer's right to restitution, with the doctrine of *condictio indebiti* then serving to confer upon the recipient a right to retain the funds.[12] The recipient's lack of legal ground – or, in other words, the continued existence of legal ground on the part of the payer – thus constitutes the very requirement for the right to restitution, whereas a mistaken payment is merely a factual circumstance capable of being subsumed under that requirement. Accordingly, there exist two diametrically opposed views, differing not only as regards the substantive content of the rule, but also as to what, more precisely, the doctrine of *condictio indebiti* is taken to regulate. One view proceeds on the basis that the doctrine positively governs the payer's right to restitution, while the other holds that such a right follows from other rules but may be negatively excluded in accordance with the doctrine.

The purpose of this article is to provide, through a close study of *condictio indebiti*-related case law of the Swedish Supreme Court from recent decades, an accurate account of the doctrine as it stands in modern Swedish law. The study focuses to a significant extent on the Court's choice of language and on the meanings and functions that such language has been given through its use in judicial application. The study raises questions concerning the relationship between the doctrine of *condictio indebiti* and the law of contract, concerning legal acts of various kinds, and concerning two distinct principles of reliance. The relationship to principles concerning the acquisition of ownership is also addressed. Inter alia, the following conclusions are reached. *Condictio indebiti* should not be described as a rule of invalidity. The doctrine, as it has developed in recent times, is a protective rule operating in favour of the recipient of the payment. It is connected to ideas concerning the acquisition of ownership, namely that a legal ground is required for the acquisition of ownership, and that possession alone does not constitute such a ground. It is further connected to a contractual distinction between

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5 Zimmermann, R., The Law of Obligations. Roman Foundations of the Civilian Tradition, Oxford 1996, p. 849 ff.

6 As a particularly influential work, Hult's contribution *Condictio indebiti* is often highlighted, originally published in Festskrift till Vilhelm Lundstedt, Uppsala universitets årsskrift, Uppsala 1947, p. 240 ff., and subsequently republished in a somewhat expanded version in the collected volume Juridisk debatt, Uppsala 1952, p. 42 ff.

7 At the outset, the statements were more cautious in nature and linked to the underlying rationale of the doctrine of *condictio indebiti*, whereas in more recent years the absence of legal ground (or perhaps more accurately, the payer's retained legal ground) has instead been identified as the very basis of the right to restitution. NJA 1994 p. 177: »In the condictio indebiti situations referred to, there has been *an unintended transfer of wealth that lacks legal ground.*« NJA 1999 p. 575: »One of the principal arguments that has traditionally been invoked in support of the right to restitution in classic *condictio indebiti* situations is that, if the recipient is allowed to retain what he has received, *a transfer of wealth arises in his favour without legal ground*: he thereby makes an unjustified enrichment.« *The Tax Account I* (*Skattekontot* I) NJA 2011 p. 749: »Whether an erroneous payment has been made as a result of mistake or mere clerical error, or whether it has been made in connection with a payment order or payment intermediation, is of subordinate importance. What is decisive instead is whether *the payment has been made without legal ground* and that the payment does not constitute a disposition, i.e. a payment where the payer voluntarily chooses to pay regardless of whether a payment obligation in fact exists.« *The Printing VAT I* (*Tryckerimomsen I*) NJA 2015 p. 1072*: »The main rule in cases of payment without legal ground is that restitution shall be made.« The Tax Account II* (*Skattekontot II*) NJA 2016 p. 1074: »*The doctrine of condictio indebiti is directed at payments made without legal ground*. The starting point is that such a payment gives rise to an obligation on the part of the recipient to make restitution, an obligation which the recipient may, under certain conditions, avoid«. *The Dental Care Subsidy* (*Tandvårdsstödet*) NJA 2020 p. 334: »Where a debtor, with discharging effect, pays a third party in accordance with the creditor's instruction, a *transfer of wealth* takes place from the creditor to the third party. Where the creditor's instruction did not intend such a transfer and the third party received the payment in bad faith […] *the wealth is to be restored*. In other cases, the creditor's right depends on what appears reasonable following a balancing of the opposing interests of the creditor and the third party. The balancing is to be carried out in accordance with the criteria developed within the framework of the doctrine of *condictio indebiti* […].« *Independent Finance* NJA 2016 p. 933: »*The main rule in Swedish law is that a payment that has been received without legal ground shall be returned*.« *The Real Estate Agent's Client Account* (*Fastighetsmäklarens* klientmedelskonto) NJA 2023 p. 339: »*The principles of condictio indebiti are directed at payments made without legal ground*. The starting point is that such a payment gives rise to an obligation on the part of the recipient to make restitution, an obligation which the recipient may, under certain conditions, avoid.« (All emphasis added)

8 Aagaard, JT 2021–22 p. 873.

9 Danielsson, JT 2011–12 p. 886; Ingvarsson, *Condictio indebiti*, 2016, p. 26 ff.; and Hellner, JT 1999–2000 p. 413.

10 Hellner, JT 1999–2000 p. 15.

11 Schultz, M., Obehörig vinst-motiveringar [Justifications Based on Unjustified Enrichment], SvJT 2012 p. 380.

12 Lindskog, S., Betalning. Om kongruent infriande av penningförpliktelser och andra betalningsrättsliga frågor [Payment. On Congruent Performance of Monetary Obligations and Other Issues in Payment Law], 3 ed., Stockholm 2022, pp. 886 ff. and 942 ff.; and idem, Felaktig betalningsanvisning – några funderingar efter »Tandvårdsstödet« [Erroneous Payment Instructions – Some Reflections Following »The Dental Care Subsidy«], SvJT 2021 p. 661 f. note 21. A similar account is presented in Almkvist, G., Förmögenhetsbrott och förmögenhetsrätt. Om straffansvaret i 8 och 10 kap. brottsbalken och dess förhållande till civilrätten [Property Offences and Private Law. On Criminal Liability under Ch. 8 and 10 of the Swedish Penal Code and Its Relationship to Civil Law], p. 311 at and including note 1008.

legal acts giving rise to obligations and acts of performance, as well as to a form of contractual logic according to which an act of performance cannot, in principle, exist without a corresponding obligation.

2 The Invalidity Perspective and Its Implications

The study takes as its point of departure *condictio indebiti*-related case law of the Swedish Supreme Court from the 1980s, 1990s, and 2000s. In this body of case law, the doctrine of *condictio indebiti* was typically described as »the principles governing the recovery of payments made by mistake«.[13] These principles were stated to »be directed at situations in which a person makes a payment to another under the mistaken assumption that he is indebted to that person in that amount, or where a debtor pays an amount exceeding the actual debt«.[14] When the Court, in *Royal* NJA 2008 p. 392, addressed *condictio indebiti*, the »receipt of a payment made by mistake« was treated as a ground of invalidity, equated with »other so-called weak grounds of invalidity« under Sec. 29–34 of the Swedish Contracts Act.[15] Along similar lines, in NJA 2009 p. 182, a mistaken payment received in bad faith was described as »invalid« vis-à-vis the recipient »under the rules of *condictio indebiti*«.[16] In several of the cases, it is stated that the principal rule in *condictio indebiti* is that the payer has a right to restitution, but that exceptions may arise, in particular where the recipient has received the payment in good faith and adjusted their position accordingly.[17]

The wording of these descriptions points towards a particular understanding of the fundamental structure of the doctrine of *condictio indebiti* and its place within the legal system. This approach, which may be termed the invalidity perspective,[18] may be described as follows.

The references to invalidity, and the linkage to the rules in Ch. 3 of the Swedish Contracts Act – entitled »On the invalidity of legal acts« – give the impression that a payment is to be regarded as a legal act, irrespective of whether it has been made in the absence of any underlying debt. A legal act is, by definition, binding.[19] This means that it cannot, in principle, be reclaimed, at least not once it is too late to revoke it.[20] In line with this, the Court has, in NJA 1994 p. 177, in connection with *condictio indebiti*, stated that »it lies in the legal function of a payment to constitute a final settlement of an outstanding matter between the parties«.[21]

A legal act may, however, be invalid if the requirements of a rule on invalidity are satisfied. In such a case, the performance is to be returned.[22] Since the principal rule in *condictio indebiti* is precisely restitution, it also becomes natural to regard the doctrine as a rule of invalidity. The description that the doctrine is directed at cases in which payment is made under the mistaken assumption that a debt exists or that an existing debt is greater than it in fact is, thus suggests that the central requirement for the consequence of invalidity is a mistake as to indebtedness.

Different perspectives on, or ways of explaining, a legal concept may entail different implications as regards such matters as the boundaries of its scope of application, its protective purpose, and its legal consequences.[23] Certain implications for *condictio indebiti* that follow from the invalidity perspective will be outlined below.

A first such implication concerns the question of who constitutes the protected party under the doctrine. If a payment is a binding legal act despite not having been preceded by an obligation to pay, but may nonetheless be reclaimed by way of *condictio indebiti*, this implies that the doctrine constitutes a protective rule operating

13 NJA 1999 p. 575 at p. 585; NJA 2001 p. 353 at p. 361; and *The Interest Screw* (Ränteskruven) NJA 2005 p. 142 at p. 166. In the 1980s case *Stångåstaden* NJA 1989 p. 224, the wording of the description reproduced above was not used verbatim, but almost. There, at p. 235, *condictio indebiti* was described as »the legal principles that may be considered to govern the recovery of payments made by mistake«.

14 NJA 1999 p. 575 at p. 585. Compare NJA 1994 p. 177 at p. 183, where the scope of application is further specified to the effect that *condictio indebiti* is said to concern cases where a person »makes a payment to another in the belief that he owes that person the amount and the recipient receives the amount in the same belief. After some time, it is discovered that no debt existed or that the amount of the debt was lower than what was paid.« The same description appears verbatim in Justice Lind's separate opinion in *Stångåstaden* NJA 1989 p. 224, at p. 239.

15 *Royal* NJA 2008 p. 392 at p. 401.

16 NJA 2009 p. 182 at p. 187.

17 NJA 1999 p. 575 at p. 585; NJA 2001 p. 353 at p. 361; *The Interest Screw* NJA 2005 p. 142 at p. 166. Compare also *Royal* NJA 2008 p. 392 at p. 401.

18 In a recent Norwegian dissertation, Rønning, T., *Condictio indebiti.* Et bidrag till norsk retts ulovfestede prinsipper for oppgjørskorrektion [*Condictio Indebiti*. A Contribution to the Unwritten Principles of Norwegian Law on Adjustment of Settlements], Oslo 2024, p. 93 ff., three central explanatory models for the doctrine of *condictio indebiti* are identified, which have been applied in legal practice or advocated in the literature. Rønning refers to these models as the »contract model«, the »enrichment model«, and the »vindication model«. The invalidity perspective described in this section may be regarded as a subcategory of Rønning's contract model, and the ownership perspective discussed below corresponds in essence to his vindication model (although, in my view, the term ownership perspective or ownership model is preferable, since the label of ownership may be applied both to the payer's right to restitution and to the recipient's right to retain the funds, whereas the label of vindication is suitable only for the former).

19 Mossberg, O., Rättshandlingsbegreppet: kriterierna [The Concept of a Legal Act: The Criteria], JT 2023–24 p. 75 note 11.

20 In *Stensele's Revoked Payment Order* (*Stenseles återkallade betalningsuppdrag*) NJA 1995 p. 25, the Supreme Court appears to have taken the view that a payment cannot be revoked once the payer has lost control over the amount, or at least once the payment has reached the recipient. This suggests that revocation cannot be effected up until the point at which the recipient has acquired knowledge of the payment, which would otherwise have been in line with Sec. 7 of the Swedish Contracts Act. See also NJA 1999 p. 575, where the Court appears to have proceeded on the basis that the recipient of a payment to an account is to be deemed to have acquired knowledge of it, pursuant to Sec. 39 of the Swedish Contracts Act, already upon receipt. This may indicate that the principles underlying Sec. 7 of the Swedish Contracts Act are in themselves applicable to account payments, but that the recipient is then deemed to have acquired knowledge of, or to have taken notice of, the payment already when it reaches the recipient. Even in that case, the rule in practice thus becomes that revocation is not possible after receipt. However, the functioning of the recipient's payment system may be of relevance in this regard; compare *The Tax Account II* NJA 2016 p. 1074 paras 15–18.

21 NJA 1994 p. 177 at p. 183.

22 See, for example, Ingvarsson, T., Ogiltighet och rättsföljd [Invalidity and Legal Consequences], Stockholm 2012, p. 87.

23 Compare Unnersjö, A., Regress. Begreppet regressrätt och solidarregress [Recourse. The Concept of the Right of Recourse and Contribution between Joint and Several Debtors], Stockholm 2021, p. 271 ff.

in favour of the payer.[24] The fact that exceptions to the principal rule of restitution may result in the recipient being entitled to retain the funds does not detract from this, since the payer is, in any event, afforded a tentative opportunity to reclaim something that would otherwise not even tentatively have been recoverable. The circumstance that the restitutory effect of the doctrine constitutes a departure from the position that would otherwise apply, in favour of the payer, in turn suggests that a certain degree of caution is called for in its application. In other words, the invalidity perspective calls for a measure of generosity towards the recipient when assessing whether, in a given case, an exception should be made to the doctrine's principal rule of restitution. This may perhaps, at least in part, explain why Swedish courts – as Gorton put it in the mid-2000s – »have been rather reluctant to grant the party who has made a mistaken payment a right to repayment in disputes of this kind«.[25]

A requirement to the effect that the payer is under a mistake as to the existence of a debt gives rise to further implications regarding the delimitation of the doctrine's scope of application. Such a requirement entails that no right to restitution arises where the payer makes the payment in the knowledge that no debt exists, or where the payer is indifferent to that question. A line is thus drawn whereby such payments are treated as final.[26] An intentional payment of a debt arising from a so-called immoral agreement (*pactum turpe*) is likewise excluded. A further line is drawn in relation to cases where a debt in fact exists or corresponds to the amount paid, but where the payer has made a mistake in some other respect, for example where a payment intermediary has mistakenly assumed that the principal had the means to reimburse an outlay.

