Perspectives on Property and Unjust Enrichment

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To everyone who was with me on the journey,

With grateful thanks

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Unjust Enrichment. An Answer in Search of a Property Question?

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DECLARATIONS

This dissertation is my own work and contains nothing which is the outcome of work done in collaboration with others, except as specified in the text and Acknowledgements.

This dissertation is not substantially the same as any submitted by me for a degree or diploma or other qualification at any other University.

This dissertation, including footnotes, does not exceed the permitted length.

Eoin O'Dell

31 March 2004

SUMMARY

It is now almost a truism that the mysteries of the inter-relationship of property and unjust enrichment will soon be solved, and, in particular, that there will be a stable set of principles on which to base proprietary remedies for unjust enrichment. This confidence is engendered in part by two important monographs which claim that the resulting trust and subrogation proprietarily reverse unjust enrichments, and by contemporary House of Lords decisions, which, though they do not speak with one voice, seem largely in tune with that academic work.

The main aim of this thesis is to demonstrate that this development is misconceived. Having set the scene in the introductory Chapter 1, Chapter 2 argues that the resulting trust arises by operation of law on the basis of one of two essential facts (apparent gifts, and trusts which fail), though they may be rebutted by the donor's intention to make a gift, Chapter 3 argues that the *Quistclose* trust responds not to the defendant's unjust enrichment but to the mutual intentions of the parties, and Chapter 4 also argues that subrogation arises by operation of law having regard to the intentions of the parties. In all these cases, intention-based explanations work; and in none does the doctrine respond to unjust enrichment.

Nevertheless, there may be other doctrines which provide proprietary responses to unjust enrichment: the equitable salvage lien discussed in Chapter 5 is probably one; and a strict understanding of the remedial constructive trust discussed in Chapter 6 might be another, if, in addition to the defendant's unjust enrichment at the claimant's expense, it is shown both that the claimant did not take the risk of the defendant's insolvency and that the defendant was aware of the circumstances of the claimant's claim.

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CHAPTER 1. INTRODUCTION

As Fermat to Wiles: Solving the Riddles of Property and Unjust Enrichment?

> "… within the near future there will be a solution to the continuing mystery of the relationship between property law and unjust enrichment".[1]

> "The relationship … is fiendishly problematic … one can regard it as the last great unsolved mystery for those working in the law of Restitution …".[2]

Every schoolchild is familiar with Pythagoras' Theorem: that, in a right-angled triangle, the square on the hypotenuse is equal to the sum of the squares on the other two sides; that is: $x^2 + y^2 = z^2$. This holds for powers of two, but generations of mathematicians after Pythagoras failed to find whole-number solutions for x, y and z for powers higher than two; that is: they failed to find any whole number solutions to $x^n + y^n = z^n$ where $n>2$. Pierre de Fermat, seventeenth-century French judge and amateur mathematician, claimed that no such solutions were to be found.[3] In a note scribbled in the margins of his favourite mathematical text,[4] he wrote:

> I have a truly marvellous demonstration of this proposition which this margin is too narrow to contain.[5]

Fermat's Last Theorem then, is that there are no whole-number solutions for x, y and z for an equation in the form $x^n + y^n = z^n$ where $n>2$. However, since Fermat did not set down his "truly marvellous demonstration", for more than three hundred and fifty years, the world of mathematics struggled to prove or disprove his conjecture, until, on 23 June 1993, Andrew Wiles, a professor in Princeton, returned to Cambridge, the city of his birth, to give a lecture in the Issac Newton Institute, in which he demonstrated a proof of Fermat's

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[1] Burrows (1997) 112; *cp* Millett (1995) 41; Worthington (1995) 113; Barker & Smith (2000) 424, 432.

[2] Burrows (2001) 412; *cp* Rotherham (2000) 113; Smith (2000) 413.

[3] See, generally, Singh (1997).

[4] Bachet's translation of Diophantus' *Arethmetica* (Paris, 1621); the note is in Book II, on the margin of a discussion of Pythagoras' Theorem and related matters. See Singh (1997) 55-62.

[5] *Cuius rei demonstrationem mirabilem sane detexi hanc marginis exiguitas non caperet*. See Singh, 66, 69.

Last Theorem, and in the process "created a new bridge between wildly different mathematical worlds".[6]

In many ways, proprietary remedies for unjust enrichment stand to the modern law as Fermat's Last Theorem stood to the world of mathematics. Everyone expects there to be a solution, and it is only a matter of time until it is found. Indeed, most observers expect that the solution will be similar to Wiles', creating a bridge between the wildly different worlds of unjust enrichment and restitution on the one hand, and property and equity on the other. The quotes from Burrows at the start of this chapter are simply illustrations of these beliefs.

These were beliefs that I once shared, but no longer. This thesis is a story of apostasy, of belief being confounded by evidence. The story commences with recent decisions of the House of Lords and contemporary analyses which, hand in hand, began to explain when proprietary remedies for unjust enrichment might be available; and, at first, I believed in the solution to the riddle which seemed thereby to emerge. However, as the analytical foundations of these decisions and the unjust enrichment analyses constructed upon them are excavated, doubts grow as to the efficacy of that solution, and, in the event, it becomes clear that the unjust enrichment analysis of these cases does not hold. I am therefore forced to abandon my first belief: the evidence simply would not support it. At the end of the story then, these decisions are seen to rest on foundations other than unjust enrichment, and have little to contribute to the solution to the riddle.

In *Westdeutsche*,[7] the House of Lords considered the resulting trust; in *Twinsectra v Yardley*,[8] the *Quistclose*[9] trust; in *BFC v Parc*,[10] subrogation; and in *Westdeutsche* (again), the constructive trust. With these cases stand important books, by Chambers,[11] Mitchell[12]

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6 Lynch (1997) xiii.

7 *Westdeutsche Landesbank Girozdentrale v Islington LBC* [1996] AC 669; Birks & Rose (1999); Hudson (1999).

8 [2002] 2 AC 164.

9 *Barclays Bank v Quistclose Investments* [1970] AC 567.

10 *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221.

11 Chambers (1997)

12 Mitchell (1994); see also Mitchell (2003).

(and Elias[13]) which seek to ascribe unjust enrichment foundations to these proprietary institutions, an ascription which was by and large open after these decisions. My belief had been that the unjust enrichment view of these institutions would prove robust; but, on a close examination of the cases, that belief was confounded. From it I have now resiled. In its stead, I now believe two things: first, that many of the modern proprietary remedies claimed for unjust enrichment turn out to be founded not upon unjust enrichment but upon intention; and, second, that having diverted analytical energies into inappropriate contexts, it is (as Zhou En Lai is reported to have said (in 1972) of the French Revolution (in 1789)) much too early to tell in what – if anything – proprietary remedies for unjust enrichment will consist.

In *Foskett v McKeown*,[14] their Lordships drew a sharp distinction between rights born of property and rights born of unjust enrichment, and held that the claimants could trace[15] their money – misapplied by the deceased into the payment of life assurance premiums – into the proceeds of the policy, and make a claim of the former kind and not the latter. For Lord Browne-Wilkinson, the "rules establishing equitable proprietary interests … are an integral part of … property law"[16] and the case before him was not a matter of discretion but of "hard-nosed property rights".[17] For Lord Millett, the claimant succeeded "by virtue of his own title, not to reverse unjust enrichment. Property rights are determined by fixed rules and settled principles. They are not discretionary".[18] In terms of this sharp distinction between pure proprietary claims and proprietary claims born of unjust enrichment, this thesis argues that resulting trusts, *Quistclose* trusts and subrogation, like a great many institutional constructive trusts, are of the former kind, and that salvage and the remedial constructive trusts are probably of the latter.

[13] Elias (1991).

[14] [2001] 1 AC 102; Birks (2001); Burrows (2001); Grantham & Rickett (2000); Rotherham (2003); Stevens (2001); Virgo (2003); Virgo (2004).

[15] O'Dell (1999).

[16] [2001] 1 AC 102, 109.

[17] *Ibid*.

[18] *Ibid*, 127.

On the other hand, Birks has long argued that all rights, personal and proprietary, are responses to consent, wrongs, unjust enrichment, or other events,[19] (and, unsurprisingly, disagrees with *Foskett*[20]). In these terms,[21] this thesis argues that resulting trusts, *Quistclose* trusts, and subrogation give legal effect to the parties' intentions and are thus not born of unjust enrichment. (Furthermore – though not a theme of this thesis – this view might demonstrate the inappropriateness of (re)structuring or (re)aligning all sources of proprietary claims and remedies merely to establish whether or not unjust enrichment can give rise to proprietary remedies Birks'[22] event-response approach is simply inappropriate to contemporary understandings of property as contextual and variable bundles of rights of transferability and excludability.[23] At least since Locke,[24] such conceptions of property have been at the heart of modern liberal democratic polities;[25] they are central to most western constitutions;[26] and their discourse pervades the whole of the law.[27] Birks' view then is one view of the cathedral,[28] – and a partial one at that, on a rainy day – if only because property rules *can* meaningfully be contrasted with liability or obligation rules.[29] Quite simply, then, there is far more to property than Birks gives credit for).

Chambers and Mitchell posit that the resulting and *Quistclose* trusts, and subrogation, are restitutionary because they respond to unjust enrichment. The contrary conclusion that they do not respond to unjust enrichment is a matter of substance rather than a redefinition of boundaries. When Chambers and Mitchell were first writing, they accepted Birks' early view that unjust enrichment was the event to which restitution was the sole response, and

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19 See, *eg*, Birks (1997)a; (1997)b; (1999); (2003) 26-27, 30-34. On the utility of this kind of approach, *cf* Weinrib (1997) 37; Collins (1997) 57; Penner (1997) 81. On the utility of this approach to obligations, *cf* Hedley (2004). See also Keane CJ, extrajudicially: "… legislators and judges alike should be careful of succumbing to the attractions of taxonomy. The law, of its nature, cannot always be as precise as the natural sciences in defining categories" (Keane (2001) 259).

20 Birks (2001).

21 Virgo (1999) 6-17; Grantham & Rickett (2003).

22 Birks' attempt is not the only one to consider property and obligations at common law: for other approaches, see Gray (1991); Gray (1994); Samuel (1994); Kohler (2000).

23 Worthington (2003) 47-54, 79.

24 Locke (1698) (1960).

25 Harris (1996); Waldron (1988).

26 Ackerman (1977); McLean (1997); Underkuffler (2003).

27 Penner (1997).

28 For this metaphor in a property context, see Calabresi & Melamed (1972).

29 Kaplow & Shavell (1996).

vice versa; that is, that unjust enrichment and restitution perfectly quadrated.[30] But Virgo has argued that unjust enrichment is merely one of three events to which restitution is the response;[31] and Birks has recanted the quadration thesis in favour of another multi-causal view and a new focus on unjust enrichment;[32] though as Burrows points out, there remain powerful reasons to adhere to Birks' former view.[33] Nevertheless, Birks, Virgo and Burrows all agree that there is a core of unjust enrichment to which restitution is an appropriate response. The work of Chambers and Mitchell is primarily an attempt to give content to the assertion that within that core of unjust enrichment there exist circumstances in which the restitutionary response can appropriately be proprietary,[34] and that such a proprietary restitutionary response to unjust enrichment includes resulting trusts, *Quistclose* trusts, and subrogation. Having begun with the belief that there was something in this, I have come reluctantly to the conclusion that both Chambers and Mitchell have distorted perfectly adequate underlying doctrines in their quest to incorporate resulting trusts and subrogation within an unjust enrichment framework. They make some important points in the details, but I am now unconvinced by the project.

To establish this, chapter 2 examines the foundations of the resulting trust, to demonstrate that the intention-based orthodoxy reasserted by Lord Browne-Wilkinson in *Westdeutsche* is superior to the Chambers unjust enrichment approach. Similarly, chapter 3 examines the foundations of the *Quistclose* trust to demonstrate that the intention-based approach of Lord Wilberforce in that case is superior to its recasting by Lord Millet in *Twinsectra*. Likewise, chapter 4 examines the categories of subrogation, to demonstrate that an orthodox intention-based approach is superior to the Mitchell-induced unjust enrichment approach adopted by the House of Lords in *BFC v Parc*. Whisper it softly: in these contexts, intention works (indeed, presumptions of intention work); whisper it more softly still: in these contexts, the unjust enrichment approach is unprincipled. To this extent,

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30 Birks (1989) 16-22; applied *ibid* chapter 2.