A further implication of the invalidity perspective is that *condictio indebiti* and the contractual rules on invalidity, such as the provision on mistake in declaration in Sec. 32(1) of the Swedish Contracts Act and the doctrine of assumptions (*förutsättningsläran*), are, in principle, of equal standing.[27] The invalidity perspective thus does not entail any given logical order in which these are to be applied, other than that it may be considered that, by virtue of the principle of *lex specialis*, *condictio indebiti* should be applied in the first instance, as a kind of special rule governing payments.[28]

3 The Metamorphosis of the Doctrine Through the Phases of Legal-Ground Terminology

3.1 Three Developmental Phases

In *condictio indebiti*-related case law from recent decades, the Supreme Court has, as noted, repeatedly stated that the doctrine is directed at payments made without legal ground.[29] The function and significance that the Court has attributed to these statements do not, however, appear to be the same in all cases. Broadly speaking, it is possible to distinguish between three different categories that have developed over time, as if they represented distinct developmental phases. In the first of these categories, the absence of legal ground operates as a purposive consideration. In both the second and the third categories, the absence of legal ground instead functions as a central requirement, but the legal consequence of that requirement being satisfied differs between the two. In the second category, the absence of legal ground operates as a requirement triggering the principal rule of the payer's right to restitution, whereas in the third category it functions as a condition for the application of rules that may confer upon the recipient a right to retain the funds. Moreover, the notion of absence of legal ground is given somewhat different conceptual content: in the second category it is equated with mistake, whereas in the third the expression more closely denotes the absence of a claim. When the relevant case law is discussed below, the discussion is structured on the basis of this categorisation. The purpose of the discussion is to demonstrate that, through the developmental phases that these categories may be said to represent, the doctrine of *condictio indebiti* has undergone a form of metamorphosis, the implications of its »new« form differing from those associated with the invalidity perspective. This development appears to have been made possible by the introduction of the terminology of absence of legal ground and by its flexibility as regards both meaning and function.[30]

3.2 Phase One: Absence of Legal Ground as a Purposive Argument; the 1990s Cases

Already in the 1990s cases NJA 1994 p. 177 and NJA 1999 p. 575, statements concerning the absence of legal ground are to be found.[31] In the 1994 case, a bank had credited a customer's account as a result of having mistakenly believed that it had received a payment instruction from a debtor of that customer. In the 1999 case, a bank had effected a payment on behalf of a customer under the mistaken assumption that there were sufficient funds in the customer's account to cover the payment. The Supreme Court considered that

24 Compare Lennander, Festskrift till Torgny Håstad, p. 442.

25 Gorton, JFT 2005 p. 469.

26 That not only the situation of knowledge but also that of indifference is excluded may be considered to be confirmed by the fact that, in the 1990s cases NJA 1994 p. 177 and NJA 1999 p. 575, the Supreme Court held that *condictio indebiti* could not (or at least »not without further consideration«) be applied where a payment intermediary made a payment on behalf of another while mistakenly believing that a payment instruction existed or that the principal had sufficient funds for the payment. For a payment intermediary, it is in itself immaterial whether the recipient has a claim against the principal.

27 Compare Lennander, Festskrift till Torgny Håstad, p. 442. See also Ingvarsson, *Condictio indebiti*, 2016, p. 25 f.

28 Compare *The Tax Account I* NJA 2011 p. 739 paras 5 and 10; Danielsson, JT 2011–12 p. 885 ff.; and Lennander, Festskrift till Torgny Håstad, p. 442.

29 See references, and quotations reproduced, above in note 8 under Section 1.

30 This is not to suggest that the terminology itself was the underlying reason for the shift, but rather that it has served as a means of enabling it. For some speculations regarding possible underlying motives, see below under Section 5 at and including note 124.

31 It was at this point that the notion of absence of legal ground made its broad entry into Swedish *condictio indebiti* case law, although it may have appeared sporadically earlier. The expression »without legal ground« was already used by Justice Sjögren in his separate opinion in the *condictio indebiti* case NJA 1912 p. 562. See also the statements concerning German law in the memorandum authored by Justice Alexandersson, reproduced in NJA 1933 p. 25.

neither case constituted a »traditional« *condictio indebiti* situation, since – as it was at least expressed in the 1994 case – »the payment had not been made by a person who believed himself to be a debtor«.[32] For the purpose of determining whether »the principal right to restitution« should nevertheless be recognised, the Supreme Court in both cases proceeded by reference to the considerations underlying the right to restitution in the traditional situation. In the 1994 case, these considerations were stated to be that there had been "»an unintended transfer of wealth lacking legal ground«.[33] Along similar lines, the Supreme Court stated in the 1999 case that »[o]ne of the principal arguments advanced in support of the principal right to restitution in traditional *condictio indebiti* situations is that, if the recipient of the payment is allowed to retain what he has received, a transfer of wealth arises in his favour without legal ground: he is unjustly enriched«".[34] In the 1994 case, it was found that no transfer of wealth without legal ground arose from the recipient being allowed to retain the funds, since the amount had been set off against due claims which the recipient held against the person on whose behalf the bank had believed itself to be acting. A right to restitution was therefore denied. In the 1999 case, the Supreme Court stated that the doctrine of *condictio indebiti* may also be applied in a case of payment by a third party, provided that the circumstances of the particular case are such that the considerations justifying a right to restitution in the traditional situation are present. Although the recipient was assumed to have received payment in respect of a valid claim, the situation was said to be capable of approximating the traditional case where the debtor lacked the means to pay and the recipient had therefore regarded the claim as worthless. Since, however, there was no evidence in the case as to the debtor's ability to pay, there were no grounds for applying the principle of restitution on that basis. Having also considered another ground for an extended or analogous application of the doctrine of *condictio indebiti* – namely that an obligation to make restitution might arise where the recipient had been more negligent than the payer – the Supreme Court concluded that the doctrine should not be applied in the case.[35]

In both of these cases, the reference to a transfer of wealth without legal ground thus served as a description of the purpose or function of the doctrine of *condictio indebiti*. That purpose or function was used as a point of reference in assessing whether the doctrine should be given effect beyond its immediate scope of application. Since no transfer of wealth was considered to arise from the recipient being allowed to retain the funds, the Supreme Court held in the 1994 case that there were no grounds for extending the scope of application of *condictio indebiti*. In the 1999 case, the absence of legal ground was linked to the meta-norm of unjustified enrichment,[36] and was considered to justify or explain the principal right to restitution in the traditional cases. If unjustified enrichment could be established also outside the traditional cases, this could support an extension of the doctrine's scope of application. In neither of the decisions does the Supreme Court appear to have intended the absence of legal ground to denote a requirement for the consequence of restitution in *condictio indebiti*; rather, the Court's underlying approach to the doctrine appears to have been the invalidity perspective.[37]

3.3 Phase Two: Absence of Legal Ground as Mistake and as a Requirement; The Tax Account I and The Printing VAT I

3.3.1 The Doctrine Takes Precedence over the Law of Contract

The next occasion on which the Supreme Court linked *condictio indebiti* to the absence of legal ground was in *The Tax Account I* (*Skattekontot I)* NJA 2011 p. 739. In that case, an accounting firm, which was to make tax payments to the Swedish Tax Agency on behalf of two client companies, due to a clerical error made both payments to the tax account (i.e. the taxpayer's account with the Swedish Tax Agency used for the settlement of taxes) of one of the companies. This resulted in a surplus on that company's tax account, which the Tax Agency set off against an older outstanding tax liability of that company. When the mistake came to light, the other company demanded that the misdirected payment be reallocated to the correct tax account, but the Tax Agency refused. The accounting firm covered the deficit on the latter company's tax account, acquired that company's claim against the Tax Agency, and sought repayment of the amount from the Agency. As legal grounds, it relied primarily on *condictio indebiti* and, in the alternative, on the contention that it had made a mistake in declaration under Sec. 32 of the Swedish Contracts Act of which the Tax Agency had been in bad faith. The Tax Agency argued that the doctrine of *condictio indebiti* was not applicable and that the misdirection constituted a mistake in declaration of which the Agency had been

32 NJA 1994 p. 177 at p. 184.

33 NJA 1994 p. 177 at p. 183.

34 NJA 1999 p. 575 at p. 585.

35 That is, at any rate, how I interpret it. However, the Supreme Court's formulations in the relevant parts of the reasoning are unusually vague. It is also possible to view it as the Court considering itself to be applying a kind of extended version of the doctrine of *condictio indebiti*, and that it was within the framework of that application that the Court reached the conclusion that no right to restitution existed; compare Danielsson, JT 2011–12 p. 887 note 28.

36 The term »meta-norm« is borrowed from *The Paying Cohabitant* (*Den betalande* sambon) NJA 2019 p. 23 para. 20, where the Supreme Court states that unjust enrichment may be used in different senses, either as an independent legal rule or as a meta-norm underlying and explaining various rules within the legal system and capable of influencing the application of the law in different ways.

37 However, it may be that the Supreme Court in NJA 1994 p. 177 should be understood as having proceeded from a different, more open perspective. In that case, the Court did not state that there is any particular main rule governing payments made by mistake. It merely explained that, in the traditional *condictio indebiti* situations, the question arises whether the payer is entitled to recover the mistaken payment or whether the recipient is entitled to retain it. It was said that this depends on a number of different factors, which may vary from case to case, and on which of the competing interests deserves to prevail. One may gain the impression that the Court regarded it as an entirely open question whether a mistaken payment should be reversed or allowed to stand, and that the matter is to be determined by a discretionary assessment. The reporting judge in the case was Justice Lind, who had previously advocated precisely such an open approach to the doctrine of *condictio indebiti* in his addendum to his dissenting opinion in *Stångåstaden* NJA 1989 p. 224. An open overall assessment of this kind appears to represent the law in Norway; see Rønning, *Condictio indebiti*, 2024, p. 14 ff. (Rønning himself, however, at p. 147, advocates a somewhat more structured approach, with restitution as the main rule and the right to retain as an exception.)

in good faith, with the consequence that no obligation to repay arose, Sec. 32 of the Swedish Contracts Act *e contrario*.

In paragraph 6, the Supreme Court described the doctrine of *condictio indebiti* as follows:

"*The rules on condictio indebiti are directed at cases in which a person has paid a debt that did not exist or has paid an excessive amount, all in the mistaken belief that a payment obligation existed. In such cases, the payment has been made by mistake, that is, without legal ground.*"

This description appears to be entirely in line with the invalidity perspective, even though the expression »without legal ground« is introduced as a synonym for »by mistake«. However, in paragraph 8, the Supreme Court also provided the following additional clarification to the description:

"*Whether an erroneous payment has been made as a result of a mistake or a mere clerical error, or whether such a payment has been made in connection with a payment instruction or payment intermediation, is of secondary importance. What is decisive instead is whether the payment has been made without legal ground and that the payment does not constitute a disposition, that is, a payment where the payer voluntarily chooses to make the payment irrespective of whether a payment obligation in fact exists.*"

When the two cited paragraphs are read together, it becomes apparent that the Supreme Court, by introducing the notion of absence of legal ground, managed to convey that the application of *condictio indebiti* both requires that a payment has been made as a result of a mistake as to indebtedness (para. 6: »all in the mistaken belief that a payment obligation existed«) and that such a mistake is not required (para. 8: »mistake […] is of secondary importance«). The Court thus downplayed the requirement that the payment must have been made under a mistake as to the existence or the amount of a debt. Instead, it is stated that the payment must have been made without legal ground – which the Court appears to have equated with »by mistake« – and that it does not really matter what caused this absence of legal ground or, in other words, what the mistake consisted of.

Thereafter, the Court stated, with comparative reference inter alia to NJA 1999 p. 575, that the question of the Swedish Tax Agency's obligation to repay should, in the first instance, be assessed under the doctrine of *condictio indebiti*, that is, in preference to a contractual assessment based on reliance under Sec. 32 of the Swedish Contracts Act. It was then observed that there was no legal ground for the payment made by the accounting firm to the wrong tax account, with the consequence that the doctrine of *condictio indebiti* was applicable to the payment. Since the Supreme Court considered that the Tax Agency could not be regarded as having, in good faith, adjusted its position in reliance on the payment, the payment was to be returned.

Like the 1990s cases, *The Tax Account I* concerned a third-party payment, albeit with the difference that the third party was not a bank but an accounting firm, and that the claim for restitution was based not on the firm's own right but on a claim acquired from the debtor on whose behalf the payment had been made. In certain respects, the decision also appears to be connected with the two earlier cases. Terminologically, the Court's use of the expression »payment without legal ground« echoes the 1990s cases' formulation »transfer of wealth without legal ground«. Moreover, in both *The Tax Account I* and the 1990s cases, the absence of legal ground is given decisive significance, albeit in different ways.

There are, however, also significant differences. In the 1990s cases, the absence of legal ground, as noted, concerned the function of the doctrine of *condictio indebiti*, and was accorded significance in determining whether the doctrine should be applied beyond its immediate scope of application (as defined on the basis of the invalidity perspective). NJA 1994 p. 177 conveys that cases in which the payer did not believe himself to be a debtor – thus, cases of third-party payment – fall outside the scope of application, while NJA 1999 p. 575 conveys that the doctrine may, by way of exception, be applied in cases of third-party payment where the recipient, due to the debtor's lack of ability to pay, regarded the claim as worthless, or where the recipient was more negligent than the payer. *The Tax Account I*, by contrast, conveys that there is, in principle, no such limitation on the applicability of the doctrine arising from the fact that it is an actually existing debt that has been mistakenly paid by a third party.[38] The explanation appears to be that, through the decision, the absence of legal ground was transformed from a purpose or function underlying a requirement of mistake as to indebtedness into constituting, in itself, the decisive requirement for the consequence of restitution.

Moreover, the notion of absence of legal ground is given a different conceptual content in the decision. In the 1990s cases, a transfer of wealth without legal ground referred to a payment which, as a result of a mistake as to indebtedness, was, so to speak, directed towards a non-existent claim, or alternatively to a third-party payment of an existing claim which the creditor, due to the debtor's lack of ability to pay, had valued at zero. In *The Tax Account I*, however, the absence of legal ground was instead used as a synonym for mistake. This reflects a broad conception of mistake. The concept, we are told, encompasses »mistake«, »mere clerical error«, or some form of »erroneous payment« in connection with payment instructions and payment intermediation.[39] In principle, the boundary appears to be drawn only against what might be termed »voluntary errors«, having regard to how the Supreme Court defined the notion of a disposition: »a payment where the payer voluntarily chooses to make the payment irrespective of whether a payment obligation in fact exists«.[40]

With such a concept of absence of legal ground, operating as the central requirement for the obligation to make restitution, it no longer appears possible to regard the doctrine of *condictio indebiti* as being of equal standing with the contractual rules on invalidity,

38 Admittedly, there were material differences between the 1990s cases and *The Tax Account I* as regards the circumstances surrounding the payment. In *The Tax Account I*, the payment had been made by an accounting firm rather than a bank; it had not been prompted by a mistake as to motive but instead involved a payment combined with an erroneous designation; and the accounting firm did not base its claim on a right of its own but on a claim assigned to it by the debtor. This could explain why the outcome of the case differed, without it being necessary to regard the decision as entailing a departure from the positions expressed in the 1990s cases. At the same time, however, it does not appear that the Supreme Court intended to attach any significance to these differences. On the contrary, the impression is that the Court sought to distance itself from the underlying approach to third-party payments reflected in the 1990s cases. This is supported by the categorical statement that it is of subordinate importance whether an erroneous payment has been made as a result of mistake, mere clerical error, or error in connection with a payment order or payment intermediation, as well as by the fact that it was even highlighted in the headnote that the case concerned a third-party payment, despite the fact that the Court did not, strictly speaking, need to mention this circumstance at all, since the third party did not base its claim on a right of its own.