31 Virgo, 3-17.

32 Birks (2003), 9-15, 20-26, 238-242.

33 Burrows (2000), (2002) 5-7; see also Tettenborn (1998) 32; McInnes (1999).

34 Birks' original thesis conceived of enrichments as unjust if they reflected, *inter alia*, a claimant-sided consent-related factor such as mistake or failure of consideration (see, *eg*, Birks (1989) 18, 100-103, 140, 219). Virgo and Burrows still organise their discussions around these factors, as did Chambers and Mitchell, and they are considered in these terms in this thesis. However Birks (2003) 36-40, 87-113 reconception (replacing the unjust factors with general notion of failure of basis) is also briefly considered.

therefore, these chapters of thesis tell the story of how I learned to stop worrying and love intention. But even if resulting trusts, *Quistclose* trusts, and subrogation, do not turn out to be examples of proprietary reversal of unjust enrichment, that is not to say that there may not be other doctrines which do. Indeed, the Irish principle of equitable salvage, examined in chapter 5, may provide just such an example. And in chapter 6, where Lord Browne-Wilkinson's speech in *Westdeutsche* is revisited, the remedial constructive trust emerges as a doctrine which, cumulatively with unjust enrichment at the claimant's expense, might very well justify in some cases at least the elevation of a personal claim into a proprietary one. This was a belief I once held, then abandoned when I favoured the resulting and *Quistclose* trusts for the proprietary reversal of unjust enrichment, and to which I have now returned, not without surprise; and yet "we shall not cease from exploration / and the end of all our exploring / will be to arrive where we started / and know the place for the first time".[35]

This is not an idle theoretical discussion. Equitable rights, in particular equitable proprietary rights, matter a great deal. Unlike personal claims at law, they are not vulnerable in an insolvency,[36] and may not be subject to the same bars, limits, limitations, or defences as related or underlying personal claims;[37] they can reach appreciations in value of the claimed asset[38] or profits made by the defendant,[39] generate claims to compound interest,[40] support applications for court orders to preserve the property until

[35] Eliot *Little Gidding V* from *The Four Quartets* (1943).

[36] Anderson (1992) 171; Cope (1997) 2-15, 101-110; Oditah (1997); *Shanahan's Stamp Auctions v Farrelly* [1962] IR 386 (HC) 444-445, 448 (Budd J); *Dempsey v Bank of Ireland* (Supreme Court, unreported, 6 December 1985, Henchy J); *Anglo Irish Bank v Kavanagh* (High Court, unreported, 19 December 2003, Gilligan J).

[37] Goff & Jones (2002) 876 [43.024]. Proprietary claims traditionally have longer limitation periods than personal claims, and many equitable claims had no formal limitation periods being subject only to the doctrine of laches; however, equitable remedies for unjust enrichment, including proprietary claims such as constructive trusts, are now increasingly being made subject to common six year limitation periods (Birks (2003) 211-214; Swadling (2002)). Similarly, it is still an open question whether the defence of change of position applies to proprietary claims to reverse unjust enrichments (Birks (200) 189 (arguing that it does); Burrows (2000) 527 (same); *Foskett v McKeown* [2001] 1 AC 102, 129 (Lord Millett) (suggesting *obiter* that it does not); Rotherham (2003) (different reasons for the same conclusion); *cf* Worthington (2003) 283-284). Finally, in *Sinclair v Brougham* [1914] AC 398 the personal claim was barred, but a proprietary claim succeeded; though now discredited (*Westdeuthsche*; O'Dell (2000)a), a similarly odd imbalance between personal and proprietary claims on peculiar facts cannot be ruled out *in limine*.

[38] *Scott v Scott* (1962) 109 CLR 649; *Trustees of the Property of F Jones & Co v Jones* [1997] 1 Ch 159 ; *Foskett v McKeown*.

[39] *AG for Hong Kong v Reid* [1993] AC 713 .

[40] *Westdeutsche*; *Lonhro Exports v Export Credit Guarantee Department* [1996] 2 Lloyd's Rep 649.

trial,[41] and increase the range of possible defendants;[42] and they may be the most appropriate means of dealing with certain domestic[43] or even commercial[44] property disputes, with breaches of fiduciary duty,[45] or with other cases in which the claimant for personal reasons might particularly want the property *in specie*.[46] For all of these reasons, and more, "proprietary status is inevitably controversial. The dividing line between personal and proprietary rights is widely regarded as one of the most troubling theoretical and practical distinctions currently facing the law …".[47]

It is, therefore, vital to be clear as to the basis not only of such important proprietary institutions as the resulting trust, the *Quistclose* trust, and subrogation, but also more generally of the principles of proprietary restitution. Much of the law on these issues has tended to obscure their redistributive nature;[48] the unjust enrichment approach has not dispelled that obscurity; in its place, this thesis offers a clarification of the principles which in fact do underpin these doctrines, and then works out from them to the kinds of matters which ought to underpin proprietary liability. Where a proprietary recourse is what the parties intended, there are few potential principled objections[49] to the law's recognising and giving effect to this intention. If the resulting trust, the *Quistclose* trust, and subrogation, all respond to intention, as they do, then their proprietary nature is unexceptionable.[50]

The analysis in this thesis is directed in the first instance not to overarching theory but to the cases themselves. Each chapter constructs a view of the relevant issue based upon a

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41 *OBA Enterprises v TMC Trading International* (High Court, unreported, 27 November 1998, Laffoy J); Courtney (1999); (claim for a *Mareva* injunction or similar relief failed),

42 Rotherham (2000) 123.

43 *Hussey v Palmer* [1972] 1 WLR 1286; *Binions v Evans* [1972] Ch 359; *Eves v Eves* [1975] 1 WLR 1338 (Lord Denning's new model constructive trust); *Lloyd's Bank v Rosset* [1991] 1 AC 107 (common intention trust).

44 *Banner Homes v Luff Developments* [2000] Ch 372.

45 Worthington (2003) 124-129.

46 Radin (1982); Rachlinksi & Jourden (1998).

47 Worthington (2003) 127; see also n1 above.

48 Rotherham (2001) *passim*, *esp* 343-344; Stevens (1989).

49 Apart from considerations of invalid preferences (see, *eg*, Keay (2000)), or public policy (see, *eg*, *British Eagle International Airlines v Compagnie International Air France* [1975] 1 WLR 758).

50 *Cp* Calnan (2003) 171, 176.

consideration of what the judges in the cases have actually said or upon what can fairly be inferred from them.[51] This inductive bottom-up reasoning is far more consonant with the common law method than the kind of top-down deductive reasoning in the works of Birks, Mitchell and Chambers.[52] The common law, Dan Prentice once remarked to me, is a messy thing. It is messy because human nature is messy. As Holmes famously commented: "The life of the law has not been logic: it has been experience".[53] Striving to impose a logic unsupported by the experience of the cases does violence to the fabric of the law. This is not to downplay the importance of academic work to the modern law of unjust enrichment; it is hardly an exaggeration to say that it is a product of the academy in way that is unique in the common law tradition. Rather, academic work must not lose sight of the underlying cases upon which doctrine is constructed. Hence, in every chapter this thesis strikes out first from what the cases actually say, and accepts the end points which these starting points entail. If there is a guiding principle in the approach in this thesis, it is Aristotle's injunction "to rest satisfied with the degree of precision which the nature of the subject admits and not to seek exactness where only an approximation is possible". And if that means that unjust enrichment's equivalent of Fermat's Last Theorem remains unproven for now, then so be it.

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51 Rotherham (2002) 337, Gummow (1990) 55.

52 Rotherham, 33; *Muschinski v Dodds* (1985) 160 CLR 583, 615 (Deane J); *Roxborough v Rothmans of Pall Mall Australia Limited* (2001) 208 CLR 516 [72] (Gummow J); *cp* Kremer (2001).

53 Holmes (1881) (1991) 1; adopted: *Read v Lyons* [1947] AC 156, 175 (Lord Macmillan); adapted: *Quinn v Leathem* [1901] AC 495, 506 (Lord Halsbury LC).

CHAPTER 2. RESULTING TRUSTS

There's No Such Thing as a Resulting Trust to Reverse Unjust Enrichment, and It's a Good Thing Too!

1. Introduction

The law on resulting trusts seems to be in a mess. For too long, courts of chancery muddled along with resulting trust rules which embarrassed them.[1] Recently, however, a consensus seemed to be emerging around which the law on resulting trusts could cohere (and from which anomalies could be excised on a case by case basis[2]). The speech of Lord Browne-Wilkinson in *Westdeutsche*,[3] though not without its own difficulties, represents the high water mark of that consensus. Against it stands Chambers, who claims that the cases demonstrate that the resulting trust is directed to reversing unjust enrichment.[4] Nevertheless, this chapter will defend a version of the Browne-Wilkinson orthodoxy, and if that vision of the resulting trust works well enough, as it does, then there is no normative justification to displace it in favour of unjust enrichment analysis. Finally, if, however, the orthodoxy is mortally wounded by the Chambers assault, and if that in turn has nothing better to put in its place, there may be nothing for it than to rip up the law on resulting trusts and to start again.[5] But it will not come to that. If the great mass of encrusted learning and misleading doctrine is stripped away, and the resulting trust is stripped down to its essentials, a very simple doctrine emerges, that the resulting trust, as a classic default rule, arises by operation of law and may be displaced by intention.

The resulting trust arises by operation of law in two basic situations, in the case of gifts, and in the case of trusts which apparently fail;[6] the gift and the apparent failure are the

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1 *Bennet v Bennet* (1879) LR 10 Ch D 474, 476 (Jessel MR) ("very much embarrassed by the authority" by which a presumed resulting trust of a gift from mother to child was not rebutted by a presumption of advancement); *cp Re De Visme* (1863) 2 DeGJ&S 17; *Sekhon v Alisse* [1989] 2 FLR 94; *Ali v Khan* [2002] EWCA Civ 974, [30] (Morritt VC).

2 Notwithstanding *Bennet*, *cf Garrett v Wilkinson* (1848) 2 DeG&Sm 344; *Sayre v Hughes* (1868) LR 5 Eq 376; *Re Grimes* [1937] IR 470; *Wirth v Wirth* (1956) 98 CLR 228; *Brown v Brown* (1993) 31 NSWLR 582; *Nelson v Nelson* (1995) 184 CLR 538; *Damberg v Damberg* [2001] NSWCA 87.

3 *Westdeutsche Landesbank Girozdentrale v Islington LBC* [1996] AC 669.

4 Chambers (1997).

5 *Calverly v Green* (1984) 155 CLR 242, 264-265 (Murphy J); *Dullow v Dullow* (1985) 3 NSWLR 531, 535 (Hope JA); *Brown v Brown* (1993) 31 NSWLR 582, 595 (Kirby P); *Nelson v Nelson* (1995) 184 CLR 538, 600-602 (McHugh J); *Tinsley v Milligan* [1994] 1 AC 340, 371 (Lord Browne-Wilkinson).

6 Simpson (2000) 5.

essential facts which constitute the trust, though it can be displaced if in either case it can be demonstrated that the donor actually intended a gift to the recipient. This basic truth has been obscured of late, and out of the obscurity, led by Chambers, entirely different approaches have emerged not only to lay claim to the territory traditionally occupied by the resulting trust but also to expand it.[7] However, if this basic truth is retrieved, these expansionist approaches will be seen to be at best misconceived and at worst dangerous. The essential difference between the version of the orthodoxy presented here and the approach taken by Chambers centres on the role of the presumption as to the donor's intention. Chambers argues that what is presumed is that the donor did not intend to benefit the recipient, and that if a similar lack of intent can be affirmatively proved a resulting trust also arises. On this view, the vitiation of the donor's intention is constitutive of the resulting trust. However, this takes the presumption much too seriously. Indeed, far from being the central point of the analysis, as Chambers would have it, the better view is that analysis of the donor's intention is largely irrelevant to the constitution of the resulting trust, though a donor's intention to make a gift will displace it. Hence, the donor's intention is not so much constitutive of the resulting trust as responsive to it.

In part 2, the resulting trust will be stripped down to its essentials, to establish and defend a vision of a resulting trust which arises by operation of law in the case of gifts and of trusts which apparently fail, but which may be displaced by the donor's intention. Part 3 will consider the competing Chambers view, and seek to strip the resulting trust to reverse unjust enrichment out of the legal system, before concluding in part 4 that, as a consequence, there is no such thing as a resulting trust to reverse unjust enrichment, and it's a good thing too!

2. Stripping down the resulting trust

2.1 Introduction.

A resulting trust arises by operation of law, and it may be displaced by intention. As a matter of history, there seem to be two categories in which such trusts arise. They arise in respect of gifts, and in respect of trusts which seem to fail.

7 Chambers (1997) 2.

2.2 Resulting Trusts and Gifts.

In the case of gifts, resulting trusts arise simply because they are gifts.[8] The core of this basic truth is to be seen in the oft-quoted words of Eyre CB in the great case of *Dyer v Dyer*:[9]

> The clear result of all the cases, without a single exception, is that the trust of a legal estate … results to the man who advances the purchase money. This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy with the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence.[10]

The key to this passage is simple: the resulting trust arises by operation of law simply because the donor transferred the property *gratuitously*. Because of equity's historical suspicions of gifts, that was enough for it to require that the recipient justify the receipt, and a recipient who could not would hold it on resulting trust for the donor. The best way for the recipient to justify the receipt was to show that the donor did in fact intend it to be a gift notwithstanding that it was not a transaction for value. In this respect, proof of the donor's intention was the best of the circumstances in evidence to rebut the resulting trust which had arisen simply by virtue of the gratuitous nature of the transfer. This is the proper role of intention: it is responsive, in the sense that it is properly used in response to a trust which has arisen by operation of law. It is not constitutive, in the sense that it is not an element the presence or absence of which is necessary to constitute that trust. Hence, in the case of a gift, a resulting trust arises by operation of law, and it may be displaced by intention. Hence, in *Cowcher v Cowcher*,[11] Bagnall J held:

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8 There were good historical reasons why a medieval use was presumed in the context of a gratuitous disposition of land (see, *eg*, Barton (1965) 571-572; Baker (1977); Simpson (1975) 334-357; Simpson (1986) 177; Ibbetson (1999) 267, 274, 281-284), and the trust inherited the presumption when it succeeded the use (*Grey v Grey* (1677) 2 Swans 594, 598 (Lord Nottingham LC); *Lloyd v Spillet* (1740) 2 Atk 148, 150 (Lord Hardwicke LC); *Dyer v Dyer* (1788) 2 Cox Eq 92, 93 (Eyre CB); *Dullow v Dullow* (1985) 3 NSWLR 531, 535 (Hope JA); *Goodfriend v Goodfriend* (1972) 22 DLR (3d) 699, 703 (Spense J); Chambers (1997) 19-20; Chambers (2000) 385-386, 393-395; Glover (1999) 111-113; Swadling (1996) 113-115; Worthington (2003) 236, 279-280.

9 (1788) 2 Cox Eq 92.

10 *Ibid*, 93; *Rider v Kidder* (1805) 10 Ves Jun 360. In *Standing v Bowring* (1885) 31 Ch D 292; the donor's gift (Hill (2001)) raised an unrebutted resulting trust. *Carlton v Goodman* [2002] EWCA Civ 545 (same; following *Dyer*: [22](iii) (Mummery LJ), [36] (Ward LJ)). *Aroso v Coutts* (Chancery Division, unreported, 30 March 2001, Lawrence Collins J) (presumption of resulting trust rebutted by evidence of contrary intention ([22], [25]) on the facts before him ([35]). *Vajpeyi v Yusaf* [2003] EWHC 2788, Judge Prescott QC, followed *Dyer* ([64]-65]) (presumption rebutted ([71]-[78]) by proof that the advance was a loan ([82]-[90]).

11 [1972] 1 WLR 425.

> A resulting trust arises where a person acquires a legal estate but has not provided the consideration or the whole of the consideration for its acquisition, unless a contrary intention is proved.[12]

The mechanism by which the burden of showing the donor's intention is cast upon the recipient is that old favourite of equity's, a presumption. When a gift is made without consideration, equity presumes that the donor[13] intended it to be held on resulting trust[14] unless the recipient can rebut the presumption by any evidence which negatives the presumed intention, and in particular by proof of a contrary intention on the part of the donor.[15]

The presumption probably reflects the donor's most likely intention,[16] but it does not alter the fact that the two essential characteristics of this trust are that it arises by operation of law because the transfer is made without consideration, and that it can be displaced by demonstrating the donor's intention to make a gift to the recipient. However, the interposition of the presumption does have three important consequences. First, it is a strong means of casting upon the recipient the onus of justifying the receipt[17] – and if the recipient cannot, the property results to the donor. Second, in doing so by presuming an intention on the part of the donor and allowing it to be rebutted by anything[18] that negatives that intention, the set of evidence that can rebut the presumption is broader than the donor's intention to make a gift to the recipient - though that is still the best way to rebut it. In particular, it can be rebutted by a contrary presumption, the presumption of

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[12] [1972] 1 WLR 425, 431; *cp Vandervell v IRC* [1967] 2 AC 291, 306 (Lord Reid) 312 (Lord Upjohn); *Pettitt v Pettitt* [1970] AC 777, 813-814 (Lord Upjohn); *Carlton v Goodman* [2002] EWCA Civ 545, [36] (Ward LJ).

[13] And not the intentions of *both* parties (*cf Tinsley v Milligan* [1994] 1 AC 340, 371 (Lord Browne-Wilkinson); *Westdeuthsche*, 708; *Carlton v Goodman* [2002] EWCA Civ 545, [21], [22](ix) (Mummery LJ); *cf* Ward LJ ([33]-[35], [42]). The common intention trust is not resulting (Chambers (1997) 36-38, 98, 228-229; Mee (1999) 39-43; Rickett & Grantham (2000) 40), but is either a constructive (*Lloyd's Bank v Rosset* [1991] 1 AC 107, 132-133 (Lord Bridge); *cf* Glover & Todd (1996)) or a *Quistclose* trust (chapter below 3)).

[14] *Gissing v Gissing* [1971] AC 886, 902 (Lord Pearson); *Westdeutsche*.

[15] Glover (1999) 120; *Nicholson v Mulligan* (1869) IR 3 Eq 308, 322-323 (Walsh MR); *Standing v Bowring* (1885) 31 Ch D 292, 287 (Cotton LJ); *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353, 363-364; *Vandervell v IRC* [1967] 2 AC 291, 312 (Lord Lord Upjohn); *Re Vandervell's Trusts (No 2)* [1974] 1 Ch 269, 288 (Megarry J); *Lynch v Burke* [1995] 2 IR 159, 166-167 (O'Flaherty J).

[16] *Pettitt v Pettitt* [1970] AC 777, 283 (Lord Diplock); Rickett & Grantham (2000) 44-45.

[17] *Vandervell v IRC* [1967] 2 AC 291, 315 (Lord Upjohn) (evidential longstop); *Muschinski v Dodds* (1985) 160 CLR 583, 612 (Deane J); Virgo & O'Sullivan (2000) 97.

[18] *Vandervell v IRC* [1967] 2 AC 291, 312 (Lord Upjohn); *Pettitt v Pettitt* [1970] AC 777, 814 (Lord Upjohn); *Westdeutsche*, 708; Swadling (1996) 115-117.

advancement, which presumes an intention on the part of the donor to make a gift in certain situations.[19]

Third, the presumption must be handled with care: the key is that the intention is presumed from the underlying essential fact which actually gives rise to the trust. It does not do to take the presumption either too lightly or seriously; but Rickett and Grantham, making the latter mistake, see the fundamental enquiry as whether the transfer is intended by the donor to be beneficial to the recipient, and the presumption as the means by which the donor's intention is established.[20] This focus on the presumption rather than the underlying facts is misguided: the presumption – and, if it is unrebutted, the trust – arise simply because the transfer was a gift. The donor's intention, actual or presumed, is not constitutive of the resulting trust; that arises out of the underlying essential fact of the gift. Once a trust has thereby been triggered, an intention on the part of the donor to make a gift to the recipient is sufficient to displace it. The proper role of intention, then, is as responsive to the resulting trust and not constitutive thereof; and the interposition of a presumption as to the donor's intention between the essential fact of the gift and the resulting trust seems to amount to an unnecessary extra layer of analysis.

If the presumption applies to gifts of realty,[21] it is rather easily rebutted; it does apply to gifts of personalty, [22] and it is rebutted very easily indeed.[23] So, in the context of a joint deposit account, where the donor has deposited money in an account in the joint names of the donor and another, equity will presume a resulting trust in favour of the donor but it is

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[19] Chambers (1997) 27-32.

[20] Rickett & Grantham (1999) 300-307; (1999)a 115-117; (2000) *passim*; Rickett (1999) 313-319.

[21] Section s60(3) of the Law of Property Act, 1925 probably precludes the resulting trust in the case of gratuitous transfers of land (*cp* s123(3) of the Registration of Title Act, 1964 (Ireland) (a similar rule for registered land); Chambers (1997) 16-19, 38; Glover (1999) 112-113, 120-122; *Hodgson v Marks* [1971] 1 Ch 892 (open question); *Lohia v Lohia* [2001] WTLR 101 (ambiguous); *Ali v Khan* [2002] EWCA Civ 974, [24] (Morritt VC) (presumption abolished by s60(3)).

[22] Chambers, 12-13, 16; Glover, 111-112; *The Venture* [1908] P 218 (ship); *Niles v Lake* [1947] 2 DLR 248, 255 (choses in action); *Shepard v Cartwright* [1955] AC 431 (same); *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353; *Bateman Television v Bateman* [1971] NZLR 453 (cars); *Fitzpatrick v Criminal Assets Bureau* [2000] 1 IR 217 (car).

[23] *Fowkes v Pascoe* (1875) LR 10 Ch 343, 352 (Mellish LJ); *Vandervell v IRC* [1967] 2 AC 291, 312 (Lord Upjohn); *Pettitt v Pettitt* [1970] AC 777, 814 (Lord Upjohn), followed in *Carlton v Goodman* [2002] EWCA Civ 545 [36] (Ward LJ).

now[24] relatively easy to rebut the trust by inferring from the circumstances of the creation or operation of the account that the donor did intend such a gift.[25] The resulting trust is so easily rebutted in so many situations, in fact, that it may be questioned whether it is appropriate to modern conditions.[26] But for so long as there is no legislative or judicial act of law reform abrogating it, it remains the law that presumed resulting trusts arise by operation of law in the case of gifts, and are displaced (primarily) by the donor's contrary intention.

2.3 Resulting Trusts and Trusts Which Apparently Fail.

In the case of trusts which apparently fail, they arise by operation of law simply because the trust has failed. In *Morice v Bishop of Durham*,[27] where an attempted testamentary bequest to the Bishop of Durham on trust for benevolent purposes failed for uncertainty, Lord Eldon LC held:

> The consequence of Law is, that the Bishop takes the property upon trust to dispose of it, as the Law will dispose of it: not for his own benefit, …[28]

As a failed testamentary trust, the law disposed of the residue to the testator's next of kin, for whom the Bishop held the bequest on a trust, which arose by operation (as a consequence of) law. Again, had this apparently failed trust instead been intended absolutely for the recipient, the resulting trust would have been displaced:

> … if the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be upon this ground, according to the authorities; that the testator did not mean to create a trust; but intended a gift to that person for his own use and benefit;…[29]

The key to this passage is simple: the resulting trust arises by operation of law simply because the attempted trust appears to have failed, unless the recipient could show that the

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24 *Cf Owens v Greene* [1932] IR 225; Delany (1957); *Lynch v Burke* [1991] IR 1; Brady (1990); *AIB Finance v Sligo Co Co* [1995] 1 ILRM 81.