39 Para. 8 of the Supreme Court's reasoning.

40 Para. 8 of the Supreme Court's reasoning.

as implied by the invalidity perspective. Rather, what is involved here appears to be a strictly subjective concept of mistake, proceeding from the perspective of the payer, without regard to how the recipient may have perceived the situation. That said, within the framework of the doctrine's application, an objective assessment is subsequently to be made – when determining whether an exception should be made to the principal right to restitution – of the recipient's possible reliance on, and adjustment of position in response to, the correctness of the payment. The placement of *condictio indebiti* in a hierarchical order prior to the contractual rules is further reinforced by the fact that the Supreme Court considered that the claim in the case should, in the first instance, be assessed under the doctrine, in preference to the contractual principle of reliance.[41]

3.3.2 The Beginning of a Shift

It is not entirely clear where, within the present categorisation or developmental-phase framework, the case *The Printing VAT I* (*Tryckerimomsen I*) NJA 2015 p. 1072 is to be placed. The decision has been regarded as something of an anomaly within Swedish *condictio indebiti* case law, based inter alia on the view that no genuine mistake attended the payment at the time it was made.[42] Such a view is, however, dependent on the concept of mistake one adopts, and if regard is had to the broad understanding of mistake/absence of legal ground articulated by the Supreme Court in *The Tax Account I*, there can be no doubt that a mistaken payment was also present in *The Printing VAT I*. The reason why the decision is difficult to place within the taxonomy is instead that, in its descriptions of *condictio indebiti* and its constituent elements, the Court begins to exhibit a certain shift from Phase Two towards Phase Three. Notwithstanding this, I have chosen to classify the case under Phase Two. This is because, when read in isolation, the decision does not entail any real departure from *The Tax Account I*. The shift becomes apparent only when the case is viewed in retrospect, in the light of subsequent decisions.

The background to the case was as follows. Two publishing houses had, during the period 2005–2007, had books printed by a printing company. The publishers paid the invoiced price and VAT. The printing company accounted for the VAT to the Swedish Tax Agency. The invoiced VAT corresponded to 25 per cent of the price, which was consistent with the view generally prevailing at the time as to the VAT rate applicable to printing services. However, following a decision of the European Court of Justice delivered in 2010,[43] the Swedish Tax Agency subsequently changed its position, such that printing services were to be subject to VAT at a rate of only six per cent. The Swedish Tax Agency refunded to the printing company the portion of the VAT accounted for corresponding to the difference between the two rates, and the publishers were instead reassessed for that amount. The publishers sought repayment of the same amount from the printing company. They argued that an obligation to repay followed either from a contractual right, *condictio indebiti*, the doctrine of unjustified enrichment, Sec. 36 of the Swedish Contracts Act, or the doctrine of assumptions (*förutsättningsläran*).

The Supreme Court chose, in the first instance, to examine whether an obligation to repay arose under the doctrine of *condictio indebiti*. The Court repeated the general description of the doctrine set out in *The Tax Account I*. Accordingly, the doctrine was said to concern recovery where a person has made a payment under a mistake as to the existence or the amount of a debt, while at the same time it was explained that it is of secondary importance whether the erroneous payment was made as a result of, inter alia, such a mistake. Once again, what was said to be decisive was »whether the payment was made without legal ground and does not constitute a disposition in the sense that the payer has voluntarily chosen to make the payment irrespective of whether a payment obligation in fact exists«.[44] The Court stated that »[t]he principal rule in the case of a payment made without legal ground is that restitution is to be made«.[45] Thereafter, it was explained that the recipient may, however, be entitled to retain the funds under certain conditions. The criteria for such a right of retention were formulated in a somewhat more formalised manner than in earlier decisions: a right of retention arises where the recipient had reasonable grounds to believe that he or she was entitled to the funds and, in continued justified good faith, adjusted his or her position accordingly, and where, following an overall balancing of interests, it appears justified that the payer should lose the right to restitution. The recipient bears the burden of proof that the circumstances are such that the payer's right to restitution should be denied.

In its assessment of the case, the Court stated that the publishers had paid VAT at an excessively high invoiced rate and that the payment had been made without legal ground. It was therefore to be returned, unless the doctrine of *condictio indebiti* required otherwise. Since the VAT rate applied had been generally accepted at the time, and since, according to the Court, this was not a case of such a mistake of law as the printing company itself should bear the risk for, the requirement of good faith under *condictio indebiti* was considered to be satisfied. However, the requirement of adjustment of position under *condictio indebiti* was not considered to be satisfied, with the result that the printing company was required to repay the excess VAT.

The Supreme Court's descriptions of *condictio indebiti* in *The Printing VAT I* are in line with those given in *The Tax Account I*. The requirement of a mistake as to indebtedness is once again relegated to the background, and the absence of legal ground is presented as the central requirement for the applicability of the doctrine. The fact that the Court, without any hesitation, found that the payment in the case had been made without legal ground and that it should therefore, as a starting point, be returned also suggests that, as in *The Tax Account I*, a rather broad concept of absence of legal ground – or mistake – was at play. The fact that the printing company had invoiced, and the publishers had paid, excessive VAT was due to a view generally prevailing at the time – a kind of mistake of law at a societal level. Previously, the prevailing view

41 Compare Danielsson, JT 2011–12 p. 885 ff.

42 Ingvarsson, *Condictio indebiti*, 2016, p. 61 ff.

43 Graphic Procédé, C-88/09, EU:C:2010:76.

44 The Printing VAT I NJA 2015 p. 1072 para. 10.

45 Para. 11 of the Supreme Court's reasoning. The statement was supported by a »cf., e.g.« reference to NJA 1933 p. 25; NJA 1944 p. 653; NJA 1951 p. 187; NJA 1961 p. 18; NJA 1970 p. 539; *Stångåstaden* NJA 1989 p. 224; NJA 2001 p. 353; *The Interest Screw* NJA 2005 p. 142; and *The Tax Account I* NJA 2011 p. 739; and by a »cf. also, inter alia« reference to Hult, Juridisk debatt, 1952, pp. 42–89; Danielsson, JT 2008–09 pp. 434–439; Lennander, Festskrift till Torgny Håstad, pp. 427–446; Adlercreutz, A. & Gorton, L., Avtalsrätt I [Contract Law I], 13 ed., Lund 2011, pp. 295–297; Danielsson, JT 2011–12 pp. 878–891; Lindskog, Betalning [Payment], 1 ed., Stockholm 2014, Section 16; and Mellqvist & Persson, Fordran & skuld [Claims and Debts], 10 ed., Uppsala 2015, pp. 37–41.

appears to have been that a restrictive approach was called for when it came to recognising a right to restitution in respect of payments made as a result of a mistake of law on the part of the payer, if such a right was not to be excluded altogether.[46] That position was likely connected with the view that the doctrine of *condictio indebiti* was applicable only to payments occasioned by a mistake on the part of the payer that was excusable, and that a mistake of law should accordingly, in principle, be regarded as inexcusable.[47] However, the Court did not express any view of that kind; rather, it appears to have been treated as almost self-evident that the situation fell within the concept of absence of legal ground.[48] The fact that the Court chose to examine the claim for restitution, in the first instance, under the doctrine of *condictio indebiti*, rather than on the basis of the other legal grounds advanced by the publishers, including Sec. 36 of the Swedish Contracts Act and the doctrine of assumptions (*förutsättningsläran*), may further be regarded as consistent with the Court's approach in *The Tax Account I*, where the doctrine was applied in preference to the contractual principle of reliance.

However, as noted above, the reasoning contains certain elements which, at least in retrospect, may be understood as a kind of segue into Phase Three. Unlike in earlier cases, including *The Tax Account I*, the principal rule was not stated to apply in *condictio indebiti*, but in respect of payments made without legal ground. Moreover, in its assessment of the case, the Court stated that the payment had been made without legal ground and should therefore be returned, unless the doctrine of *condictio indebiti* required otherwise. Furthermore, as noted, the Court refined the conditions under which the right to restitution is to be denied, and clarified that it is for the recipient to bear the burden of proving that the conditions for a right to retain the funds are satisfied. Here, one can discern the beginnings of a shift, whereby *condictio indebiti* is to cease to function as a basis for restitution in respect of payments made by mistake and instead come to operate as a basis for the right to retain funds received without legal ground.

3.4 Phase Three: Absence of Legal Ground as a Requirement and as the Counterpart to a Claim; 2016–

3.4.1 Analysis of Four Decisions

In only one decision following *The Printing VAT I* has the Supreme Court, in its reasoning, referred to the obligation to repay in cases of payment without legal ground as »the principal rule of *condictio indebiti*«: NJA 2016 p. 79.[49] In that decision, delivered in the wake of *The Printing VAT I*,[50] it was not the right to restitution as such that constituted the primary issue for the Court's determination. The precedential issue was whether a printing company's obligation to repay overcharged VAT on printing services should be accompanied by an obligation to pay statutory interest, and, if so, from what point in time such interest should accrue. Apart from that case, the Supreme Court has addressed *condictio indebiti*-related issues in five further reported decisions during the relevant period: *Independent Finance* (NJA 2016 p. 933), *The Tax Account II* (*Skattekontot II*) NJA 2016 p. 1074, *The Dental Care Subsidy* (Tandvårdsstödet) NJA 2020 p. 334, *Svartön's Price* (*Svartöns pris*) NJA 2022 p. 3, and *The Real Estate Agent's Client Account* (*Fastighetsmäklarens klientmedelskonto*) NJA 2023 p. 33.[51] The decision in *Svartön's Price* does not add much to the present analysis and will therefore be set aside in this section,[52] whereas the remaining four decisions will be examined.

3.4.2 Restitution and the Right to Retain are Separated

The background to the first case, *Independent Finance* NJA 2016 p. 933, was that a bankruptcy estate had, through transfers to the Swedish Enforcement Authority and by way of set-off in connection with the repayment of taxes and charges, paid parts of a VAT debt

46 See, for example, Justice Alexandersson's separate opinion in NJA 1933 p. 25; Justice Lind's separate opinion in *Stångåstaden* NJA 1989 p. 224; and Hult, Juridisk debatt, 1952, p. 86 ff.

47 Hult, Juridisk debatt, 1952, p. 86.

48 The Supreme Court did, admittedly, indicate that a mistake of law may be a risk that a party must bear, but the Court does not appear ever to have considered placing that risk on the publishers; rather, the issue arose only in the assessment of whether the printing company was to be regarded as having received the payment in justified good faith.

49 See NJA 2016 p. 799 para. 7.

50 The reason why the Supreme Court designated NJA 2015 p. 1072 as *The Printing VAT I* (*Tryckerimomsen* I) was presumably that it envisaged NJA 2016 p. 799 being designated as *The Printing VAT II* (*Tryckerimomsen II*). However, the 2016 decision has not yet appeared in the Supreme Court's official list of named cases, https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/dopta-rattsfall/officiell-lista-over-dopta-rattsfall.pdf (accessed 23 August 2024). It may be expected to do so only if and when the Court in the future has occasion to refer to the case in a subsequent decision.

51 This concerns cases in which the Supreme Court has expressly addressed *condictio indebiti*. Compare, in addition, *The Non-Revived Claim* (*Den ej återuppväckta* fordran) NJA 2018 p. 805, which, in substantive terms, concerns the question of legal ground and the right to restitution. The case is taken into account at the level of footnotes but is not discussed separately in its own section. Compare also Justice Mattsson's separate opinion in *Tax and Legacy* (*Skatt och* legat) NJA 2021 p. 1073, where, in connection with issues concerning restitution of funds that, as a result of an agreement with an estate, had been paid to a legatee instead of being treated as a legacy, he refers to »general principles of restitution«, according to which the good or bad faith of the recipient may be of significance for the obligation to make restitution, »as may such passivity and the more general considerations of reasonableness that must be taken into account in the individual case, for example as regards the acceptability of an unfounded transfer of wealth«. Might it be that payment without legal ground is what Mattsson had in mind here?

52 The line of reasoning in the decision is consistent with the picture presented by the other cases. In paras 28–32, the Supreme Court discusses the significance of a consumer having delayed in asserting a claim for restitution after having paid an excessive price. The Court states that »a payment recipient is considered entitled to retain a payment made without legal ground« if the conditions under the doctrine of *condictio indebiti* are satisfied. In light of earlier case law, the Court further states that »there may be an obligation to assert a claim for restitution within a certain period of time in order for that right to be preserved« and that this period may »extend to significantly longer periods than is typically the case for a duty to give notice based on breach of contract«. The Court concludes that »[a] starting point should be that a consumer in this situation is to be afforded a reasonable time to consider his or her position; at the same time, the longer the payer delays in asserting a claim for restitution, the greater the reason for the recipient to believe that the payment is final«. It should only be added that it is not self-evident that the latter statement – concerning the recipient's reason to regard the payment as final – is to be understood as a statement relating to *condictio indebiti*; it may instead be understood as concerning passivity as forming part of a legal act on which the right to retain the funds is based. See further on this below under Section 5.

incurred by the estate. The estate requested repayment from the Swedish Tax Agency, arguing that the VAT claim had become time-barred at the time the Agency received the payments. The request was rejected by the Tax Agency as well as by the administrative court and the administrative court of appeal, to which the estate had appealed. The estate then brought proceedings before the general courts, which were dismissed, on different grounds, by both the district court and the court of appeal. The case before the Supreme Court concerned whether the administrative courts were to be regarded as having exclusive jurisdiction to determine questions concerning the limitation of tax claims, and, if that were not the case, whether the general courts were nevertheless precluded from hearing the case on the ground that the matter had already been finally determined by the judgment of the administrative court of appeal. The Supreme Court answered both questions in the negative, but these determinations will not be examined in detail here. Of interest in the present context is instead how the Court framed its examination by describing the estate's claim before the general courts and the issues raised by the case:

»*The claim which the courts have dismissed concerns the question whether certain amounts transferred to the Swedish Tax Agency are to be returned on the ground that the State had no claim against the bankruptcy estate. The case thus does not concern the repayment of tax, but a claim founded on general principles of private law. […] The principal rule in Swedish law is that a payment received without legal ground is to be returned. However, an assertion that a payment lacked legal ground may be met by the recipient either by contending the contrary or by raising an objection that the payment may be retained on the basis of general principles of* condictio indebiti. *[…] Where, as here, the recipient, as defendant, asserts that a legal ground in the form of a claim against the payer existed at the time of payment, that objection is, as a starting point, to be examined in the same manner as if the recipient had brought an action for payment of the alleged claim. In the present case, however, the disagreement does not concern the estate's tax liability as such, but whether that liability has become time-barred. This raises the question whether the administrative courts have exclusive jurisdiction to determine whether limitation has not occurred under the Act on the Limitation of Tax Claims, etc. […] If the administrative courts do not have exclusive jurisdiction, the question arises whether it is to be regarded as finally determined [by the judgment of the administrative court of appeal] that limitation has not occurred.*«[53]

The Supreme Court thus found it necessary to address payments made without legal ground and *condictio indebiti*. The impression is that, in doing so, the Court took its point of departure from the formulations used in *The Printing VAT I*. However, the otherwise customary formulation – that »*condictio indebiti* concerns recovery where a person has paid a debt that did not exist or has paid an excessive amount in the mistaken belief that a payment obligation existed«, which also appeared in *The Printing VAT I* – has been omitted. What remains is that a payment received without legal ground is, as a principal rule, to be returned, but that the application of the doctrine of *condictio indebiti* may give rise to an exception. The message, in other words, is that the right to restitution is founded on the recipient's lack of legal ground, and not on the doctrine of *condictio indebiti*, which may instead provide a basis for the right to retain the funds. As in both *The Tax Account I* and *The Printing VAT I*, the absence of legal ground appears as the decisive factor. The difference, however, is that the right to restitution and *condictio indebiti* have here been separated from one another.