25 *Russell v Scott* (1936) 55 CLR 440; *Lynch v Burke* [1995] 2 IR 159 (overruling *Owens v Greene*); Breslin (1996); Capper (1996); O'Doherty (1996); Woods (2002); *Aroso v Coutts* (Chancery Division, 30 March 2001, Lawrence Collins J).

26 See n5 above. Cf *Pettitt v Pettitt* [1970] AC 777, 813-814 (Lord Upjohn); *Calverly v Green* (1984) 155 CLR 242, 265 (Deane J); *Carlton v Goodman* [2002] EWCA Civ 545, [36] (Ward LJ); Rickett & Grantham (2000)a 17.

27 (1804) 9 Ves Jun 399 (Grant MR) *affd* (1805) 10 Ves Jun 522 (Lord Eldon LC).

28 (1805) 10 Ves Jun 522, 543.

29 *Ibid*, 535.

donor did in fact intend him to have it absolutely.[30] This is the proper role of intention: it is responsive, in the sense that it is properly used in response to a trust which has arisen by operation of law. It is not constitutive, in the sense that it is not an element the presence or absence of which is necessary to constitute that trust. Hence, where a trust has apparently failed, a resulting trust arises by operation of law, and it may be displaced by intention.

2.4 The Common Structure Underlying Resulting Trusts.

Dyer and *Morice* are merely time-honoured examples of the two categories of resulting trusts which arise in respect of gifts and of trusts which seem to fail. The gift and the apparent failure of the trust are the essential facts which trigger the resulting trust. As a consequence, there is an underlying common structure between the two categories in the combination of the essential fact which generates the trust and the role of the donor's intention in displacing it. But too much should not be made of this commonality: it does not prescribe a basis upon which resulting trusts arise outside the historical categories. It is, therefore, a rather limited doctrine,[31] a creature of the categories and confined to them.

In the first category, by means of the presumption, equity interposes a further step between the essential fact which generates the trust and the intention which displaces it. In the infamous *Vandervell* litigation,[32] Megarry J considered that this interposition gave rise to a difference not just in degree but also in kind between the two categories. Mr Vandervell transferred shares to the Royal College of Surgeons, which in turn granted an option over the shares to his trust company, Vandervell Trustees. However, he did not clearly specify the trust on which the trust company held the option, and, in *Vandervell v IRC*,[33] the House of Lords held that the trust failed for lack of ascertainable beneficiaries, so that there was a resulting trust for Mr Vandervell, with calamitous surtax consequences for him. Subsequently, with money from a trust in favour of Mr Vandervell's children, the trust company sought to exercise the option and hold the shares on trust for the children. The revenue again sought to visit Mr Vandervell with a surtax liability, arguing that this trust

30 *Vandervell v IRC* [1967] 2 AC 291, 313 (Lord Upjohn), 329 (Lord Wilberforce).

31 Rickett & Grantham (1999) 40.

32 Simpson (2000).

33 *Vandervell v IRC* [1967] 2 AC 291 *affg* [1966] Ch 261; Jones (1966); Spencer (1967); Strauss (1967); Nolan (2002).

also failed. However, the Court of Appeal in *Re Vandervell's Trusts (No 2)*[34] held that, this time, a trust had validly been constituted.[35] There being no gap in the beneficial ownership, there could be no resulting trust. Megarry J at first instance had held that this attempt to create a trust too had failed, and, in the course of a consideration of the nature of the resulting trust which thereby arose, held that the two categories operate in different ways:

> … in the first category, subject to any provisions in the instrument, the matter is one of intention, with the rebuttable presumption of a resulting trust applying if the intention is not manifest. For the second category, there is no mention of any expression of intention in any instrument, or of any presumption of resulting trust: the resulting trust takes effect by operation of law, and so appears to be automatic.[36]

The automatic resulting trust "does not depend on any intentions or presumptions but is the automatic consequence of A's failure to dispose of what is vested in him".[37] Though Megarry J's analysis has been praised as a classic judgment at the heart of the modern law on resulting trusts,[38] his distinction – and in particular his understanding of the automatic resulting trust – has divided commentators. Those who take the presumption seriously argue that the automatic resulting trust is based on a presumption of intention. Birks has always presented both species of resulting trust as presumed;[39] whilst Chambers demonstrates that there is a long line of authority basing the resulting trust in such cases on the intention of the donor,[40] and argues that the "intention to benefit the third party shows that the [donor] did not intend to benefit the trustee, which is the fact giving rise to the resulting trust by operation of law".[41] Rickett & Grantham argue that an "incomplete disposal is merely the most obvious case for a presumption of non-beneficial intent. Conceptually it is of exactly the same type as the apparent gift cases. Indeed, rather than being the category most likely to be excluded from the operation of the presumption, it turns out to be the category most likely to be included! It is the strongest case for the

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34 [1974] 1 Ch 269; Clarke (1974); Harris (1975); Klinck (1987). See also *Re Vandervell's Trusts (No 1)* [1971] AC 912.

35 [1974] 1 Ch 269, 319-320 (Denning MR), 325 (Lawton LJ), 323 (Stephenson LJ).

36 *Ibid*, 289, *cp* 294-295.

37 *Ibid*, 294.

38 Swadling, 113. *Corin v Patton* (1990) 169 CLR 540, 578.

39 Birks (1989) 60-63, (1996) 11 (welcoming Lord Browne-Wilkinson's rejection of the automatic resulting trust in *Westdeutsche*), (2003) 266.

40 Chambers (1997) 47-48, (2000) 388-389; *Cook v Hutchinson* (1836) 1 Keen 42; *Croome v Croome* (1888) 59 LT 582; *Re Foord* [1922] 2 Ch 519.

41 Chambers (1997) 50, 44; Worthington (2003) 67, 280.

operation of the presumption".[42] Even Lord Browne-Wilkinson got in on this act in *Westdeutsche*, arguing that all resulting trusts give effect to the donor's presumed intention and confessing himself as a consequence unconvinced by Megarry J's category of automatic resulting trusts.[43]

Although these three positions take the presumption seriously for different reasons, they all demonstrate that it can easily accommodate cases of apparently failing trusts. Indeed, even if the presumption is downplayed in favour of a concentration upon the underlying essential facts, both species of resulting trusts can be said to arise in the same manner, by operation of law as a consequence of the establishment of one or other of the relevant essential facts.[44] Since resulting trusts in both categories operate on a similar pattern, any difference between the two categories can only be a matter of degree and not of kind. Indeed, even if the presumption continues to be interposed between the essential underlying fact and the displacement of the trust in one category but not the other, it does not change the underlying commonality of structure or pattern.

Consequently, the basic point is that resulting trusts arise by operation of law in the case of gifts and of trusts which apparently fail, but they may be displaced by the donor's intention to make a gift to the recipient. Much of this analysis is to be seen in Lord Browne-Wilkinson's speech in *Westdeutsche*:

> Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer … (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest: … A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention.[45]

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42 Rickett & Grantham (2000) 47; Keane (1990) 157 [12.02].

43 *Westdeutsche*, 708.

44 Simpson (2000) 14.

45 *Westdeutsche*, 708 (Lord Browne-Wilkinson); *Carlton v Goodman* [2002] EWCA Civ 545 [37] *per* Ward LJ. The leading statement at Irish law is to the same effect; see *Dublin Corporation v Building and Allied Trades Union* (High Court, unreported, 6 March 1996) 105-106 (Budd J), *rvsd* without reference to this point [1996] 1 IR 468; O'Dell (1998) 170-172; Delany (2003) 66, 131.

This passage provides a complete answer to the important but misguided attempt to provide a restitutionary vision of the resulting trust discussed in the next section.

3. Stripping out the resulting trust to reverse unjust enrichment

The resulting trust arises from one of two essential facts, a gift or an apparent failure of a trust. From these, orthodoxy has it that equity presumes that the donor intended that the recipient hold the benefit on resulting trust. However, it has been suggested that what equity actually presumes is that the donor did not intend to benefit the recipient.[46] Samuels JA has suggested that the distinction between these two views is unimportant.[47] He is quite right to sit on this particular fence; how the presumption of the donor's intention is described matters not at all if the proper focus is not upon it but upon the underlying essential fact which generates the trust.

Nevertheless, history has grafted the presumption as to intention onto (at least one of) the underlying facts, and analysis has shifted accordingly. Although the presumption that the donor intended that the recipient hold the benefit on resulting trust is consistent with history, Birks argues that "in modern life a technical presumption of an intent to create a resulting trust is plainly nonsense",[48] and Glover argues that the presumption that the donor did not intend to benefit the recipient now "provides by far the better explanation"[49] of the intention presumed. To the extent that it does, it provides Chambers with his basic jumping-off point.[50] He identifies a difference between a presumption that the donor *intended not* to benefit the recipient and a presumption that the donor *did not intend* to benefit the recipient,[51] and argues that only the former can properly explain the resulting trust:[52] "all resulting trusts come into being because the provider did not intend to benefit the recipient".[53] Hence, in the context of a gift or of a trust which apparently fails,[54] equity

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46 *Calverly v Green* (1984) 155 CLR 242, 246, 251-252 (Gibbs CJ).

47 *Allen v Snyder* [1977] 2 NSWLR 685, 698.

48 Birks (1996) 18.

49 *Ibid*, 116; see generally *ibid* 114-120.

50 Chambers (1997) 19-21.

51 *Ibid*, 21.

52 *Ibid*.

53 *Ibid*, 2; *cp* 3, 21, 26, 227; Worthington (2003) 279-281.

presumes such an absence of intention, and the recipient therefore holds the benefit on resulting trust for the donor.

Obviously, the presumption that the donor did not intend to benefit the recipient can explain all of the cases in which the orthodox presumption is deployed "because the provider's intention to keep any portion of the beneficial interest necessarily means that he or she does not intend to pass that interest to the recipient".[55] There are however more difficult cases in which the donor could not have formed the relevant intent presumed by orthodoxy to create a trust for himself.[56] In such cases, Chambers argues that the orthodox presumption cannot operate, but that his presumption of "a resulting trust based on the lack of intention to benefit the recipient can explain all these cases satisfactorily".[57] However, this is to misrepresent the role of the presumption. As an evidential longstop, the relevant intent is presumed simply from the underlying essential fact such as a gift by the donor. It is about presuming – *rather than finding the reality of* – the donor's intent in the circumstances. Of course, if the presumption has been properly triggered, then an examination of the donor's actual intention might follow in an attempt to rebut it; and in cases where the donor could not have formed any intent, this will preclude the demonstration of the intent necessary to rebut the trust. Hence, where the donor is unaware of a transaction which amounts to a gratuitous transfer of his property, a resulting trust will be presumed, and if the donor's intent to make a gift cannot be demonstrated – as it will not be because the donor was unaware of the transaction – then the resulting trust will return the benefit to the donor.[58] Hence, the orthodox approach is able to accommodate even the difficult cases, even if some of them may be regarded as benign applications of the principle on marginal facts.

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[54] For Chambers, secondary *Quistclose* trusts (see *Barclays Bank v Quistclose Investments* [1970] AC 567) are also resulting trusts, but *cf* chapter 3 below.

[55] Chambers, 21.

[56] *Ryall v Ryall* (1739) 1 Atk 59 (donor unaware of the transaction); *Lane v Dighton* (1762) Amb 409 (same); *Re Vinogradoff* [1935] WN 68 (infant).

[57] Chambers (1997) 21-27, (2000) 390.

[58] This explains a resulting trust over stolen property; though there is here the question of whether this ought to be regarded as a constructive trust (various views: *Black v Freeman* (1910) 12 CLR 105, 110 (O'Connor J); *Re Kolari* [1982] 36 OR (2d) 473; *Westdeutsche*, 715-716).

Chambers first crucial move then is to the take too seriously the presumption as to the donor's intention. Then, in a further crucial move, Chambers argues that if the fact that the donor did not intend to benefit the recipient is the presumed fact from which the resulting trust arises, then it must follow that if it can be affirmatively established that the donor did not intend to benefit the recipient, a resulting trust must equally arise: the "presumption is an inference of a fact drawn from the existence of other facts, whereas the resulting trust is the equitable response to those facts, *proven or presumed*":[59] if it is not presumed but proven that the donor had no relevant intention at all, or that it was impaired in some way, a resulting trust will arise. This key move both establishes the unjust enrichment approach to the resulting trust and opens up the prospect of a massive expansion of its ambit. He cites *Hodgson v Marks*[60] to justify this move. An old lady, Mrs Hodgson, was persuaded by her smooth lodger, Evans, to put legal title to her house into his name, giving her to understand that she would be owner in all but name, and the Court of Appeal held[61] that Evans held the property on trust for Mrs Hodgson. But Russell LJ also held that "the evidence is clear that the transfer was not intended to operate as a gift, and, in those circumstances, I do not see why there was not a resulting trust of the beneficial interest to the plaintiff".[62] On Chambers' view, this provides an example of a resulting trust arising not because of a gift or the apparent failure of a trust but because of the absence of the donor's intent, that is, because of the independent demonstration of the fact which is usually presumed. However, Swadling argues that *Hodgson v Marks* is a case in which the court enforced an *express* trust[63] which arose because of Mrs Hodgson's actual intention; it did not respond either to an underlying essential or to the vitiation of her consent, and cannot therefore properly be described as either resulting or based on an unjust enrichment.

In the absence of *Hodgson*, no authority justifies Chambers' attempt to generate a resulting trust on the basis of demonstrating the intention which is said to be presumed. More fundamentally, if the proper focus of the enquiry in presumed resulting trust cases is as to

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[59] Chambers (1997) 32 (emphasis added); 32-33, 38-39.

[60] [1971] 1 Ch 892; Maudsley (1973); Sweeney (1979).

[61] Following *Rochefoucauld v Boustead* [1897] 1 Ch 196: see Youdan (1984); *Paragon Finance v Thakerar* [1999] 1 All ER 400.

[62] [1971] 1 Ch 892, 933.

[63] Swadling (2000); Harpum (2000) 164; *cf* Chambers (2000).

the underlying fact of the gift and not upon the donor's intention, then demonstrating that the donor did not intend to benefit the recipient is irrelevant to the question of whether a resulting trust arises. Hence, neither authority nor principle justifies his attempt to prove the fact presumed and generate a resulting trust as a consequence.

The proprietary nature of the resulting trust confers priority in insolvency,[64] and it is easier to justify such a priority on the orthodox view than it is on Chambers' view. Having taken the presumption seriously, and spun it into a presumption of negative intention which could also be affirmatively proved, he then sought to justify the proprietary nature of the resulting trust which is thereby generated, arguing that the relevant property must remain identifiable in the defendant's hands, and that title must not have been lost by becoming part of the defendant's general assets. All of these various points come together in Chambers' definition of the essential elements of the resulting trust:

> [e]very resulting trust requires that the [donor] (i) has provided the property and (ii) did not intend to benefit the recipient in the circumstances and, (iii) is identifiable in the hands of the recipient and (iv) has never been a freely available part of his or her general assets before the right to … [claim them] arose.[65]

The first issue is a matter of fact. The second goes to the question whether the plaintiff can prove that he did not intend to benefit the recipient, or that any relevant intent was vitiated or qualified. The third is a tracing identification requirement that the property to be fixed with the trust still identifiably exists;[66] if it does not, there is nothing upon which to fix the trust. The fourth is a limitation to balance the donor's claim with competing third party claimants such as the recipient's creditors, though, for Chambers, where the donor had no intention (for whatever reason) at the moment of the transfer to enrich, then the property has never been freely available to the defendant. On Chambers' view, if these four elements are satisfied, equity will raise a new[67] equitable title by means of the resulting trust.

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[64] See, *eg,* Tettenborn (2000) 156 (preferring the orthodox resulting trust).

[65] Chambers (1997) 234; see 5, 32, 38, 144, 148, 151, 220, 225 on the evolution of these requirements; *cp* Birks (2003) 176-178, 264-266.

[66] *Cp* Smith (1997) 129.

[67] Chambers (1997) 52-54, 76-77, 102-104, 131-132; Rickett & Grantham object that beneficial ownership of the trust assets never leaves the resulting trust beneficiaries (Rickett & Grantham (1999), chapters 3, 12, and 13); *cf* Chambers (2001) 4-5.

As to whether this resulting trust reverses unjust enrichment, first, the resulting trust is certainly restitutionary in pattern since it restores the claimant's property to him. Second, however, Chambers goes further, arguing that the resulting trust is not only restitutionary in pattern but reverses unjust enrichment in principle because it responds to the impairment of the donor's intention, on a pattern of unjust factors including mistake and failure of consideration. If this is right, it conforms to a basic unjust enrichment truth. Third, if so, then the resulting trust would be subject in principle to restitutionary defences, which could well serve to meet objections that an unjust enrichment view of the resulting trust would be to expand it too far. Finally, in Chambers view, the resulting reverses unjust enrichments because equity actively raises a new equitable title, rather than passively protecting a pre-existing and continuing one.[68]

However, this analysis has a misguided focus on the donor's intention and takes the presumption of intention too seriously. The vitiation of the donor's intent is not constitutive of the resulting trust; that arises because of the existence of an underlying essential fact such as a gift or an apparently failing trust, though it can be rebutted by proof of the donor's intention; and the proper focus of the enquiry generating the resulting trust is not the intention of the donor at all but the underlying essential fact. Furthermore, in taking the presumption too seriously, misconceives its role by seeking to prove the fact presumed and to generate a resulting trust as a consequence.

Moreover, even if[69] it is possible to wrench the resulting trust from its historical roots and transform it as Birks and Chambers would have us do, nevertheless, from the perspective of unjust enrichment, the proprietary remedy thus emerging must be seen as inadequate. It only explains trusts of money or property arising from impaired intention. It does not explain trusts for services or for wrongs, or for unjust factors which are not intention-related, such as free acceptance or policy. Given that unjust enrichment orthodoxy insists upon both the necessary equivalence between money and property claims on the one hand

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[68] Chambers (2000) 51-55 rejecting Hackney's notion of "proprietary arithmetic" (Hackney (1987) 153-154). Gardner's (20003) 132-137 more sophisticated notion of "proprietary inertia" – that the donor should not be taken to have alienated except by voluntary disposition – can accommodate resulting trusts predicated upon either pre-existing or new titles, but in either case cannot accommodate resulting trusts raised to reverse unjust enrichments.

[69] *Pace* Rickett & Grantham (2000) 58.

and services claims on the other,[70] and the necessary equivalence of matters at law and in equity,[71] it is hard to see how it can insist on a perfect theoretical symmetry between money claims and services claims at law and yet contemplate a proprietary claim in equity which does not cover both money and property claims and services claims. Similarly, given that the same orthodoxy insists upon the functional equivalence of the three main families of unjust factors,[72] it is it is hard to see how the it can contemplate a proprietary claim necessarily confined to only one such family. Hence, from an unjust perspective, the resulting trust as a vehicle for proprietary reversal of unjust enrichment must be seen at best as partial and incomplete.

There were precursors to the Chambers analysis: Birks argued that the trust in *Hodgson v Marks* was restitutionary at least in pattern,[73] that traditional resulting trusts are restitutionary both in pattern and in origin,[74] and that the orthodox approach to resulting trusts is therefore conservative and incomplete.[75] For him, therefore, Lord Browne-Wilkinson's restatement of the orthodoxy in *Westdeutsche* overly narrowed the ambit of resulting trusts.[76] Instead, on his view, donors should be able to rely on a resulting trust if they can prove the fact which the presumption usually presumes, that the donor did not intend to benefit the recipient.[77] But *Hodgson v Marks* simply will not bear this weight. Returning recently to the theme, he now argues that the fact presumed in the context of presumed resulting trusts is the absence of an explanatory basis for the transfer, which should be seen for that reason as trusts responding to unjust enrichment.[78] But this misrepresents the presumption in precisely the same way as Chambers does, and falls for the same reason.

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70 Birks (1990) 229-231.

71 Birks (1989), (2002).

72 Birks & Chambers (1998) 2.

73 Birks (1989) 58-60.

74 *Ibid*, 60-61.

75 Birks (1992).

76 Birks (1996).

77 *Ibid*, 17-18; *cp* Birks (1992); Millett (1991) 80, (1993) 13-14, (1995) 39, (1998) 201-202, (2000) 72-74; Norman (1992) 102. Simspon (2000) 4, n9; 20, n88; Virgo & O'Sullivan (2000); Nolan (2000).

78 Birks (2003) 265.

Another route to the resulting trust to reverse unjust enrichment, which does not set out from *Hodgson v Marks* or seek to misrepresent the presumption, is that taken by Worthington, who argues that in cases where assets are transferred pursuant to mistake or failure of consideration, "it is generally the case that the transferee receives the asset for no consideration. Since a gift is clearly not intended, it seems appropriate to adopt the presumed resulting trust analysis".[79] Because it makes no attempt to reformulate the orthodox presumed resulting trust but instead attempts to bring impaired transfers within it, this is an attractive analysis. However, there is a fundamental contradiction at its core. Take the example of a mistaken gift. Either the donor makes a gift, in which case a traditional resulting trust arises (and may of course be rebutted); or the donor makes a mistake, in which case the transfer cannot amount to a gift, and any trust which reverses the transfer cannot be a traditional resulting trust.[80]

Despite the problems at the heart of the unjust enrichment analysis, there is some judicial support for the "restitutionary resulting trust".[81] In the Court of Appeal in *Twinsectra v Yardley*, Potter LJ held that "the role of intention in resulting trusts is a negative one, the essential question being whether or not the provider intended to benefit the recipient and not whether he or she intended to create a trust. The latter question is relevant to whether the provider succeeded in creating an express trust, but its relevance to the resulting trust is only as an indication of lack of intention to benefit the recipient".[82] On appeal to the House of Lords, Lord Millett went further, approving the "central thesis"[83] of Chambers' book that "a resulting trust arises whenever there is a transfer of property in circumstances in which the transferor … did not intend to benefit the recipient. It responds to the absence of an intention on the part of the transferor to pass the entire beneficial interest, not to a positive intention to retain it".[84]

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79 Worthington (1995) 114, (2003) 68, 163, 174, 233-237, 279-280.

80 Swadling (1996) 111-112, 115-116, 130-131.

81 *Twinsectra v Yardley* [1999] Lloyd's Rep Bank 438, 462 (Potter LJ); *rvsd* [2002] 2 AC 164.

82 *Ibid*, 457.

83 [2002] 2 AC 164 [92]; *cp Air Jamaica v Charlton* [1999] 1 WLR 1399, 1412 (Lord Millett); Rickett & Grantham (2000); (Garnder (2003) 132 n52 (*Air Jamaica* possess no authority); *cp El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, 734 (Millett J); *rvsd* on other grounds [1994] 2 All ER 685

84 *Ibid*. In *Carlton v Goodman* [2002] EWCA Civ 545, Mummery LJ treated this passage from Lord Millett's speech as supporting the Chambers view.

If Lord Millett's approach is to be taken to represent what the law now is[85] or might soon be,[86] his comments and those of Potter LJ might not necessarily amount to judicial endorsement of the whole of Chambers' thesis. In particular, adoption of first move that equity presumes that the donor did not intend to benefit the recipient,[87] does not necessarily entail acceptance of Chambers' next key move that if it can be affirmatively established that the donor did not intend to benefit the recipient, a resulting trust would arise. Nevertheless, in the light of his lordship's express extrajudicial[88] endorsements of the Chambers thesis, it is far more likely that Lord Millett intended his views to stand as judicial unjust enrichment counterweights to Lord Browne-Wilkinson's orthodoxy. Given that there are serious problems with the resulting trust to reverse unjust enrichment, from the perspective both of unjust enrichment (it is an inadequate proprietary remedy) and of the resulting trust (it fundamentally misconceives the role of the presumption), it would be unfortunate if such a trust were judicially to displace the *Westdeutsche* orthodoxy.

4. Conclusion

In *Vandervell*, the House of Lords perceived little difficulty with resulting trusts principles,[89] but Megarry J made heavy weather of their speeches, and in distinguishing between presumed and automatic resulting trusts, began a process by which those principles could now find themselves in a mess. Indeed, the Court of Appeal in the recent *Carlton v Goodman*[90] treated the juridical basis of the resulting trust as an open question which they seemed relieved not to have to answer in that case.