A further difference appears to lie in the conceptual meaning attributed to the absence of legal ground. The estate's assertion that the State had no claim against the bankruptcy estate was regarded by the Supreme Court as equivalent to an assertion that the payment lacked legal ground. Whereas the expression »without legal ground« was used as a synonym for mistake in a broad sense in the two earlier decisions, it was thus here used to denote the circumstance that the recipient lacked an enforceable claim which the transfer could have been intended to discharge. The absence of a claim is something different from a mistake. Claims arise, for example, through contract, tort, and public law rules. A mistake may even constitute a circumstance in the sequence of events giving rise to a claim. It scarcely needs to be said that a claim in damages may be caused by the debtor having made a mistake, but even a contractual or unilaterally undertaken claim may be mistake-based. This is related to the contractual principle of reliance, as reflected inter alia in an interpretation *e contrario* of Sec. 32(1) of the Swedish Contracts Act.[54]

Whether the payment had been made by mistake does not appear to have been regarded by the Supreme Court as a principled factor in the question of restitution at all. An assertion that the recipient lacked an enforceable claim was said to be capable of being met by an assertion to the contrary, which, if accepted as a matter of fact, would presumably defeat the right to restitution.[55] In the final analysis, this means that the principal right to restitution does not arise in respect of a transfer which, although made by mistake, nonetheless corresponded to an enforceable claim that the transfer could reasonably be understood as having been intended to discharge.[56] The practical difference is admittedly rather limited where it concerns a debtor's mistaken payment of his own debt, since the recipient could in such a case have met a claim for restitution by way of a set-off defence.[57] However, where a third party has mistakenly paid another's debt, the practical significance is greater, since the recipient then has no counterclaim against the payer.[58]

3.4.3 Pragmatic Departure from The Tax Account I

Already a little over a month after the decision in *Independent Finance*, the Supreme Court was called upon to revisit questions concerning payments made without legal ground and *condictio indebiti* in *The Tax Account II* (*Skattekontot II)* NJA 2016 p. 1074. As the name suggests, the circumstances of the case resembled those in *The Tax Account I*. A private individual had, by mistake, transposed two digits in his personal identity number when making a tax payment to his tax account. The amount was credited to the tax account of another individual, whose personal identity number

53 Paras 17–20 of the Supreme Court's reasoning.

54 That the provision is intended to be interpreted e contrario is apparent from the preparatory works; see Förslag till lag om avtal och andra rättshandlingar på förmögenhetsrättens område, lag om avbetalningsköp m.m. avgivna den 31 jan. 1914 av därtill utsedda kommitterade, Stockholm 1914 (Förslag 1914), p. 16 ff

55 That is, by proving or presuming the assertion to be correct.

56 That this is indeed the case has subsequently been confirmed by the decision *The Real Estate Agent's Client Account* (*Fastighetsmäklarens* klientmedelskonto) NJA 2023 p. 339, which is discussed further below.

57 See note 120 and, at and including note 121, below under Section 4.

58 Compare the situations that arose in NJA 1994 p. 177 and NJA 1999 p. 575.

corresponded to the number erroneously entered by the payer. That account came to show a surplus. The account holder had debts to private creditors with the Swedish Enforcement Authority, and the surplus was subject to attachment. The payer sought repayment of the amount from the Swedish Tax Agency. The claim was upheld by the district court, but the court of appeal held that it was not the Tax Agency but the account holder who was the recipient of the payment, and therefore dismissed the claim.

The Court stated that a tax account constitutes an entry in the accounting records of the Swedish Tax Agency, and that a transfer of funds to the Agency for the payment of tax entails that the payer acquires a claim against the Agency, which subsists for as long as no set-off has taken place. This was said to apply even where, due to incorrect information provided by the payer, the transfer is credited to another person's tax account. According to the Court, the crediting did not entail anything other than that incorrect information was reflected in both the payer's account and the other account. In the present case, this meant that the Swedish Tax Agency was the recipient of the payment and that, in principle, a right to restitution accrued to the payer. The question for the Court was whether that right to restitution had been extinguished in light of the subsequent attachment and the other circumstances of the case.

The Court reiterated that »[t]he doctrine of *condictio indebiti* is directed at payments made without legal ground«, and that »[t]he starting point is that such a payment gives rise to an obligation on the part of the recipient to make restitution«.[59] Under the heading »The more detailed meaning of *condictio indebiti*«, the Court, with reference to *The Printing VAT I*, set out the conditions under the doctrine for the payer's right to restitution to be denied: that the recipient has received and adjusted his or her position in reliance on the payment in justified good faith, and that, following an overall balancing of interests, it is justified that the payer should lose the right to restitution.[60]

The Court observed that a difference between the circumstances of the present case and those in *The Tax Account I* – where the payer had been afforded a right to restitution on grounds referable to *condictio indebiti* – was that the Swedish Tax Agency had paid out the recorded surplus pursuant to an attachment, rather than setting it off against an earlier tax liability. As regards the payment as such, however, the circumstances were said to be similar. Contrary to the assessment in *The Tax Account I*, the Court nevertheless held that the case did not concern a payment made without legal ground, »but rather an intended payment which, by mistake, was accompanied by incorrect information and was therefore credited to the wrong tax account«. It was »in itself open to discussion whether the doctrine of *condictio indebiti* is applicable to such a payment«.[61] However, despite the fact that the case did not concern a »pure case of payment without legal ground«, the Court found no reason to take a different view as to the applicable legal rules in the event of a deposit into the wrong tax account. In support of this conclusion, it was stated that the tax account system is distinctive, and that a deposit into the wrong account is »as a rule« perceived as »erroneous in the sense that constitutes the starting point for *condictio indebiti*«, even though the deposit is not to be regarded as a payment to the account holder. It was also said to be »of significance« that the State is the recipient of the payment. The doctrine of *condictio indebiti* was thus explained to afford »scope for such particular considerations as may be called for where the interests of the public stand against those of the individual«.[62]

The Court thereafter examined whether the conditions under *condictio indebiti* were satisfied for the payer's right to restitution to be denied. By providing an incorrect personal identity number, the payer had caused the Swedish Tax Agency to form the impression that the payment was to be credited to the person whose tax account was in fact credited. Since the payer, through incorrect information, had induced the Agency to adopt that erroneous understanding, the Agency was not to bear the burden of proving that it lacked constructive knowledge of the inaccuracy of the information. The allocation of the burden of proof established in *The Printing VAT I* was thus departed from in this respect. The evidence in the case did not support the conclusion that the Agency had reason to suspect that the information was incorrect. The requirement of receipt in justified good faith was therefore satisfied. Moreover, since the Swedish Tax Agency had paid out the amount to the Swedish Enforcement Authority as a result of an attachment, the requirement of adjustment of position was also considered to be satisfied. In the final overall balancing of interests, the Court stated that, as a general matter, it is of significance that the payer is a private individual while the State is the recipient of the payment. In the present case, however, decisive weight was to be attached to the fact that a person making a payment can easily verify that the tax account has been credited, whereas the Swedish Tax Agency can only with difficulty ensure that each payment to a tax account corresponds to the payer's intention. The balancing of interests thus came out in favour of the Tax Agency, and the conclusion was that, under the doctrine of *condictio indebiti*, the Agency was not obliged to make restitution.

As should be apparent, the decision's approach to *The Tax Account I* is somewhat intricate. On the one hand, the Supreme Court departed from the assessment that a mistaken deposit into the wrong tax account constitutes a payment without legal ground, and stated categorically that it is a payment with legal ground. At the same time, the Court chose not to depart from the position that the doctrine of *condictio indebiti* is applicable in cases of mistaken tax payments, on the ground that the tax account system is distinctive. It may – as two Justices who did not themselves participate in the case have put it – be »assumed that the 2011 case here set limits to the reasoning in the 2016 case«.[63] The signal is nevertheless clear: the decision is not to be taken as a basis for concluding that the doctrine of *condictio indebiti* is applicable to other cases of payment with legal ground; the case is exceptional.[64] All of this may likely be understood as a form of pragmatic distancing from *The Tax Account I*, couched in the requisite appearance of endorsement.

59 Para. 8 of the Supreme Court's reasoning.

60 Para. 13 of the Supreme Court's reasoning.

61 Para. 9 of the Supreme Court's reasoning.

62 Para. 11 of the Supreme Court's reasoning.

63 Herre & Johansson, SvJT 2020 p. 843.

64 Or, more precisely, the decision should not be taken as a basis for the conclusion that the doctrine of *condictio indebiti* can be applied to other cases of payment combined with an erroneous designation.

Subject to any procedural constraints in the case,[65] the Supreme Court could also have reached precisely the same conclusion by recasting its reasoning in the concrete case and, instead of employing the conceptual framework of *condictio indebiti*, describing the matter as an analogous application of the principle of reliance reflected in Sec. 32(1) of the Swedish Contracts Act *e contrario*, perhaps in combination with an analogous application of the so-called *re integra* rule in Sec. 39, second sentence, of the same Act. Since these provisions are applicable to legal acts, such an approach would have been more consistent with the Supreme Court's position that the case concerned an intentional payment made with legal ground. The incorrectly entered personal identity number related to the designation of the payment. According to case law, such a designation constitutes a declaration of intention to be assessed in accordance with general principles of contract law.[66] However, since the case concerned the payment of a public-law debt, together with its designation, this would not have involved a direct application but rather an analogous application of the proprietary rules of the Swedish Contracts Act. This would have allowed for the recognition of the particular considerations which, according to the Supreme Court, arose from the fact that a private interest stood against a public one.

This alternative framing of the assessment in the case would have been more consistent with the general structure of the doctrine of *condictio indebiti* that the Court nonetheless outlined, building upon the structure initiated in *Independent Finance* and, in part, also in *The Printing VAT I*: the recipient's lack of legal ground (and the payer's corresponding retention of legal ground) gives rise to the right to restitution, while the doctrine of *condictio indebiti* provides a basis for the right to retain the funds (the two issues were even addressed under separate headings), and the absence of legal ground is not equivalent to the existence of a mistake in a broad sense in connection with a transfer of funds.

3.4.4 A Question of Ownership of Sorts

The Dental Care Subsidy (Tandvårdsstödet) NJA 2020 p. 334 concerned a tripartite relationship in which the payer had made no mistake and did not assert any claim for restitution. There was moreover a legal basis for the payer to make the payment in the manner in which it was made. Nevertheless, the payment had been made to the wrong recipient. More specifically, the circumstances were that a dental care provider had applied for and been granted a dental care subsidy by the Swedish Social Insurance Agency. However, because the provider had mistakenly entered its plusgiro number (a Swedish payment account number) in the field intended for a bankgiro number (another form of Swedish payment account identifier), the subsidy was paid to another company whose bankgiro number contained the same digits as the provider's plusgiro number. The dental care provider sought payment of the amount from the recipient company. The recipient contested the claim, arguing that a payment to the dental care provider would not discharge the recipient in the event of a recovery claim by the Swedish Social Insurance Agency.

By way of a comparative reference to Sec. 32 of the Swedish Contracts Act, the Court held that the dental care provider was bound, vis-à-vis the Swedish Social Insurance Agency, by its erroneous payment instruction. It did not appear that the Agency had, or ought to have had, knowledge that the instruction was incorrect.[67] The Agency had therefore discharged its obligation to the dental care provider by making the payment, and there was no statutory basis for the authority to recover the payment from the recipient company. The Court then made the following statements of principle.

»*Where a debtor makes a payment with discharging effect to a third party in accordance with the creditor's instruction, a transfer of wealth takes place from the creditor to the third party. Where the creditor's instruction was not intended to effect such a transfer, and the third party received the transfer in bad faith (i.e. without reasonable grounds for believing that the payment was due to him), the wealth is to be restored. In other cases, the creditor's right depends on what appears reasonable upon a balancing of the competing interests of the creditor and the third party. That balancing is to be carried out in accordance with the criteria developed within the framework of the rules on condictio indebiti […].*«[68]

The Court concluded that, since an »asset« belonging to the dental care provider had been transferred to the recipient through the payment made by the Swedish Social Insurance Agency, the dental care provider was entitled to direct a claim against the recipient.[69]

Compared with the other decisions considered here, *The Dental Care Subsidy* is distinctive, both because it did not concern a claim for restitution by a payer against a recipient, and because, from the payer's perspective, the payment had a legal ground. The Swedish Social Insurance Agency owed a dental care subsidy to the dental care provider, and in making the payment the Agency acted in accordance with the objective meaning of the provider's payment instruction, as there were no reasonable grounds for it to do otherwise. The obligation was thereby discharged. As a result, there arose – as the Court expressed it in one passage of its reasoning – a transfer of wealth, or – in another passage – a transfer of an asset, from the dental care provider to the recipient.[70] The Court explained that, where the transfer has not been intended in this manner and the recipient has not had reasonable grounds for believing that it was due to him or her, the wealth or asset is to be restored.

The Court's choice of terminology implies that what is at issue is, in a sense, a question of ownership.[71] Particularly striking is the reference to a transfer of an asset and to its restoration. The impression is that what is being described is, on the one hand, the conditions for the acquisition of ownership through a derivative mode of acquisition of a transfer character and, on the other, the owner's

65 For example, the plenary rule in Ch. 3, Sec. 6 of the Swedish Code of Judicial Procedure. Compare the quotation from Herre & Johansson reproduced above, which implies that a plenary decision may have been required in order to depart from the position taken in *The Tax Account I* that the doctrine of *condictio indebiti* is to be applied to misdirected tax payments.

66 NJA 2013 p. 1190 para. 7.

67 Compare this line of reasoning with my proposal above under Section 3.4.3 regarding an alternative framing of the assessment in *The Tax Account I*.

68 Para. 7 of the Supreme Court's reasoning.

69 Para. 10 of the Supreme Court's reasoning.

70 Paras 7 and 10, respectively, of the Supreme Court's reasoning.

71 Compare the perspective adopted by Almqvist, Förmögenhetsbrott och förmögenhetsrätt [Property Offences and Private Law], 2020, p. 311 f. note 1108; and Lindskog, Betalning [Payment], 2022, pp. 886 ff. and 942 ff.

right of vindication.[72] Developed further, the reasoning may be described as follows.

A person who receives an asset may acquire ownership of it through a transfer from the owner. Such a transfer takes place by way of agreement. Whether a transfer agreement exists depends, in principle, on whether the owner intended to transfer ownership to the recipient or gave the recipient reasonable grounds to rely on such an intention. If the owner »did not intend such a transfer« and the recipient of the asset lacked »reasonable grounds for believing that it was due to him«, the asset is to be »restored« to the owner.[73] A transfer of possession does not in itself give rise to a transfer of ownership. However, the principle of vindication falls away where the conditions for a good faith acquisition are satisfied. It is at this point that the Supreme Court appears to situate the doctrine of *condictio indebiti*: the creditor's right of vindication may be extinguished through an assessment in accordance with the criteria developed within the framework of the doctrine. In this connection, the Court referred inter alia to the passages in *The Printing VAT I* in which it set out, in a structured manner, the conditions for a right to retain the funds under *condictio indebiti*. This means that the recipient makes a good faith acquisition – without any obligation to compensate the owner – if he or she has received and adjusted his or her position in reliance on the payment in justified good faith, and if, in addition, an overall balancing of interests comes out in favour of the recipient.

It may be that the Court's choice of terminology and mode of description were prompted by a need, so to speak, to adapt the conceptual framework in order to bring the reasoning under the umbrella of *condictio indebiti*, given that the circumstances of the case differed from the traditional restitution scenario. Be that as it may, the decision adds an important piece to a model for explaining, or a perspective on, the doctrine of *condictio indebiti* as it has developed across the different phases of the legal-ground terminology. If the starting point was an invalidity perspective on the doctrine, we now appear to have arrived at an ownership perspective.[74]

I will return to the ownership perspective and its implications in Section 4, but first the perspective is to be further developed through a final decision.

3.4.5 The Doctrine is Subordinated to the Law of Contract

In the most recent *condictio indebiti*-related decision of the Supreme Court, *The Real Estate Agent's Client Account* (*Fastighetsmäklarens* klientmedelskonto) NJA 2023 p. 339, there was no doubt that the payment at issue had been made by mistake. However, the Court held that the payment had a legal ground, and no right to restitution arose.

The background to the case was as follows. Two companies entered into an agreement under which one was to purchase two properties from the other. Pursuant to an escrow agreement between the seller company, the buyer company, and the real estate agent who brokered the transactions, each deposit was to be placed in the agent's client account. The account belonged to the real estate agency at which the agent was employed. The deposits were paid. The remaining portions of the purchase prices were, according to the sale agreements, to be paid in cash to the seller company on the date of completion. Prior to the completion date, the buyer company was contacted by administrative staff at the agency responsible for handling completion matters. The buyer company then stated that, three days before completion, it would pay the remaining balances to the same account as that to which the deposits had been paid. The company also issued a payment instruction to its bank for the transfer of the amounts on the relevant date. A little over a week before completion, the buyer company sent a message to the seller company requesting rescission of the purchases, invoking a rescission clause in the sale agreements. The agent was informed of this. As a result of the company's failure to cancel the payment instruction with its bank, the funds were nevertheless transferred to the client account three days before the intended completion date. By email on the same day to both the seller and the buyer, with the agent copied, the agency's completion administration confirmed that the final payments had been received for each property. In a reply to all recipients, also on the same day, the buyer company stated that the payment had been made by mistake and requested immediate repayment. After the seller company – who disputed the buyer company's right to rescind the purchases – also asserted a claim to the funds, the agent deposited the money with the County Administrative Board, with withdrawal rights for whichever of the buyer or seller would ultimately be found to be the rightful creditor. The buyer company brought proceedings against the real estate agency seeking repayment, arguing that the payment had been made by mistake. The agency contested the claim, submitting that the payment had been made in accordance with instructions given by the buyer company to the agent, such that the funds constituted client funds for which the agent was under a duty to account. Although the agency had factual control of the client account as its holder, the account was the agent's client acco-

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72 See, for example, Håstad, T., Sakrätt avseende lös egendom [Property Law in Respect of Movable Property], 6 ed., Stockholm 1996, p. 48 and p. 62 ff.

73 It is not entirely clear that, by the wording »reasonable grounds to believe that the payment belonged to him«, the Supreme Court intended to refer to an assessment under the contractual principle of reliance rather than to the assessment of good faith to be carried out within the framework of *condictio indebiti*. Lindskog, SvJT 2021 p. 661 with note 20, interprets it as relating to *condictio indebiti*, while at the same time pointing out that the Court failed to mention the doctrine's requirement of adjustment of position. His interpretation presumably rests on the view that the Court's statement that, »in other cases«, a balancing is to be carried out in accordance with the criteria developed within the framework of the doctrine of *condictio indebiti* refers only to the final overall balancing of interests. On that point, I take a different view, understanding the statement as referring to all the conditions for a right to retain the funds under the doctrine, that is to say, both the overall balancing of interests and the requirements of good faith and adjustment of position. Lindskog's interpretation is supported by the Court's wording that the balancing is to be carried out »[i]n other cases« and by the fact that, in connection with the statement on balancing, the Court, inter alia, referred to a section in the previous edition of Lindskog, *Betalning*, where precisely the overall balancing of interests is discussed. However, if one considers also the case-law references made by the Court, it appears that the statement was intended to encompass all the conditions for a right to retain the funds (the Court refers to *The Tax Account I* NJA 2011 p. 739 para. 7 and *The Printing VAT I* NJA 2015 p. 1072 paras 12–13). My interpretation that the statement concerning justified good faith relates to the contractual principle of reliance is based on the view that this is the most logical reading from a systematic perspective, as well as on the fact that it is consistent with the Court's position in the subsequent decision *The Real Estate Agent's Client Account* NJA 2023 p. 339, which is discussed in more detail below.

74 Compare Almqvist, Förmögenhetsbrott och förmögenhetsrätt [Property Offences and Private Law], 2020, p. 311 f. note 1108; and Lindskog, Betalning *[Payment]*, 2022, pp. 886 ff. and 942 ff.

unt, over which the agent had the right of disposition and responsibility. Both the district court and the court of appeal upheld the buyer company's claim on grounds referable to the doctrine of *condictio indebiti*.

The Court stated that the case concerned whether the payment had been made without legal ground, such that the principles of *condictio indebiti* could become applicable. Following some general remarks on the real estate agent's assignment – it was noted that a real estate agent is a natural person who bears personal responsibility for the brokerage engagement, must perform the assignment with due care, observe good estate agency practice, and safeguard the interests of both the seller and the buyer – the Court set out the following under the heading »Payment without legal ground«.

»*The principles of condictio indebiti are directed at payments made without legal ground. The starting point is that such a payment gives rise to an obligation on the part of the recipient to make restitution, an obligation which the recipient may, under certain conditions, avoid (see The Tax Account I NJA 2011 p. 739 paras. 6–8, The Printing VAT NJA 2015 p. 1072 paras. 10–13, and The Tax Account II NJA 2016 p. 1074 paras. 8 and 13). […] A payment may have a contractual basis, such as where a debtor pays his creditor, or constitute a disposition whereby the payer voluntarily makes a payment to the recipient. In both cases, there is then a legal ground for the payment and the doctrine of condictio indebiti is not applicable. This may be so even if the payment itself was the result of a mistake on the part of the payer. A condition for this is that, in light of the circumstances, the recipient had reason to perceive the payment as one made with legal ground. The fact that the recipient was aware that the payer questioned his payment obligation does not preclude the payment from being regarded as having a legal ground. For example, the recipient of a payment made during an ongoing dispute may have reason to regard the payment as a provisional payment pending the resolution of the dispute […].*«

The Court then turned to its assessment of the case. It stated that it must have been clear to the buyer, when it communicated that the final payments were to be made to the same account as the deposits, that the account was the agent's client account. The communication was therefore considered to constitute an instruction to the agent to receive the payments and to forward the funds to the seller. The fact that the real estate agency assisted the agent, inter alia by providing the account, was said not to affect this assessment. The Court further stated that it was apparent from the confirmation message sent by the agent, through the agency, on the day the payments were received, that the payments were understood as final payments to be accounted for to the seller in accordance with the instruction given by the buyer. It was thereby evident that the agent had not understood the buyer's request for rescission of the purchases as including a revocation of the instruction to receive the final payments. The Court observed that a buyer may have reason to choose to make a final payment even where there is a dispute as to the right to rescission or termination. Against that background, it could not be considered that the agent ought to have understood the situation as involving a revocation of the instruction. When the payments were received into the client account, the agent thus had reasonable grounds to believe that the funds were received subject to an obligation to account. In summary, the Court found that, at the time of payment, there was a legal ground for the agent to receive the final payments, and that it was immaterial that the payments had been made as a result of a mistake. In light of the instruction given by the buyer to the agent and the general nature of a real estate agent's assignment, it was further of no significance that the buyer had requested repayment of the final payments prior to the completion date. The conclusion was that the real estate agency was not liable to make restitution to the buyer.

The Court thus found that there was a legal ground for the payments that had, by mistake, been transferred to the agent's client account, which excluded any right to restitution and the application of the doctrine of *condictio indebiti*. The legal ground arose from the buyer's communication that the final payments were to be made to the agent's client account, and it was considered to subsist at the time of payment notwithstanding that the buyer had requested rescission of the purchases. The fact that the payments had been made by mistake was immaterial.[75] Although the Court, in one respect, referred to *The Tax Account I*, this use of the terminology of legal ground represents a clear departure from the meaning the Court there attributed to the expression »payment without legal ground« and from the message conveyed regarding the hierarchical relationship between contract law and the doctrine of *condictio indebiti*.

In *The Tax Account I*, the terminology of absence of legal ground was, as noted, used to denote mistake in a broad sense committed in connection with a payment – a subjective concept of mistake proceeding from the perspective of the payer. The mistaken designation to the wrong tax account in that case was regarded as a payment to the relevant account, made without legal ground. The doctrine of *condictio indebiti* was, in principle, applicable, but in its application the requirement of adjustment of position in justified good faith was not considered to be satisfied by the Swedish Tax Agency's setting off of the payment against an existing tax claim against the account holder. The Agency was therefore obliged to make restitution.

The circumstances in *The Real Estate Agent's Client Account* may be described in a similar manner: The buyer unintentionally paid an amount which, as a result of the buyer's mistaken designation,[76] was set off against an existing claim on the part of the agent (namely, a claim to the funds which the agent had reasonable grounds to believe he had been instructed to transfer to the seller on behalf of the buyer).[77] On the basis of the concept of absence of legal ground employed in *The Tax Account I*, the payment in *The Real Estate Agent's Client Account* would thus also have been regarded as a payment without legal ground. The real estate agency could then have avoided an obligation to repay the amounts only if the conditions for a right to retain the funds under the doctrine of *condictio indebiti* had been satisfied.

In *The Real Estate Agent's Client Account*, however, the absence of legal ground was not used in the sense of mistake, but in the sense of the absence of a claim (in line with the approach reflected in *Independent Finance*). Since the agent had reasonable grounds to believe that the payment was made in discharge of a claim that in fact existed, it was therefore a payment with legal ground. The right to restitution was thereby excluded, and it was consequently unnecessary to consider whether the conditions for a right to retain the funds under the doctrine of *condictio indebiti* were satisfied.

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75 Compare above under Section 3.4.2 at and including note 57 ff.

76 The fact that the amount paid corresponds to the amount of a particular claim held by the recipient will, as a rule, imply a designation of the payment; see, for example, Unnersjö, A., Borgenärens sekundära destinationsrätt – en regel inte utan undantag [The Creditor's Secondary Right of Allocation – A Rule Not Without Exceptions], JT 2014–15 p. 176 with references.

77 Compare Sec. 9 of the Swedish Commission Act.

This, in turn, means that the decision provides support for the proposition that contract law – and in particular the contractual principle of reliance – now takes precedence over the doctrine of *condictio indebiti*. In *The Tax Account I* and in Phase Two of the legal-ground terminology, the message was, as noted, the opposite. *The Real Estate Agent's Client Account*, building on the approach established in *Independent Finance*, draws clear boundaries between contract law and *condictio indebiti*, and conveys a kind of order of assessment to be applied in restitution claims:[78]

The first step is to determine whether an enforceable claim exists. If no such claim existed previously, it must then be examined whether one may have arisen no later than in connection with the payment, which is the case if this was the payer's intention or if, through the payment and the surrounding circumstances, the payer gave the recipient reasonable grounds to rely on the payer assuming a payment obligation which was at the same time discharged, Sec. 32(1) of the Swedish Contracts Act.[79] Thereafter, it must, in principle, be determined whether the payment has been designated towards an enforceable claim, which is likewise to be assessed in accordance with general principles of contract law.[80] Only if these assessments lead to the conclusion that the payment lacked legal ground does the door open to the doctrine of *condictio indebiti*. That contract law may then once again close that door is a matter to which I will return in Section 5 below.

The judgment in *The Real Estate Agent's Client Account* is recent and raises, in addition to the broader question of how *condictio indebiti* is to be understood, a couple of more detailed issues that merit some brief comment, even though they lie somewhat outside the main theme of this article. First, it may be discussed how the legal ground in the case is to be classified more precisely, and whether, in light of its nature, there is reason to question whether it still subsisted at the time of payment. Second, there is reason to say a few words about how the Court's assessment of legal ground affected the question whether the action had been brought against the proper party.

The nature and continued existence of the legal ground. We may begin by considering how the legal ground in the case does not lend itself to straightforward classification. Under the sale agreements between the buyer and the seller, the buyer was to pay the final instalments to the seller on the completion date. There was thus no basis in the agreements for the buyer to make payment to the agent. The seller could, however, by way of a departure from that term, have instructed the buyer to pay the final instalments to the agent instead. Provided that compliance with such an instruction would not have entailed any detriment to the buyer, it would have been binding on the buyer.[81] Nor did the legal ground for the payments in the case lie in any such instruction from the seller. Nor does it appear that the seller had authorised the agent to receive the final payments from the buyer on the seller's behalf. According to the prevailing view, moreover, real estate agents do not possess apparent authority to receive payment on behalf of the seller.[82] Nor was any assessment made to the effect that the seller had conferred authority on the agent retrospectively, whether through an express or a tacit ratification. By excluding the legal grounds just mentioned, it may be concluded that the agent did not have passive authority to receive payment in respect of the final instalments.[83] The payments which, by mistake, were transferred to the agent's client account cannot therefore have had a discharging effect for the buyer vis-à-vis the seller.[84]

The legal ground in the case instead consisted in the buyer being considered to have instructed the agent to receive payment prior to the completion date and, no later than on that date, to transfer the funds to the seller. This means that the arrangement did not constitute a departure from the payment term in the sale agreements. Nor could any such departure have been effected through a disposition between the buyer and the agent to which the seller was not

78 In practice, the order of assessment will be determined by factors such as how the claim is framed and what objections have been raised against it. It is, for example, not a given that the claim will give rise to any contractual issues, and other aspects than those relating to contract law and *condictio indebiti* may of course also come into play, for example matters relating to set-off (compare above under Section 3.4.2 at and including note 58 ff., and below under Section 4 note 120 and at and including note 121). The order of assessment described here is intended primarily as a pedagogical illustration of the relationship between the doctrine and contract law, in a situation where the payer has brought a claim for restitution on the ground that the payment lacked legal ground and the recipient has raised the dual objections that a (contractual) legal ground existed and that a right to retain the funds arises under the doctrine of *condictio indebiti*.