Something therefore needs to be done to tidy up that mess; and it is not the kind of issue that can be resolved simply by citation of authority. Instead, an argument of principle has to be constructed, where such principles are informed by precedent and logic. On that basis, the best way to tidy up the mess is to strip the resulting trust down to its essentials, and recognise that it arises by operation of law in the case of gifts and of trusts which apparently fail, but may be displaced by intention. Part 2 demonstrated that such a

85 See chapter 3, n7, below.

86 *Carlton v Goodman* [2002] EWCA Civ 545 [23]-[26] (Mummery LJ), [33]-[35] (Ward LJ) left the point open.

87 Glover (1999) 115, 128.

88 See n77 above.

89 [1967] 2 AC 291, 307 (Lord Reid), 312 (Lord Upjohn), 314 (Lord Pearce).

90 [2002] EWCA Civ 545.

coherent statement of the orthodoxy may easily and logically be distilled from the existing body of precedent. Nevertheless, it has recently been suggested that the mess may better tidied by explaining the resulting trust on unjust enrichment principles. This should be resisted. Unjust enrichment is a standard external to the resulting trust which it is unnecessary to impose to solve its problems or to provide it with an underlying explanation. In particular, the Chambers analysis fundamentally misconceives the roles of the donor's intention and of the presumption thereof. The donor's intention is not constitutive of the resulting trust but instead is merely responsive to a trust which arisen because of the existence of an underlying essential fact, such as a gift or an apparently failing trust. Indeed, if the proper focus of the enquiry is not upon the intention presumed at all but is instead upon the underlying essential fact, then demonstrating that the donor did not intend to benefit the recipient is irrelevant to the question of whether a resulting trust arises. Furthermore, the resulting trust is too partial to stand as an adequate vehicle for the proprietary reversal of unjust enrichment Hence, part 3 established that, despite some favourable *dicta*, it ought not to displace the orthodoxy. In the end, therefore, there is no such thing as a resulting trust to reverse unjust enrichment, and it's a good thing too!

CHAPTER 3. *QUISTCLOSE* TRUSTS

Quistclose *after* Twinsectra. *Undoing the Wages of Spin*

1. Introduction

In *Barclays Bank v Quistclose Investments*,[1] Lord Wilberforce held that arrangements

> for the payment of a person's creditors by a third person [can] give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person.[2]

Although Lord Millett in *Twinsectra Ltd v Yardley*[3] suggested that "there are formidable difficulties in this analysis, which has little academic support", nevertheless, the argument of this chapter is that any difficulties can easily be resolved in a manner consistent with Lord Wilberforce's analysis. The first such difficulty, discussed in section 2, is as to the essentials of the *Quistclose* relationship, and in particular, as to when it arises. The second, discussed in section 3, is as to the nature of the "primary trust", and in particular, of the rights and obligations of each of the three parties to the relationship: the provider, the borrower, and the intended beneficiary. The third, discussed in section 4, is as to the nature of the relationship which arises "secondarily" upon failure of the primary trust, and again in particular, of the rights and obligations of each of the three parties under it. Chambers takes the view that this secondary obligation arises by operation of law to reverse an unjust enrichment; but the conclusion in that section will be that – as with the primary obligations in the relationship – the secondary obligations are by and large consensual, responding to intention rather than unjust enrichment.

Three themes will be developed over the course of that discussion. First, analysis is greatly improved if it is directed to the primary and secondary obligations of the parties simply in those terms rather than in terms of a trust. There are potentially many different trusts and other related obligations at various stages over the lifetime of the *Quistclose* relationship. Furthermore, although most of the obligations do in fact turn out to be trusts, they can, as Lord Wilberforce recognised in *Quistclose*, also be "of a fiduciary character". Second, the key to understanding these various primary and secondary obligations lies entirely in the actual or fairly inferred mutual intentions of the parties; this, in turn, directs attention to the

1 [1970] AC 567; Swadling (2004).

2 [1970] AC 567, 581.

3 [2002] 2 AC 164 [78].

underlying contract, which has the potential to explain many of the features of the *Quistclose* relationship.[4] Third, it is important not to distort the *Quistclose* relationship by being overinclusive: there are some important cases which closely resemble *Quistclose* obligations but turn out not to fit within Lord Wilberforce's principle; any attempt to accommodate them within *Quistclose* only serves to distort the analysis of that principle and ought therefore to be resisted. Not all of the cases disclosing a *Quistclose*-like fact pattern can be forced into a single theory,[5] and once the consensual nature of the *Quistclose* relationship is revealed, insufficiently similar cases can be carefully excised from the analysis. In particular, it becomes clear that reversing unjust enrichment does not explain secondary *Quistclose* obligations.

2. The *Quistclose* relationship

2.1 The Issues in the Quistclose *and* Twinsectra *Cases.*

In *Quistclose*, a company, Rolls Razor, had obtained a loan from Quistclose Invsetments for the exclusive purpose of paying a declared dividend, and had lodged the proceeds of the loan into a newly-opened account with Barclays Bank. These facts disclose the basic structure of the modern *Quistclose* relationship: a provider who provides a benefit for a specific purpose to benefit intended beneficiaries (usually a loan to allow the recipient to pay off specific creditors), in circumstances in which it is intended that the benefit (the loan) would not become the property of the recipient – indeed, the recipient often segregates the proceeds. In *Quistclose*, the company went into liquidation before the dividend was paid, the liquidation worked the failure of the specific purpose for which the provider had transferred the benefit, and House of Lords unanimously held that the money in the account was impressed with a trust in favour of Quistclose. This additional feature of the failure of the specific purpose is what summons up the secondary obligations which are often characterised as the *Quistclose* trust.

Twinsectra concerned the liability of third parties for breaches of *Quistclose* obligations. Twinsectra had agreed to make a loan to Yardley for the purposes of purchasing and developing certain property. Twinsectra paid the proceeds of the loan to Sims, a solicitor acting for Yardley, who had undertaken to Twinsectra to retain the loan and apply it only for the property purchase. Nevertheless, on Yardley's instructions, Sims paid the money

[4] *Cp* Langbein (1995); Langbein (1997); *cf* Hansmann & Mattei (1998).

[5] Parkinson (2002) 662-663.

over to Leach, another solicitor acting for Yardley, who simply paid much of it out on Yardley's instructions for various purposes. The House of Lords unanimously held that the loan monies received by Sims were impressed with a trust,[6] which Lord Millett described as a *Quistclose* trust,[7] but they held by a majority that Yardley had not dishonestly assisted in a breach of that trust.

The basic issues raised in the *Quistclose* relationship concern the mutual intentions of the provider and recipient, the specific purpose, its failure, and the duty to repay, the necessity for a segregated fund, and the consequent priority of the provider or the intended beneficiary over competing creditors. It is to these issues, in that order, that this chapter now turns.

2.2 The Role of the Parties' Intentions.

In *Quistclose*, Lord Wilberforce tied the generation of the primary and secondary obligations squarely into the "mutual intentions"[8] of the parties, and concluded on the facts that "the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can find no reason why the law should not give effect to it".[9] Similarly, *Re McKeown*, Lord MacDermott described the *Quistclose* obligations as "trusts founded on the express intention of the parties";[10] and in *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd*, Gibbs ACJ referred to the "mutual intention"[11] of the parties. Indeed, even in *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd*,[12] Peter Gibson J fastened his rather wide conception of the nature of the *Quistclose* obligations

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6 *Cp Stumore v Campbell* [1892] 1 QB 314.

7 Lord Hoffmann (Lords Slynn and Steyn conurring ([2], [7])) described it as an express trust ([13]-[17]). Although Lord Hutton simply agreed with both speeches ([25]) and Speirs (2002) sees them as consistent, Rickett (2002) and Richardson (2002) perceive differences between them, and the Court of Appeal in the subsequent *Carlton v Goodman* [2002] EWCA Civ 545 treated the matter as open.

8 [1970] AC 567, 581; *Re AETT* (1991) 102 ALR 681, 690-691 (Gummow J); *Re Goldcorp Exchange* [1995] 1 AC 74 (PC) 100 (Lord Mustill); *Twinsectra* [1999] Lloyds Rep Bank 438, 455 (Potter LJ).

9 [1970] AC 567, 582.

10 [1974] NI 226, 232.

11 (1976-1978) 141 CLR 335, 353; *Re Associated Securities Ltd* [1981] 1 NSWLR 743, 749 (Needham J); *Ausintel Investments Australia Pty Ltd v Lam* (1990) 19 NSWLR 637, 647 (Meagher JA) 641 (Mahoney JA); *Thiess Watkins White Ltd v Equiticorp Australia Ltd* [1991] 1 Qd R 82, 84 (de Jersey J).

12 [1985] 1 Ch 207.

tightly to the intentions of the parties.[13] Again, in *Re Barrington and Associates Pty Ltd*,[14] Beach J held that it was never intended by the parties that funds, provided to a building company in the course of being wound up exclusively to allow it to meet invoices on its last construction project, would otherwise become the property of the company. Hence, when the company went into liquidation without completing the project, the remaining funds were held on trust for the lender.

It is therefore clear that the mutual intentions of the provider and recipient constitute the foundations upon which both the primary and the secondary obligations in the *Quistclose* relationship are constructed.[15] These obligations are often characterised as giving rise to express trusts,[16] but as Gummow J said in *Re Australian Elizabethan Theatre Trust*:[17]

> The question as to the existence of any express trust will always have to be answered by reference to intention. … Ordinarily, the relevant intention is that of the alleged settlor, but where the subject matter of the trust is contractual right as against the settlor conferred by the settlor upon the alleged trustee, the objective (or 'purpose') of the transaction being to benefit third parties, it may be appropriate to look to the mutual intention of settlor and trustee.[18]

On this analysis, therefore, the *Quistclose* trust, by focussing on mutual intention, differs from mainstream express trusts where the focus is upon the intention of the settlor or provider. This focus on mutual intentions is a product of the underlying contract: the arrangement which gives rise to the primary and secondary obligations is the contract between the parties, and as that contract is the expression of the parties' mutual intentions, the obligations it generates are also the products of such mutual intentions.

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13 [1985] 1 Ch 207, 221, 222; *Ausintel* (1990) 19 NSWLR 637, 641 (Mahoney JA); *Twinsectra* [1999] Lloyds Rep Bank 438, 545 (Potter LJ), all referring interchangeably to "mutual" or "common" intention; these terms are not synonymous; (writers on contract have distinguished between "mutual" and "common" in the context of mistake (Cheshire, Fifoot & Furmston (2001) chapter 8)); there already is an established category of common intention trust (*Lloyd's Bank v Rosset* [1991] 1 AC 107); so, following Lord Wilberforce's lead, this chapter uses "mutual" throughout.

14 [1989] VR 940 (Beach J).

15 Worthington (1996) 46; Rotherham (2002) 161-163, *cf* 153-155.

16 *Quistclose*, 582 (Lord Wilberforce); *Foreman v Hazard* [1984] 1 NZLR 586, 595-597 (Richardson J); *Stephens Travel* (1988) 13 NSWLR 331, 341 (Hope JA); *General Communications v Development Finance Corporation of New Zealand* [1990] 3 NZLR 406, 419 (Tompkins J), 432-433 (Hardie Boys J); *Re AETT* (1991) 102 ALR 681, 691 (Gummow J).

17 (1991) 102 ALR 68.

18 (1991) 102 ALR 681, 693; see also *Walsh Bay Developments Pty Ltd v Federal Commissioner of Taxation* (1995) 130 ALR 415, 425 (Beaumont and Sackville JJ).