79 The idea is not new; it is, inter alia, already advanced by Hult, Juridisk debatt, p. 72 f. Compare also *The Non-Revived Claim* (*Den ej återuppväckta* fordran) NJA 2018 p. 805, where the Supreme Court made the question of the right to restitution in the case of payment of a time-barred debt dependent on whether the creditor, through the payment, in accordance with general principles for the interpretation of legal acts, had acquired justified reliance that the debtor intended to acknowledge the debt and that a valid claim had thereby arisen. The message of the decision appears to be that a »straight« payment gives the creditor justified reliance as to revival, in which case the payment has been made with legal ground, whereas there is no basis for justified reliance where the payment has been made under protest or subject to a condition, or where it has been made through enforcement proceedings. In the case of consumer debts, however, the creditor must prove that the debtor has unequivocally undertaken to pay despite being aware that the claim is time-barred, or that it is clear that the debtor, irrespective of the issue of limitation, was willing to assume a payment obligation; see NJA 2002 p. 358 and NJA 2004 p. 499. Compare also *AQ Enclosure Systems* NJA 2010 p. 448, where the Supreme Court stated the following in para. 6: »A payment that does not correspond to a legal obligation may, as a starting point, be reclaimed. This also applies to a payment made pursuant to a judgment that has not become final (if the obligation to pay is set aside on appeal). However, such a payment may be final because this follows from statute […]. A right to restitution may also be lacking on contractual grounds. A payment may thus constitute a tacit acknowledgement of a payment obligation […]. […] General principles under the doctrine of *condictio indebiti* may also […] entail that the right to repayment falls away if the recipient has, in good faith, adjusted his or her position in reliance on the payment.«

80 See NJA 2013 p. 1190 para. 7.

81 Compare Sec. 3, second paragraph, of the Swedish Promissory Notes Act.

82 See, inter alia, Dotevall, R., Om ond och god tro [On Good and Bad Faith], Stockholm 2021, p. 113; Håstad, T., Deposition av handpenning hos fastighetsmäklare [Deposit of Earnest Money with a Real Estate Agent], SvJT 2007 p. 942; and Melin, M., Fastighetsmäklarlagen. En kommentar [The Real Estate Agents Act. A Commentary], 5A ed., Stockholm 2023 (JUNO, 10 February 2023), Chapter 3, Section 11

83 Compare *The Motocross Track* (Motocrossbanan) NJA 2007 p. 86. Nor would the principles underlying Sec. 29–30 of the Swedish Promissory Notes Act likely have provided payment authorisation for the real estate agent.

84 Compare *The Motocross Track* NJA 2007 p. 86.

a party; rather, the instruction must be understood as requiring the agent to assist the buyer in fulfilling that term. By informing the agency that the final payments would be made to the agent's client account three days before completion, the buyer thus, in other words, instructed the agent to act as the buyer's payment agent.

An instruction to act as a payment agent may be revoked by the principal until such time as the agent has transferred the funds to the third party, in this case the seller. Nevertheless, the legal ground – namely the payment agency instruction – was considered to subsist at the time of payment, notwithstanding that the buyer had previously requested rescission of the purchases and had informed the agent accordingly. The seller had disputed that the buyer was entitled to rescind the purchases. The Court held that the agent had reasonable grounds not to interpret the buyer's notice of rescission as a revocation of the payment agency instruction. The argument for this was that a debtor, pending a legal determination of a disputed debt, may choose to make a provisional payment in order to avoid being subject to default consequences. The argument is in itself reasonable and finds support in prior case law.[85] However, once the legal ground has been specified in the manner set out here, it may be questioned whether there were nevertheless reasonable grounds for the agent to understand that the legal ground had been revoked. Particular considerations arise where the instruction concerns a real estate agent acting as a payment agent for the buyer vis-à-vis the seller.

Under Ch. 3, Sec. 11 of the Swedish Real Estate Agents Act (2021:516), real estate agents and real estate agencies are prohibited from acting as representatives for the seller vis-à-vis the buyer or for the buyer vis-à-vis the seller. This prohibition on representation is not coupled with any invalidating effect, but a breach of it constitutes a violation of good estate agency practice and may give rise to liability in damages and a reduction of commission.[86] The prohibition is absolute for real estate agencies, but for individual real estate agents there is an exception for »limited tasks«. That exception applies where there is no conflict of interest between the buyer and the seller, such as at a completion where all terms have been agreed and only the purchase price remains to be paid and acknowledged.[87] In such cases, the agent may, under the exception for limited tasks, act as a payment agent for the buyer. However, the preparatory works make clear that the exception is not applicable where the legal act in question is disputed between the parties.[88] This means that, if a conflict arises between the buyer and the seller prior to completion, the agent must immediately withdraw from the payment agency assignment.[89]

The content of good estate agency practice determines what the agent has reasonable grounds to do and to perceive. The question of reasonable grounds is a normative one,[90] and although the prohibition on representation is not accompanied by any sanction of invalidity, it may affect how rules of private law are to be interpreted and applied.[91] Against this background, it may be argued that the agent had reasonable grounds to understand the buyer's notice of rescission as implying that the payment agency instruction had come to an end, at least once the agent had become aware that the seller disputed the buyer's right to rescind and that a conflict of interest had thereby arisen between the buyer and the seller. At that point, the agent ought at least to have paused. If the instruction was not revoked by the buyer, the agent would, in any event, have been obliged to withdraw from it.

Turning to the question of *the significance of the legal ground for the issue of proper party*. The buyer's claim for restitution was not directed against the agent but against the real estate agency. Since it was the agency that held the account to which the payments had been made, it was the agency that had in fact received the payments from the buyer, even though the account was used by the agent as a client account. In that sense, there was a certain logic in the buyer's choice of defendant in the dispute. Had the Court found that the payments lacked legal ground, the agency could, in principle, have been ordered to make restitution. Such a claim on the part of the buyer against the agency would likely not have been extinguished by the agent's deposit of the funds with the County Administrative Board, even though the buyer might, in principle, have had a proprietary interest in those funds.[92]

By finding that there was a legal ground for the payments, in the form of an instruction from the buyer to the agent to receive and transfer the funds to the seller, the Court effectively precluded the buyer from claiming repayment from the real estate agency, also on grounds other than the absence of legal ground at the time of payment. The assessment of legal ground thus, so to speak, retroactively meant that the action had, in principle, been brought against the wrong party.

The fact that the buyer lacked a right to restitution in the case does not mean that the buyer lacked a right to recover the funds on some ground other than the absence of legal ground. The agent had deposited the funds with the County Administrative Board, with withdrawal rights for whichever of the buyer or the seller would, following a determination or agreement between them, be regarded as the rightful creditor.[93] The buyer could thus, even after the finding that the payments had a legal ground, be entitled to recover the funds. As a matter of principle, however, not from the real estate agency.

The conclusion that the buyer's communication to the real estate agency entailed that the buyer gave the agent a payment agency instruction must be understood as resting, first, on the view that the agency was authorised to receive such an instruction in the

85 A similar line of reasoning appears in *AQ Enclosure Systems* NJA 2010 p. 448 para. 3. Compare also *The Non-Revived Claim* NJA 2018 p. 805 para. 13. In *The Real Estate Agent's Client Account*, the Supreme Court makes a comparative reference to *Stångåstaden* NJA 1989 p. 224, where Justice Lind touches upon the line of reasoning in his separate opinion.

86 Melin, Fastighetsmäklarlagen [The Real Estate Agents Act] (JUNO, 10 February 2023), Chapter 3, Section 11

87 Melin, Fastighetsmäklarlagen [The Real Estate Agents Act] (JUNO, 10 February 2023), Chapter 3, Section 11.

88 See the special commentary on the prohibition of agency in the 1995 Real Estate Agents Act, Government Bill 1994/95:14 p. 80, to which reference is made both in the special commentary on the corresponding provision in the 2011 Real Estate Agents Act, Government Bill 2010/11:15 p. 55, and in the special commentary on the current prohibition in Ch. 3, Sec. 11 of the Real Estate Agents Act, Government Bill 2020/21:119 p. 122.

89 Melin, Fastighetsmäklarlagen [The Real Estate Agents Act] (JUNO, 10 February 2023), Chapter 3, Section 11.

90 Compare Dotevall, Om ond och god tro [On Good and Bad Faith], 2021, p. 13 ff.

91 Compare Melin, Fastighetsmäklarlagen [The Real Estate Agents Act] (JUNO, 10 February 2023), Chapter 3, Section 11.

92 Compare NJA 2001 p. 292, in particular Justice Håstad's separate opinion, and *Sara's Money* (*Saras* pengar) NJA 2009 p. 500.

93 See Sec. 1, second sentence, and Sec. 6 of the Act (1927:56) on the Deposit of Money with a Public Authority.

agent's name and on the agent's behalf,[94] and, second, on the view that the agency was to be regarded as the agent's auxiliary in the performance of the contract. The Court noted that a real estate agent is personally responsible for his or her obligations, which is also the starting point in the legislation. Moreover, as noted, a real estate agency is prohibited under Ch. 3, Sec. 11 of the Swedish Real Estate Agents Act from undertaking a payment agency assignment of the kind in question, whereas it is not prohibited for an individual real estate agent to do so, provided that there is no conflict of interest between the buyer and the seller. The agent thus acted, in relation to the brokerage of the properties, as the seller's mandatary and, in relation to the transfer of the payments, as the buyer's mandatary. The real estate agency, in turn, was the agent's auxiliary in the performance of the contract, assisting the agent in the performance of the assignment, inter alia by providing the account used by the agent as a client account.

As noted, a payment agency instruction of the kind given by the buyer to the agent may be revoked by the principal before the agent has transferred the funds to a third party. Even if the buyer's request for rescission of the purchases did not amount to a revocation of the instruction, such a revocation must in any event be regarded as having occurred through the notice of restitution given by the buyer later that same day after the payments had, by mistake, been transferred. Upon such a revocation, the agent is, vis-à-vis the principal, obliged to repay the funds. This is not negated by the fact that, by virtue of the agent's duty of loyalty towards the seller, repayment may entail a breach of contract in relation to the seller. This explains the rationale underlying the prohibition on representation in Ch. 3, Sec. 11 of the Swedish Real Estate Agents Act, namely the risk that, by assuming a representative role, the agent cannot maintain his or her position as a fundamentally impartial intermediary.[95] However, even where, as in the present case, the principal, following an instruction from the agent, has paid the funds directly to the agent's auxiliary, the principal cannot, as a general rule, direct a claim for restitution against the auxiliary. On the basis of the Supreme Court's assessment of legal ground, such a claim would constitute a direct claim. As a matter of principle, a right to bring a direct claim does not arise unless the auxiliary has assumed the agent's position under the mandate or has undertaken an independent obligation to pay vis-à-vis the principal (either on its own or within the framework of a contract for the benefit of a third party with the agent), or unless there are grounds – such as in tort or under the law of intermediaries – for piercing liability. This has been established by the Supreme Court in *The Chinese Investment* (*Den kinesiska investeringen*) NJA 2022 p. 311.

This may provide an explanation for the statement made by the Supreme Court at the end of its reasoning, to the effect that it was of no significance in the case that the buyer had requested repayment of the final instalments prior to the completion date. The reasons given were the payment agency instruction and »the general nature of a real estate agent's assignment«.[96] It is not entirely easy to determine how this is to be interpreted. Be that as it may, it can in any event be said that, in light of the Supreme Court's assessment of the legal ground, it was of no significance for the question of the buyer's right to restitution vis-à-vis the real estate agency that the buyer revoked the payment agency instruction after the time of payment, even though this gave rise to a right to restitution against the agent.[97] In light of the Supreme Court's assessment of the legal ground, this thus became a question of a direct claim against an agent's auxiliary of a kind that Swedish law, as a matter of principle, does not recognise.

4 Synthesis: The Ownership Perspective and Its Implications

Through its use of the terminology of legal ground and the development of that terminology over the past thirty years, the Supreme Court has come to present a picture of the doctrine of *condictio indebiti* that differs from the one predominantly conveyed in earlier case law. Because the terminology has remained constant, this change has, in principle, been able to occur without being readily apparent. Expressions such as transfer of wealth, shifting of wealth, and payment without legal ground appear in all of the cases discussed above, but through the Court's manner of using them in the different decisions, their conceptual meaning and function have, as it appears, changed. Initially, the expressions functioned as a kind of teleological argument underpinning a requirement of mistake as to indebtedness, only later to come to function as the central requirement in their own right, thereby replacing the requirement of mistake as to indebtedness. And whereas the conceptual meaning of payment without legal ground was initially something along the lines of payment in the absence of a claim, or payment of a worthless claim, its meaning subsequently shifted to denote mistake in a broad sense. Thereafter, the Court changed course again, and at present appears primarily to use absence of legal ground to denote the absence of a claim. This conceptual meaning thus lies, to some extent, close to the »original« meaning in the two cases from the 1990s – NJA 1994 p. 177 and NJA 1999 p. 575 – although it is not identical.

With the flexibility of the legal-ground terminology as a springboard, the Supreme Court has, over time – through the various phases of development – also moved away from a description according to which the doctrine of *condictio indebiti* is directed at payments made under a mistake as to indebtedness, with restitution as the principal rule. It is now said instead that the doctrine is directed at payments made without legal ground, and that such a payment is to be returned unless the doctrine of *condictio indebiti* dictates otherwise. The right to restitution and the doctrine have thus been separated. It no longer appears tenable to describe the question of restitution as one of invalidity of a binding legal act. The theoretical starting point must instead be taken to be that it concerns a claim for the recovery of an asset that has come into the »possession« of another.[98] The right to restitution is founded on the payer's retained

94 Such authority could, for example, follow from the real estate agent's mandate to the brokerage firm, Sec. 18 of the Swedish Contracts Act.

95 Government Bill 1994/95:14 p. 80.

96 Para. 24 of the Supreme Court's reasoning.

97 Such a right to restitution against the real estate agent may be presumed to exist even if the buyer, as against the seller, lacks a right to rescind the purchase.