However, Millett argues that primary *Quistclose* obligations flow from a trust founded upon the intention of the provider,[19] and he is followed in this by the New Zealand Court of Appeal in *General Communications v Development Finance Corporation of New Zealand*.[20] However, aving recognised that adopting Millett's view required a view of the intentions of the parties which was inconsistent with what was said in *Quistclose*, the Court of Appeal in *General Communications* sought a reconciliation, and did so in very contractual language; the Millet formulation,

> … suggests that it is the lender's intention that is relevant. In *Quistclose* the emphasis was on mutual intention. Intention being ascertained objectively, there is really no difference: what one party is objectively seen to have intended must *ex hypothesi* have been appreciated by the other and accepted by him when he participated in the arragement.[21]

In the legal analysis of contract formation, agreement is determined objectively, and the agreement of one party to the terms proposed by the other can be determined objectively from the first party's performance. The court in *General Communications* did no more than restate this orthodoxy in the context of the agreement which generates *Quistclose* obligations. But this does not change the fact that the essential search is still for the mutual intentions of the parties, however they are located or inferred. Furthermore, even in *Twinsectra*, though he made no such concession, Lord Millett had trouble in focusing exclusively on the intention of the provider and excluding reference to the intentions of both parties.[22]

Given that the analytical foundation of the *Quistclose* relationship is the mutual intentions of the parties, the question arises as to what it is that they must mutually intend. First, it is clear that they must mutually intend the specific purpose for the money[23] provided.[24] Second, the parties must also mutually intend that if the specific purpose is not carried into

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[19] Millett (1985) 288-289; *Twinsectra* [80], [100]; *cf* Burns (1992) 154-155.

[20] [1990] 3 NZLR 406; Maxton (1989); *cp Box v Barclays Bank* [1998] Lloyd's Rep Bank 185, 193 (Ferris J).

[21] *Ibid*, 433 (Hardie Boys J); *Re Fleet Disposal Services* [1995] 1 BCLC 345, 349 (Lightman J).

[22] *Twinsectra* [69], [74].

[23] The analysis is capable of applying also to other forms of property: in *Hollingworth v Tooke* (1795) 2 H Bl 501, Eyre LCJ held that goods (light gold) delivered for a specific purpose could be recovered; *cf* retention of title clauses.

[24] *Carreras Rothmans* [1985] 1 Ch 207, 222 (Peter Gibson J).

effect the money must be returned whence it came.[25] If such a specific purpose is not mutually intended,[26] or if there is no duty to repay, an essential building block of the relationship is absent. Third, they must also mutually intend some restriction upon the recipient's use of the money received pending either the implementation of the specific purpose or the return of the money. If such a finding of fact cannot be made, then again an essential building block of the *Quistclose* relationship will be absent.[27]

However, this third element has been expressed in different ways; that the parties intended that the recipient hold the money on trust;[28] or that they merely intended that the money would not become the property of the recipient;[29] or that the ownership of the money would not pass from the payor to the recipient;[30] or that the defendant was intended to act in relation to the money in a fiduciary capacity only.[31] These are the findings of fact as to what it is the parties in the various cases had intended.[32] The question of principle, however, is whether the *Quistclose* relationship must be constructed upon a finding that the parties intended a trust, or whether it suffices to demonstrate that they intended that the recipient have fiduciary obligations in respect of the money, that title would not pass to the recipient or that it would remain with the payor. In principle, although the trust analysis is doubtless the paradigm, there seems to be no reason why the other analyses should not be sufficient. In *Quistclose*, Lord Wilberforce described the relationship as one "of *a fiduciary character* or trust";[33] and even in *Twinsectra*, Lord Millett spoke of the *Quistclose* arrangement as "giv[ing] rise to fiduciary obligations on

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25 See ss2.5 below.

26 *Box v Barclays Bank* [1998] Lloyd's Rep Bank 185; (Virgo (1999); Smith (1999) (specific purpose not mutually intended).

27 *Ausintel* (1990) 19 NSWLR 637, 644-646 (Meagher JA) (no evidence of mutual intention).

28 *Quistclose* 582 (Lord Wilberforce).

29 *Carreras Rothmans* [1985] 1 Ch 207, 222 (Peter Gibson J); *ACA v Mainline* (1976-1978) 141 CLR 335, 353 (Gibbs ACJ); *Ausintel* (1990) 19 NSWLR 637, 647-648 (Meagher JA); *cp Foreman v Hazard* [1984] 1 NZLR 586, 595-596 (Richardson J).

30 *Ausintel*, *ibid*, 641 (O'Mahoney JA).

31 *Carreras Rothmans* [1985] 1 Ch 207, 221 (Peter Gibson J); *Giber v Gonard* (1884) 54 LJ (Ch) 439. In *Twinsectra*, the *Quistclose* obligations were regarded by the parties, and by Potter LJ in the Court of Appeal, (1999] Lloyds Rep Bank 438, 454) as fiduciary.

32 *Toovey v Milne* (1819) 2 B & Ald 683 (Abbott CJ) ("fair inference from the facts proved").

33 [1970] AC 567, 580. *Re Veli* (1988) 18 FCR 204 (Ryan J) (fiduciary receipt). *cp Re E Dibbins & Sons* [1990] BCLC 577, 582 (Harman J).

the part of the borrower which a court of equity will enforce".[34] However, there has been a tendency to analyse the issue entirely in terms of trust, overlooking this reference to the possible fiduciary character of the relationship. In many cases, a trust will be the express means by which the parties choose to generate *Quistclose* obligations; in others, a trust can fairly be inferred; and in still others, the trust may be the only means by which the parties' intentions can be given legal effect.[35] Indeed, the trust may be the best or most likely means by which *Quistclose* obligations can arise; however, as a matter of principle, such obligations can also arise simply in a fiduciary relationship not amounting to trust; and the feature common to the trust and the fiduciary relationship in this context is the restriction upon the use of the money imposed by the provider and accepted by the recipient.[36]

It follows from the fact that *Quistclose* obligations can arise in fiduciary relationships that it is not necessary that the indicia of trust be found to generate *Quistclose* obligations Admittedly, many of the cases are concern the application in this specific context of general principles of trust law that the parties have manifested an intention to create a trust[37] which conforms to the three certainties[38] of words,[39] subject-matter[40] and objects.[41] But if *Quistclose* obligations arise from a relationship other than trust, such as a fiduciary relationship, then such an enquiry will not be *necessary*. Of course, if a mutual intention to generate a trust is found,[42] all to the good; but all that is necessary is to find a fiduciary

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34 *Twinsectra* [68], [76]; *R v Prestney* [2003] 1 NZLR 21, [27] (Blanchard J). *Cp* Millett (1985) 275. *Cf* [1999] Lloyds Rep Bank 438, 455 (Potter LJ) (*Quistclose* relationship a "quasi-trust") reflecting *Re Drucker (No 1) ex p Basden* [1902] 2 KB 55, 57 (Wright J) *affd* [1902] 2 KB 325; *Re Watson, ex p Schipper* (1912) 107 LT 96, 98 (Phillimore J) *affd* (1912) 107 LT 783.

35 *Re Holiday Promotions (Europe) Ltd* [1996] 2 BCLC 618, 623 (Timothy Lloyd QC).

36 *Twinsectra* [1999] Lloyds Rep Bank 438, 458 (Potter LJ).

37 In *British Columbia v Henfrey Samson Belair* (1989) 59 DLR (4th) 726, the (statutory *Quistclose*) trust asserted by the Crown over taxes collected by the defendant on its behalf failed for lack of certainty of subject matter; whilst in *British Columbia v National Bank of Canada* (1994) 119 DLR (4th) 669, a similar assertion failed for lack of certainty of intention.

38 McCormack (1990) 218-219.

39 *Re Kayford* [1975] 1 WLR 279, 282 (Megarry J); *Re Chelsea Cloisters Ltd* (1981) 41 P&CR 98, 101 (Lord Denning MR); *Re Multi Guarantee Ltd* [1987] BCLC 257, 265-266 (Nourse LJ); *Re Lewis's of Leicester Ltd* [1995] 1 BCLC 428, 437-438 (Robert Walker J); though of course the certain words do not need to meet any formalities: *Re AETT* (1991) 102 ALR 681, 695 (Gummow J).

40 *Re Fada (Australia) Ltd* [1927] SASR 590, 593 (Piper J); *Re Lewis's of Leicester Ltd* [1995] 1 BCLC 428, 437-438 (Robert Walker J).

41 *Fada*; *Lewis's*; *Foreman v Hazard* [1984] 1 NZLR 586, 596 (Richardson J); *cf Twinsectra* [1999] Lloyds Rep Bank 438, 456, 458 (Potter LJ).

42 As it seems to have been in *Twinsectra*; see [101] (Lord Millett); *cf* Rickett (2002).

relationship, and that may be established even if one or more of the three certainties is absent.

Penultimately, the relevant mutual intentions may be either express or inferred. They are usually expressed on the face of the parties' contract,[43] but in appropriate cases, such intentions may be inferred[44] "from the language employed by the parties in question … the nature of the transaction and the relevant circumstances attending the relationship between them".[45]

Finally, if there is no relevant intention, then the express *Quistclose* obligations[46] will not arise. In *Guardian Ocean Cargoes Ltd v Banco do Brasil SA*, the plaintiffs had deposited three installments of £200,000 each with the defendant bank which would be applied for the purchase of a ship if negotiations between the parties as to the finance of the purchase were successful; and Saville LJ found it "quite impossible to spell out of the transaction between the parties any trust relationship at all. … Unlike *Quistclose* …, there was nothing to indicate that what the parties intended was that the funds should not become the general property of the recipient, but should be kept and applied for a specific purpose".[47]

It summary, therefore, the mutual intentions of the provider and recipient – that the money provided should be used for a specific purpose or returned, and in the meantime, that it be held on trust or at least the recipient should be under fiduciary obligations – constitute the contractual foundations upon which both the primary and the secondary obligations in the *Quistclose* relationship are constructed. These intentions must be express or fairly inferred, and the obligations constructed upon them can properly be characterised as express. In principle, it is enough that the parties mutually intend a fiduciary relationship; in practice they often intend a trust, which can be characterised as an express trust, though, because of

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43 *Stephens Travel* (1988) 13 NSWLR 331; *Walsh Bay* (1995) 130 ALR 415.

44 *General Communications* [1990] 3 NZLR 406, 434 (Hardie Boys J); *Re AETT* (1991) 102 ALR 681, 693-694 (Gummow J).

45 *Re AETT* (1991) 102 ALR 681, 693 (Gummow J); *Twinsectra*, [69] (Lord Millett); *Walker v Corboy* (1990) 19 NSWLR 382.

46 This, of course, does not rule out a trust imposed by law: in *Neste* [1983] 2 Lloyd's Rep 658 Bingham J rejected an argument that six prepayments were held on *Quistclose* trust but accepted that the particular circumstances in which the last was paid meant that it was held on constructive trust.

47 [1994] 2 Lloyd's Rep 152, 159-160 (Saville LJ); *Ausintel* (1990) 19 NSWLR 637.

the contractual basis of the relationship, it focuses upon the mutual intentions of the parties rather than the intention of the provider, and is thus not quite a mainstream express trust.

2.3 The Specific Purpose.

In *Quistclose*, Lord Wilberforce observed that "the loan was made specifically in order … [and] only so as to enable Rolls Razor to pay the dividend and for no other purpose".[48] Without such a specific purpose, neither primary nor secondary *Quistclose* obligations can arise. It will usually be an express term of the parties' agreement, though, of course, it may also fairly be inferred from the facts.

As to those purposes which come within the *Quistclose* principle, a strict view might seek to confine it to cases of loans to pay dividends, or perhaps to pay identified creditors.[49] Pincus J in *Re Miles*[50] interpreted Lord Wilberforce's comment in *Quistclose* that "some special relationship"[51] is necessary "as implying a view that not all purposes of payment are within the principle of the *Quistclose* case";[52] and he expressly sought so to confine it to loans solely for the express purpose of paying debts.[53] Hence, where the loan had been applied for the payment of debts, the purpose was given effect and that the *Quistclose* obligations had come to an end, notwithstanding that the borrower was subsequently declared bankrupt and the payments recovered as voidable preferences.[54]

However, as a matter both of precedent and of principle, the *Quistclose* case is not and ought not to be so confined.[55] First, not all of the precendents upon which Lord

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48 [1970] AC 567, 580; *Cp* Bridge (1992) 349 discussing *Steele v Stuart* (1866) LR Eq 84.