98 Funds held in an account are not regarded as capable of possession in all respects; see NJA 1984 p. 656 and NJA 1998 p. 275 concerning the concept of possession in Ch. 4, Sec. 18 and 19 of the Swedish Enforcement Code. The term »possession« is elusive and may denote different concepts in different regulatory contexts; see Lindskog's separate opinion in NJA 2011 p. 524 para. 32 with references. See also NJA 2009 p. 899, from which it follows that the term »possession« may even denote two different concepts within one and the same provision.

legal ground. As noted, we must shift from an invalidity perspective to an ownership perspective.[99]

The view that issues concerning payments without legal ground and *condictio indebiti* should be approached from an ownership perspective of this kind has been advocated by Lindskog at least since the first edition of *Betalning*.[100] At the time that edition was published, there was little support for the model in case law, but the picture has since changed. It is difficult to conceive of another perspective by which at least the more recent case law could be captured in a coherent manner. Lindskog has no doubt had some tangible influence on the development of the case law. In his capacity as a Justice of the Supreme Court, he participated in *The Printing VAT I*, *Independent Finance*, and *The Tax Account II*, and thus in the transition from the second phase of the legal-ground terminology into the third.

From an ownership perspective, the question of legal ground ultimately concerns whether the recipient has made a valid acquisition of the funds. The mere fact that a person receives property through a transfer from the owner – whether unintended, intentional but motivated by a mistake, or fully intentional – is not in itself sufficient for a transfer of ownership. The recipient is not entitled to appropriate the funds as his or her own. The owner retains a right of vindication. The recipient may, it is true, acquire ownership of the funds through commingling with his or her own funds,[101] but in that case the recipient must compensate for the loss of the right of vindication. If one wished, that right to compensation could be characterised as a form of compensation for unjustified enrichment, thereby linking it to the continental European perspective as well as to the line of reasoning suggested by the Supreme Court in NJA 1999 p. 575. However, such a characterisation would likely neither detract from nor add anything of substance.[102] Neither a right of vindication nor a right to compensation arises, however, if the recipient has made a valid acquisition of the funds. When reference is made to legal ground, it is, from this perspective, a legal ground for the transfer of ownership that is intended. A legal ground exists where the transfer was intended to discharge a claim of the recipient, or where, on the basis of the transferor's conduct, the recipient had reasonable grounds to believe that this was the intention. Even in the absence of such a legal ground, the recipient may make a good faith acquisition, without any right of redemption for the transferor, if the funds were received in justified good faith, the recipient in justified good faith has adjusted his or her position in reliance on the payment, and, following an overall balancing of interests, it is justified that the funds may be retained without any obligation to compensate: the doctrine of *condictio indebiti*.

Like the invalidity perspective, the ownership perspective carries certain implications for issues such as scope of application, protective purpose, and legal effects. The implications of the ownership perspective may be contrasted with those of the invalidity perspective.

If the invalidity perspective entailed that *condictio indebiti* is a protective rule in favour of the payer, the ownership perspective implies the opposite. From the ownership perspective, *condictio indebiti* is a protective rule in favour of the recipient. A transfer of money is not in itself regarded as a binding legal act. The transfer is, so to speak, legally empty, and so long as there is no legal ground in the form of a claim of the recipient, the recipient is under an obligation to make restitution. The doctrine of *condictio indebiti* establishes an exception to that obligation. Notwithstanding the absence of legal ground, the recipient may retain the funds, provided that he or she has received them and adjusted his or her position in reliance on them in justified good faith, and that an overall balancing of interests comes out in favour of the recipient. And since, from the ownership perspective, the right to retain constitutes an exception to the »normal order«, a certain degree of restraint on the part of the courts may be expected when it comes to recognising such a right.[103] On the other hand, that restraint may be offset by the fact that the threshold for finding that a legal ground existed is not set sky-high.[104]

Unlike the invalidity perspective, the ownership perspective does not entail that a transfer is irrevocable merely because the payer made the payment in the knowledge that no debt was owed to the recipient, or was indifferent to that question. This also encompasses payments made pursuant to immoral agreements. Although the situation of mistake remains, unchallenged, the most important paradigm case, mistake is neither a sufficient nor a necessary condition for a right to restitution. So long as there is no legal ground entitling the recipient to retain the funds, it is, in principle, of no significance that the payer intentionally transferred the money.[105] An intentional transfer of possession is not the same as a gift of the property transferred, and, as a matter of principle, a right to restitution exists, although the outcome in the individual case will in practice often

99 See above under Section 3.4.4.

100 See Lindskog, Betalning [Payment], 2014, Sections 15 and 16. The approach remains the same in the latest edition; see Lindskog, Betalning [Payment], 2022, Sections 15 and 16.

101 Compare, for example, *Sara's Money* NJA 2009 p. 500 and *Independent II* NJA 2014 p. 935.

102 For differing views, see, on the one hand, Schultz, SvJT 2012 p. 377 ff., and, on the other, Hellner, JT 1999–2000 p. 409 ff.; Ingvarsson, *Condictio indebiti*, 2016, p. 27 ff.; idem, Obehörig vinst. Fordringsrättsliga studier 02 [Unjustified Enrichment. Studies in the Law of Obligations 02], Uppsala 2024, pp. 5 and 107 ff.; and Lindskog, *Betalning* [Payment], 2022, p. 943 note 3286 and p. 953 note 331.

103 Compare the fact that, according to *The Printing VAT I*, the recipient bears the burden of proof that the circumstances are such that the right to restitution falls away.

104 Compare that, in *The Real Estate Agent's Client Account*, the Supreme Court found that the real estate agent had reasonable grounds to believe that a legal ground existed. As argued above in the fine print under Section 3.4.5, principles of real estate brokerage law may be considered to point in the direction that there were no such reasonable grounds for the agent to hold that view.

105 Note that, in *The Real Estate Agent's Client Account*, para. 19, the Supreme Court states that a payment has a legal ground if it constitutes »a *disposition* by which the payer voluntarily makes a payment to the recipient« (emphasis added). It is thus not sufficient that the transfer was intentional for a legal ground to exist; it must amount to a disposition – a legal act – for example in the form of the payment, together with the surrounding circumstances, expressing an acceptance of an offer from the recipient or a promise of a gift. The question whether a disposition exists is to be assessed in accordance with principles of contract law; compare paras 19–24 of the same case. The same reading should now apply to the obiter dicta in *The Tax Account I* para. 8 and *The Printing VAT I* para. 10, to the effect that exceptions to the principal right to restitution apply to voluntary payments that are dispositions. The case NJA 1918 p. 405 has been regarded as supporting the view that intentional payments without legal ground are not recoverable; see Gentele, G., Återbäring av betalning, erlagd av misstag [Restitution of a Payment Made by Mistake], SvJT 1942 p. 713. However, the casuistically formulated reasoning in that older decision can be read in other ways; see note 109 below.

be determined by the allocation of the burden of proof.[106] That said, it may well be questioned whether a person who intentionally transfers money to another, in the knowledge that no payment obligation exists, should be able to use the recipient as a kind of deposit account, with an unrestricted right of withdrawal and a potential entitlement to statutory interest from the date of payment.[107] What good is that? One possible solution might be to presume the existence of donative intent where the recipient is able to prove that the payer made the transfer in the knowledge that no payment obligation existed.[108] Another solution would be to take the payer's knowledge into account in favour of the recipient in the assessment of good faith carried out within the framework of the doctrine of *condictio indebiti*, or – if the good faith assessment has already, on other grounds, come out in favour of the recipient – in the final overall balancing of interests.[109] A further, albeit perhaps somewhat strained, alternative would be to regard the payer, by making the intentional transfer, as having abandoned the funds, and the recipient as having acquired ownership of that *res derelicta* by occupation.

Like the invalidity perspective, but unlike what followed from the conceptual meaning of the legal-ground terminology in Phase Two and, to some extent, also in Phase One, the ownership perspective excludes third-party payments of another's debt. If, for example, a payment intermediary mistakenly believes that it has received a payment instruction and pays the principal's debt, the payment has a legal ground provided that, on the basis of general contractual assessments, it appears that the payment was designated towards an existing claim and there is no reason to shift the risk of the intermediary's mistake as to motive onto the recipient.[110] In such cases, the solution may instead be to afford the payer a right of recourse.[111]

As noted, the invalidity perspective did not entail any fixed order of assessment between the doctrine of *condictio indebiti* and the contractual rules on invalidity; they could be regarded as being on an equal footing. During the second phase of the legal-ground terminology, in *The Tax Account I*, the message conveyed was that the doctrine took precedence over contract law. However, with *The Real Estate Agent's Client Account* and the third phase of the legal-ground terminology, the clear message is now that contract law takes precedence over the doctrine. In determining whether a transfer of funds has had a legal ground, contractual principles will typically come into play.[112] First and foremost, there must have been an enforceable claim. In this respect, the transfer, together with the surrounding circumstances, may at one and the same time constitute both a payment and an implied undertaking of the debt being paid. This is to be assessed in accordance with principles of contract law, and decisive weight is to be given to the payer's intention, the recipient's justified reliance,[113] or the payer's knowledge of the recipient's mistaken understanding.[114] A payment is a legal act, an act of performance.[115] For such an act to exist, there must be an intention to be bound that has been expressed in a declaration of intention with a certain content, communicated to and received by the recipient, thereby giving rise to a justified impression on his or her part.[116] From a contractual-theoretical perspective, it must probably be regarded as the case that an act of performance cannot exist in the absence of an obligation.[117] In practice, the obligation may of course arise simultaneously with the performance being rendered,[118] but from a theoretical standpoint the two must be kept distinct. This means that a transfer cannot be declared invalid if there has been no debt to which the transfer could be regarded as a payment. In such a case, the transfer is not a legal act at all, but merely a factual act, and there is no legal ground. If, however, the recipient has a claim to which the transfer may be regarded as

106 The question of the allocation of the burden of proof is a difficult one. In this regard, see the discussion of the cases *The Dentist's Mishap* (*Tandläkarens olycka*) NJA 2014 p. 364, *Terry's Restaurant* (*Terrys restaurang*) NJA 2017 p. 1094, and *The Paying Cohabitant* (*Den betalande sambon*) NJA 2019 p. 23 in Hardenberger, A., Bevisbördans placering i fordringsmål – en rättsfallsstudie [The Allocation of the Burden of Proof in Claims Litigation – A Case Law Study], SvJT 2018 p. 360 ff.; idem, Bevisbördans placering i fordringsmål II – särskilt om förhållandet mellan den civilrättsliga regeln och föremålet för bevisbördan [The Allocation of the Burden of Proof in Claims Litigation II – With Particular Reference to the Relationship between the Substantive Rule and the Object of Proof], SvJT 2019 p. 705 ff.; and Lindskog, S., Prövningsordningen vid återkrav av överlämnad egendom [The Order of Examination in Claims for Restitution of Transferred Property], SvJT 2020 p. 297 ff.

107 The import of *Royal* NJA 2008 p. 392 is that good or bad faith is not a factor in the assessment of whether a right to yield interest arises under Sec. 2, second paragraph, of the Swedish Interest Act. However, that provision is only applicable by analogy in cases of restitution following the absence of legal ground, which leaves some room for other assessments, a point cautiously acknowledged by the Supreme Court in NJA 2016 p. 799 para. 15.

108 Compare NJA 1918 p. 405. In that case, a person who had made a payment in the knowledge that he was not obliged to do so was held not to have a right to restitution, since »he had not shown any other circumstance that could entitle him to recover the same amount«, although the payer's knowledge of the absence of a debt also appears to have been presumed in the case (the payer had »not made it probable that, at the time of the payment of the said amount, he was under a mistake«).

109 Compare Rønning, *Condictio indebiti*, 2024, p. 190 f. and 221 ff., where it is indeed argued that a legal ground is created if the payer has at least knowledge of the absence of a debt and makes the payment without reservation, but that lower degrees of negligence (»ought to have known«) may be »taken into account as an element in *the settlement exception*« (emphasis in original

110 Compare the doctrine of assumptions (*förutsättningsläran*).

111 Compare NJA 1999 p. 575 with reference to NJA 1912 p. 562. See, regarding recourse in cases of mistaken payment of another's debt, Unnersjö, A., Misstagsbetalning av annans skuld. Regress mellan försäkringsbolag i ljuset av en norsk dom [Mistaken Payment of Another's Debt. Recourse between Insurance Companies in the Light of a Norwegian Judgment], SvJT 2018 p. 641 with references.

112 Naturally, legal frameworks other than contract law may also come into play, since obligations may arise from sources other than contract.

113 Compare Sec. 32, first paragraph, of the Swedish Contracts Act.

114 Compare Sec. 6, second paragraph, of the Swedish Contracts Act.

115 This is, at any rate, the starting point according to the preparatory works to the Swedish Contracts Act; see *Förslag 1914*, p. 111 f. and 117.

116 See Mossberg, JT 2023–24 p. 72 ff. for an in-depth theoretical discussion of the criteria for legal acts.

117 Compare Arnesdotter, Moderna betalningsmetoder [Modern Methods of Payment], Stockholm 1996, p. 19 f.; Ingvarsson, Fordringsrätt [The Law of Obligations], 2021, p. 21; Lehrberg, B., Moderna betalningsformer [Modern Forms of Payment], 3 ed., Stockholm 2005, p. 15 ff.; and Lindskog, Betalning [Payment], 2022, p. 145.

118 A simple example is registration for an event effected by payment of the registration fee.

having been designated, the situation is different. As noted, the question of designation is to be determined in accordance with principles of contract law, in which the recipient's justified reliance may once again be of decisive importance. If a transfer made by mistake is assessed as a payment designated towards a particular claim, the payment does not lack legal ground.[119] In such a case, it must instead be examined whether the mistake may constitute a ground of invalidity under contract law, for example pursuant to Sec. 32(1) of the Swedish Contracts Act or the doctrine of assumptions, or whether adjustment may be made under Sec. 36 of the Swedish Contracts Act. If the payment discharged the payer's own debt, however, the effect of restitution following a successful claim of invalidity may be neutralised by the recipient setting off the restitution claim against his or her claim against the payer.[120] The same applies, moreover, where the payment cannot be regarded as having been designated at all, but the payer has a debt to the recipient. However, where a third party has paid another's debt, no such right of set-off arises, since the recipient then lacks a counterclaim against the payer.

Voluntary transfers of money are, in all likelihood, most often made with the purpose of discharging the payer, or the person on whose behalf the payment is made, from a debt owed to the recipient. Against that background – that a payment typically embodies a settlement – it could be argued that the act of payment, in a situation where no payment obligation existed, in itself gives the recipient reasonable grounds to assume that the payer intended to undertake an obligation towards the recipient corresponding to the amount paid.[121] However, it may equally be argued that a person who receives a payment has reason to assume, on the contrary, that the payer made the payment only because he or she believed that there was an obligation to do so. If one is again to speculate as to what is most common, it is likely far more usual that a payment is made in discharge of an already existing debt than that it is made both in discharge of and as a simultaneous undertaking of a debt that would not otherwise have existed. A reasonable starting point appears to be that persons typically have no interest in gratuitously assuming a payment obligation, which suggests that fairly high demands may be justified as regards what is to be regarded as giving rise to justified reliance of the kind in question.[122] At the same time, it is difficult to conduct this discussion on an abstract level. The assessment will depend on the circumstances of the particular case, and the question of reasonable grounds is a normative one.

5 Revolving Doors Between the Doctrine and Contract Law, and the Two Principles of Reliance?

Finally, a few observations will be made regarding certain systematic challenges associated with the ownership perspective. It is necessary to tread carefully in order to maintain a clear distinction between contract law and the doctrine of *condictio indebiti*, while at the same time recognising that the two bodies of rules contain overlapping components.

From the ownership perspective, a sharp distinction is, as noted, drawn between the doctrine and contract law, see in particular *The Real Estate Agent's Client Account*. Typically, one must, so to speak, first pass through contract law in order to gain access to the gates of the doctrine. In earlier case law, the two areas were more fluid and tended to overlap.[123] Systematic order is important, and it may be that, inter alia, systematic considerations have motivated the Supreme Court's shift from an invalidity perspective to an ownership perspective.[124] That does not mean, however, that it is always easy to determine where one is situated within the structure.

An excerpt from the decision *Svartön's Price* (*Svartöns* pris) NJA 2022 p. 3 may be illustrative. One issue in the case was whether a consumer who had, in part, made a payment without legal ground, by paying an excessive amount, was entitled to recover the excess even though a considerable period of time had elapsed between the payment and the claim for restitution. On this question, the Supreme Court stated that

»*there may be an obligation to assert a claim within a certain period of time for [the right to restitution] to be preserved. However, the time within which a claim for restitution must be made depends on the circumstances of the individual case and may, particularly in consumer transactions, extend to significantly longer periods than is typically the case for a duty to give notice based on breach of contract. A starting point should be that a consumer in such a situation is to be afforded a reasonable time to consider his or her position; at the same time, the longer the payer delays in asserting a claim for restitution, the greater the reason for the recipient to believe that the payment is final.*«[125]

Bearing in mind the sharp distinction between contract law and the doctrine of *condictio indebiti*, one may ask whether the reasons that the passage of time has given the recipient to regard the payment as final are to be addressed as a matter of contract law or within the framework of the doctrine of *condictio indebiti*. From

119 Compare *The Real Estate Agent's Client Account*. If the transfer were not to be classified as a legal act, the payer should, in principle, have a right to restitution even if the recipient has a claim to which the transfer could in fact have constituted payment. However, where the payer himself is the recipient's debtor, the recipient has the possibility of neutralising his repayment obligation by raising a set-off defence. In line with the approach reflected in *Independent II* NJA 2014 p. 935 (compare *The Liquidator's Right of Retention* (*Likvidators* retentionsrätt) NJA 2019 p. 259), the ownership perspective could, admittedly, exclude a right of set-off if the mistakenly paid funds have never been mixed with the recipient's own funds. Since the recipient has the power to mix the funds, such an obstacle could, on the other hand, easily be overcome.

120 Compare Lindskog, Betalning [Payment], 2022, Section 14.1.2.4.

121 This is the main thesis advanced by the Danish scholar Ravnkilde, J., Betalningskorrektioner [Payment Corrections], Copenhagen 2001, p. 153 ff. Compare also the Norwegian scholar Arnholm, C. J., Streiftog i obligasjonsretten [Forays into the Law of Obligations], Oslo 1939, pp. 168 ff. and 196 ff.

122 Compare *The Non-Revived Claim* NJA 2018 p. 805 para. 10.

123 See, for example, *Stångåstaden* NJA 1989 p. 224.

124 Compare Lindskog, Betalning [Payment], 2022, p. 952. For my part, I wonder whether the policy considerations underlying the shift are, to a large extent, of a narratological nature. The ownership perspective simply provides, in my view, a more coherent and convincing underlying narrative than that associated with the invalidity perspective. Compare, for example, what Andersson, H., writes about archetypal narratives in Rättens narratologiska dimensioner – interaktion och konstruktion [The Narratological Dimensions of Law – Interaction and Construction], in Gräns, M. & Westerlund, S. (eds), Interaktiv rättsvetenskap. En antologi, Uppsala 2006, p. 22 ff.

125 Para. 32 of the Supreme Court's reasoning.

one perspective, the mere passage of time may be understood as a factor of evidence supporting the conclusion that the recipient has, with reasonable grounds, adjusted his or her position in reliance on the payment.[126] On that view, the matter concerns an application of the requirement of adjustment of position under the doctrine of *condictio indebiti*. However, the statements cited in *Svartön's Price* were made independently of the requirement that the payment must already, from the outset, have been received in justified good faith, and under the doctrine the requirement of adjustment of position is not to be examined until the requirement of good faith has first been satisfied.[127] That, together with the fact that the Court in the case generally proceeded from a broader perspective of passivity, suggests that what is involved is a contractual assessment of the legal effects of passivity.[128] A party's passivity may have contractual significance in a number of ways.[129] One is that the passivity, together with the surrounding circumstances, constitutes a legal act by which the passive party gives the counterparty reasonable grounds to believe that a right against the counterparty has been waived.[130] In other words, the contractual principle of reliance is once again engaged. This means that the assessment may move back and forth between the doctrine and contract law; a kind of revolving door is opened between the two bodies of rules. The order of assessment may, somewhat pointedly, be described as follows. Once, following an assessment under the contractual principle of reliance, it has been established that the payment did not constitute a disposition, and we have thereby entered the doctrine of *condictio indebiti*, we may have to step out of the doctrine and back into contract law in order to determine whether the payer, under that same principle of reliance, has nevertheless made a disposition by delaying in asserting a claim for restitution. If that is not considered to be the case, we must return to the doctrine and examine whether its conditions for a right to retain the funds are satisfied. Or, more concretely: if, at the time of payment, the recipient had reasonable grounds to believe that the payment formed part of a legal act whereby the payer undertook a payment obligation or unreservedly accepted an offer from the recipient, the door to *condictio indebiti* is closed. The door opens where there is no basis for justified reliance of that kind. The longer the payer delays in asserting a claim for restitution, the more reason the recipient has to regard the payment as final. The passivity thus forms part of a legal act by which the payer waives the right to restitution, which once again closes the door to *condictio indebiti*. But if the passivity cannot be regarded as giving rise to such a waiver, the condictio door remains open.

The precise legal considerations and sequencing that the order of assessment must encompass in the individual case will, of course, be determined by how the claim is framed and what objections have been raised. It should also be emphasised that the revolving-door effect described is not unique to situations concerning restitution of transferred funds. The matter may be said to concern what is commonly referred to as legal plurality of avenues or alternative bases of claim.[131] The doctrine of *condictio indebiti* simply stands available as one of several possible lines of defence for the recipient once he or she has lost the initial question of the payer's prima facie right to restitution.[132] But it is for the court to find its way through the thicket.

It is not only contract law that contains a principle of reliance; the doctrine of *condictio indebiti* also embodies such a principle in the requirement of good faith that must be satisfied for the payer's right to restitution to fall away. The two principles of reliance also exhibit significant similarities.[133] Just as the contractual principle of reliance requires that the recipient have justified reliance (»knew or ought to have known«)[134] the requirement of good faith under the doctrine of *condictio indebiti* requires that the recipient have justified reliance (»reasonable grounds to believe«)[135]. In a situation where a person has transferred an amount without being wholly or partially obliged to do so, the object of the recipient's justified reliance must, however, differ depending on which principle of reliance is to be applied. The meaning of the recipient's justified reliance cannot be the same within and outside the doctrine. Otherwise, the doctrine's principle of reliance would seldom be capable of appli-

126 Compare Lindskog, Betalning [Payment], 2022, p. 966 f. note 3360. The passage of time in itself does not constitute an adjustment of position, as Lindskog also points out.

127 Compare Andersson, SvJT 2022 p. 396; and Mellqvist, M., Konkursprocess samt något om *condictio indebiti* [Bankruptcy Procedure and Some Observations on Condictio Indebiti], JT 2021–22 p. 954 f.

128 Compare Andersson, SvJT 2022 p. 394 ff.

129 See, for example, Arvidsson, N. & Gorton, L., Passivitet inom avtalsrätten [Passivity in Contract Law], Festskrift till Göran Millqvist, Stockholm 2019, p. 97 ff.

130 Compare the passivity cases *The Pledgor's Passivity* (*Pantsättarens passivitet*) NJA 1961 p. 26; *Division of Property after 24 Years* (*Bodelning efter 24 år*) NJA 1993 p. 570; *Restaurang Pelé* NJA 2002 p. 630; *The KRAV Milk* (*Kravmjölken*) NJA 2017 p. 203 (para. 9); *Skogssällskapet* NJA 2017 p. 1195 (para. 14); *The Toy Shop in Vimmerby* (*Leksaksaffären i Vimmerby*) NJA 2018 p. 171 (para. 13); and *Svartön's Price* (*Svartöns pris*) NJA 2022 p. 3 (para. 27), from which it follows that a right may be lost, inter alia, if the entitled party, through passivity, has given the counterparty the (justified) impression that the right has been waived (or if the entitled party, through such passivity, must be considered to have acquiesced). It thus appears that, in case law, no particular weight has been given to the fact that a waiver constitutes a form of gift and that the contractual principle of reliance, which follows e contrario from Sec. 32, first paragraph, of the Swedish Contracts Act, would therefore not be applicable (compare the preparatory works, Förslag 1914, p. 140). Another matter is that evidentiary rules may make it difficult for the counterparty to prove that the entitled party has made a waiver. From The Endorsed Promissory *Notes* (*De påtecknade reverserna*) NJA 1987 p. 40 and *Mother's Guarantee* (*Mammas borgen*) NJA 2012 p. 804, it follows that it is the debtor who bears the burden of proof that a simple claim has been waived, and that it must be clear that the legal act expresses a genuine intention to make a gift and is intended to have legal effect without any further measure. How this evidentiary requirement comes into play when the »legal act« consists of passivity, and how it stands in relation to the statements made in the above-mentioned passivity cases, is not self-evident.

131 See, in this regard, inter alia, Lindskog, S., Något om rättslig flerspårighet [Some Observations on Legal Plurality of Avenues], Festskrift till Gertrud Lennander, Stockholm 2010, p. 191 ff.; and Bratt, S., Alternativa anspråksvägar i skadeståndsrätten [Alternative Bases of Claims in Tort Law], Stockholm 2023.

132 In addition to contractual defences, mention may be made, for example, of defences relating to limitation and set-off.

133 Compare, inter alia, Hellner, Minnesskrift Hult, p. 195 f.

134 Sec. 32, first paragraph, of the Swedish Contracts Act.

135 The Printing VAT I, para. 12.

cation, since a typical precondition for its application is that the contractual assessment has led to the conclusion that the payment lacked legal ground, including that the recipient lacked justified reliance. If the reliance element were the same under both principles, the reliance principle within the doctrine of *condictio indebiti* would thus be of little practical significance, which would make the sharp distinction between the doctrine and contract law difficult to justify in this respect.

In such a situation, the contractual assessment of reliance is directed at two matters. First, it concerns whether, through the payment and the surrounding circumstances, the payer has given the recipient reason to believe that the payer has made a unilateral disposition by which the payer has undertaken a payment obligation. The question is thus – so long as the payer never intended to assume an obligation that would not otherwise have existed – whether the payer's conduct has given rise to a mistake in expression and, if so, whether the recipient was in good faith as to that mistake.[136] An established way of expressing this is to say that the question is whether the payment embodied a settlement.[137] Secondly, the contractual assessment of reliance, in cases where the recipient did in fact have a claim to which the transfer could in principle have been a payment, concerns whether the payer gave the recipient reasonable grounds to believe that he or she intended to designate the payment towards that claim. This latter aspect is particularly decisive in cases of third-party payment (see above under Section 4 regarding the recipient's possibility of set-off where the payer is himself the recipient's debtor).

What, then, is the focus of the principle of reliance within the doctrine of *condictio indebiti*, when the reliance element cannot concern whether the payment embodied a settlement in the sense described above?[138] The doctrine's reliance criterion must probably be understood as a mirror image of the central requirement for a right to restitution under the invalidity perspective, namely a mirror image of the requirement of mistake as to indebtedness. The decisive question should thus be whether the recipient was under a justified mistake as to having an existing claim corresponding in amount at least to the sum paid. The circle is closed.

136 Compare Sec. 32, first paragraph, of the Swedish Contracts Act *e contrario*.

137 See, for example, Hult, Juridisk debatt, p. 73.

138 According to Lindskog, Betalning [Payment], 2022, p. 152, both the recipient's justified reliance and the payer's actual knowledge thereof are required in order for a transfer of funds, from a contractual perspective, to be classified as a disposition. He thus considers that the recipient's justified reliance alone is not sufficient. On such a view, the distinction between the contractual principle of reliance and that applicable under the doctrine of *condictio indebiti* becomes simpler, since the latter does not entail any requirement of actual knowledge on the part of the payer. My view, however, is that actual knowledge on the part of the payer is not a necessary condition for a transfer to constitute a contractual disposition. This is supported by *The Real Estate Agent's Client Account*, where the Supreme Court stated in para. 19 that a payment may have a legal ground even if it was due to a mistake on the part of the payer, provided that the recipient, in light of the circumstances, had reason to perceive the payment as one made on a legal ground. Compare also *The Dental Care Subsidy* para. 7 and what is said in that regard in note 74 above. Compare further the Supreme Court's statements in *The Non-Revived Claim* (*Den ej återuppväckta fordran*) NJA 2018 p. 805 para. 7 concerning general principles for the interpretation of legal acts and the significance of justified reliance. Reference may also be made to the debate that has followed upon the Supreme Court's case law in *The Travel Company Representative* (*Reseföretagsrepresentanten*) NJA 2013 p. 659, *The Division Manager* (*Divisionschefen*) NJA 2014 p. 684, and *The Loan Agreement with Svea Ekonomi* (*Låneavtalet med Svea Ekonomi*) NJA 2021 p. 1017 concerning so-called reliance-based authority (*tillitsfullmakt*); see Unnersjö, A., *Skadeståndströskeln och bundenhetströskeln vid orsakande av befogad fullmaktstillit* [The Threshold for Damages and the Threshold for Being Bound in Cases of Causing Justified Reliance on Authority], Ny Juridik 2:23 p. 17 ff. with references in note 2; and Lundberg, K., *Ännu något mera om tillitsfullmakt* [Yet More on Reliance-Based authority], JT 2023–24 p. 227; and Svensson, O., *Kollapsar skillnaden mellan fullmakt grundat på en viljeförklaring och fullmakt grundat på tillit?* [Is the Distinction between Authority Based on a Declaration of Will and Authority Based on Reliance Collapsing?], SvJT 2023 p. 812 ff.