49 In *Re Securitibank Ltd* [1978] 1 NZLR 97 Barker J sought to distinguish *Quistclose* on the grounds that "the financier there *lent* money to the company for a specific purpose … [whereas in] the present situation, the promissory notes and other securities were not *loans* to Merbank …" ([1978] 1 NZLR 97, 164, emphasis added). *Daly v Sydney Stock Exchange* (1985-1986) 160 CLR 371, 379-380 (Gibbs CJ) (loan for a designated purpose); *cf ACA v Mainline* (1976-1978) 141 CLR 335, 353 Gibbs CJ ("money advanced" rather than loan). Austin (1986) 454-455 (corporate rescue); Millett (1985) 288; McCormack (1994) 97; Finch & Worthington (2000) n22, 10 n39.

50 (1988) 85 ALR 218; Jamieson (1989).

51 [1970] AC 567, 581.

52 (1988) 85 ALR 218, 220.

53 *Ibid*, 220.

54 *Ibid*, 220-221.

55 Rickett (1991) 612-613, 618, 627-628, 647-648; Klinck (1994) 69; Worthington (1996) 43, 64-65; Chambers (1997) 85-86.

Wilberforce relied were cases of loan. *Toovey v Milne*[56] certainly was, but *Re Nanwa Gold Mines*[57] certainly was not. There, Harman J held that a mining company which proposed to raise capital by a share issue held the subscriptions on trust when the mining operation was abandoned and the share issue cancelled.[58] By no stretch of the imagination can the subscriber for shares here be regarded as making a loan to the company.[59]

Second, subsequent cases have gone further, applying both limbs of *Quistclose* not only to cases of loans for the payment of debts but also in many other contexts, so that in *Twinsectra*, Lord Millett commented that the principle is not limited to cases where the purpose is to enable a borrower to pay creditors.[60] Hence, in *Stephens Travel Service International Pty Ltd v Qantas Airways*,[61] Hope JA held that a travel agent held on trust for an airline the proceeds not of a loan but of payments received from travellers for air tickets. In *Re Northern Development (Holdings)*[62] the banks lent money to the recipient not for the purpose of paying off its own debts but the debts of a subsidiary, but Megarry VC held that this was still within the *Quistclose* principle. Again, in *Carreras Rothmans*[63] the plaintiff tobacco company had not so much made a loan to its advertising company as made its due contractual payments in such a way as to enable and require the advertising company to meet its tobacco advertising liabilities.[64] The subsequent *Re EVTR*[65] did indeed concern a loan, but it was one to purchase new equipment rather than to pay off

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56 (1819) 2 B&Ald 683; *Edwards v Glyn* (1859) 2 E&E 29; *Giber v Gonard* (1884) 54 LJ (Ch) 439; *Re Rogers; ex p Holland and Hansen* (1891) 8 Morr 243.

57 [1955] 3 All ER 219. Such claims usually fail on the facts: see *Moseley v Cressey's Co* (1865-1866) LR 1 Eq 405; *Stewart v Austin* (1866) LR 3 Eq 299; *Re Fada (Australia) Ltd* [1927] SASR 590; *Re Associated Securities Ltd* [1981] 1 NSWLR 743; *Dines* (1989) 4 NZCLC 65,298; *Ausintel* (1990) 19 NSWLR 63; *cf Quistclose*, 581 (Lord Wilberforce).

58 *Cp National Bolivian Navigation Co v Wilson* (1880) 5 App Cas 176: bondholders who placed money in the hands of trustees to invest in the construction of a South American railway recovered what remained when the railway was abandoned.

59 Neither can the delivery of goods; see n23 above.

60 *Twinsectra* [69]; *cp* [1999] Lloyds Rep Bank 438, 456 (Potter LJ); Tettenborn (2000)a 460; Tettenborn (2000) 161-163); *Re AETT* (1991) 102 ALR 681, 694 (Gummow J).

61 (1988) 13 NSWLR 331.

62 Chancery Division, unreported, 6 October 1978, Megarry VC.

63 [1985] 1 Ch 207 (Peter Gibson J).

64 *Cf Re Miles* (1988) 85 ALR 218, 220 (Pincus J).

65 [1987] BCLC 646; Maxton (1988).

existing creditors.[66] Furthermore, a plaintiff who has put up funds to allow the payee to make a payment which would have the effect of freeing up funds out of which the plaintiff is to be paid[67] may just about be described as having made a loan, though it could just as easily be described simply as an investment and in some cases as a punt or a gamble. Taken together, all of these examples strain at the edges of the concept of a loan for the payment of debts, but *Quistclose* has been applied well beyond this sphere, extending to conditional gifts[68] as well as to other commercial arrangements. Hence, holiday winners covering promotion costs in *Re Holiday Promotions (Europe) Ltd*,[69] are hardly making a loan to the holiday promotion company.[70] It is the parties' intentions, and not the nature of the property transferred, which is crucial.[71]

Similarly, a specific purpose may very well allow the inference to be drawn that the parties mutually intended consequent *Quistclose* obligations, but the key is always what the parties intended. Hence, in *Quistclose*, Lord Wilberforce held that the basis for the decision in *Toovey v Milne* was that "the money advanced for the specific purpose did not become part of the bankrupt's estate".[72] This was obviously a conclusion on the facts, not a statement of legal principle. However, in *Foreman v Hazard*,[73] Richardson J held that "[m]oney advanced for a specific purpose does not become part of the general assets of the payee divisible amongst his creditors".[74] This goes too far: every loan has a purpose;[75] what distinguishes *Quistclose* is that as a consequence of the purpose the parties also

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66 *Cf Re Miles* (1988) 85 ALR 218, 220 (Pincus J). *General Communications* [1990] 3 NZLR 406 also concerned a loan to purchase new equipment.

67 *Re McKeown* [1974] NI 226 (claimant paid arbitration costs to be repaid out of arbitration award).

68 *Re Groom* (1977) 16 ALR 278; *Rose v Rose* (1986) 7 NSWLR 679.

69 [1996] 2 BCLC 618.

70 *Ibid*, 624. Similarly, there are no loans in *Re Kayford Ltd* [1975] 1 WLR 279 (customers' prepayments); *Re Chelsea Cloisters Ltd* (1981) 41 P&CR 98 (tenants' security deposits); *Foreman v Hazard* [1984] 1 NZLR 586 (investors in property syndicates) or *Patel v Brent LBC* [2003] EWHC 3081 (provider's own money to be lodged to a specific account for road works). Furthermore, in *General Communications* [1990] 3 NZLR 406, 419 Tompkins J at first instance would not have limited *Quistclose* to corporate rescue situations; see also *Box v Barclays Bank* [1998] Lloyd's Rep Bank 185.

71 Jamieson (1989) 443.

72 [1970] AC 567, 580.

73 [1984] 1 NZLR 586.

74 [1984] 1 NZLR 586, 595-596 (Richardson J); *Dines* (1989) 4 NZCLC 65,298, 65,304 (Ellis J); see also *Stumore v Campbell* [1892] 1 QB 314, 316 (Lord Esher MR); *Re Mid-Kent Fruit Factory* [1896] 1 Ch 567; *Loescher v Dean* [1950] Ch 491; *Smith v Liquidator of James Birrell Ltd* 1968 SLT 174.

75 *Twinsectra*, [73] *per* Lord Millett.

mutually intend that the money would not become part of the borrower's assets. In other words, a specific purpose, of itself and without more, is insufficient to generate *Quistclose* obligations. In *Guardian Ocean Cargoes Ltd v Banco do Brasil SA*,[76] there was a specific purpose in the sense that the plaintiffs' deposits with the defendant were intended to be applied for the purchase of a ship if financing negotiations between the parties were successful, but the Court of Appeal held that the parties intended no *Quistclose* obligations. In *Carreras Rothmans*, Peter Gibson J claimed ample authority for the proposition "that moneys paid by A to B for a specific purpose which has been made known to B are clothed with a trust".[77] Though closer to the mark than *Foreman v Hazard*, this is still not quite there. The fact that the parties are aware of the purpose is insufficient of itself to generate *Quistclose* obligations; these must be intended by the parties. Of course, the mutual knowledge of the purpose may be fact from which such an intention may fairly be inferred. Nevertheless, neither a specific purpose nor mutual knowledge of the specific purpose is sufficient of itself to generate *Quistclose* obligations;[78] only the parties' mutual intentions can do that.

As a matter of principle, it is sufficient that the parties mutually intend a fiduciary relationship, though in many if not most cases, they will intend that the recipient hold the money on trust for the specific purpose or returned. Non-charitable purpose trusts usually fall foul of the beneficiary principle[79] requiring certainty of objects unless, as Goff J put it in *Re Denley's Trust Deed*, the trust "though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals".[80] The primary *Quistclose* obligation is occasionally described as a "purpose trust",[81] and in *Northern Developments* Megarry VC sought to explain it as a purpose trust of this nature. However, since such trusts are ordinary trusts for the benefit of an individual and not invalid purpose trusts at all,[82] this seems to add nothing to the analysis of the *Quistclose* obligations.[83] On the

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76 [1994] 2 Lloyd's Rep 152.

77 [1985] 1 Ch 207, 221.

78 *Cp Twinsectra* [1999] Lloyds Rep Bank 438, 455–456 (Potter LJ).

79 McKay (1973); *cf* Austin (1988) 68; Hayton (2001).

80 [1969] 1 Ch 373, 383-384.

81 *Twinsectra* [1999] Lloyds Rep Bank 438, 455 (Potter LJ).

82 *Re Grant's Will Trusts* [1979] 3 All ER 359.

83 Millett (1985) 281-282; Payne (2000); Rotherham (2002) 156-157.

contrary, it can serve to confuse. As Gummow J explained in *Re Australian Elizabethan Theatre Trust*[84]

> … it would be an error to treat the references by Lord Wilberforce in *Quistclose* … to "purpose" as characterising an express trust which did not have to satisfy the ordinary requirements for any private (as distinct from public) trust. … The expression 'purpose' was apt to describe the end sought to be achieved by the settlor, Quistclose, and accepted by the trustee, Rolls Razor. … The use of the expression "purpose" should not be read as hearlding a new era for the non-charitable purpose trust.[85]

There are at least two reasons why this should be so. First, the primary *Quistclose* obligation, though it encompasses trust, goes much further than that because it includes circumstances where the parties mutually intend that the recipient merely have fiduciary obligations to the provider; and if there is in form no trust, there is nothing for which certainty of objects can be required. Second, even where the parties mutually intend to generate *Quistclose* obligations by means of a trust rather than merely by means of a fiduciary relationship, it is not essential that "at the time of the loan, there should be an identifiable third party for whose ultimate benefit the payment was made. The rationale for the recognition of the lender's equitable interest is the imposition of the restriction which he imposes and the recipient accepts".[86] This is merely another way of saying that if the provider and recipient mutually intend the restriction on the use of the money, the court should enforce it, even if at the time of the payment, the ultimate destination of the money is not clear (as it would not be if it was provided, for example, to meet debts to be incurred in the future); if it subsequently becomes clear, then primary *Quistclose* obligations will arise; if not, then secondary will. Hence, it is not essential "that the nature of the special purpose need be such as to meet the usually strict requirements for a valid trust as far as certainty of objects is concerned".[87] It bears repeating, however, that the best way to establish the *Quistclose* obligations is to demonstrate that the payee holds the money on trust, by proving the three certainties. The point merely is that the essence of the *Quistclose* obligations extends well beyond express trust into fiduciary territory, and hence it is possible to establish such obligations even if the three certainties – in particular certainty of objects – are not clearly established.

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84 (1991) 102 ALR 681; Burns (1992) 155-156.

85 *Ibid*, 692; see also *Twinsectra*, [88]-[89] (Lord Millett).

86 *Twinsectra* [1999] Lloyds Rep Bank 438, 458 (Potter LJ).

87 *Ibid*, 456.

2.4 The Failure of the Specific Purpose.

The failure of the specific purpose for which the money is transferred is the basis upon which the secondary *Quistclose* obligations arise. If that purpose is carried into effect, then the primary *Quistclose* obligations will be spent;[88] in effect, they will have been discharged by performance and as the purpose has not failed, the secondary obligations cannot arise. Hence, in *Re Miles*,[89] Pincus J held that when the recipient used the money to pay the relevant debts, the purpose had been carried out, even when the payments were subsequently recovered as voidable preferences.

Of course, just because the performance of the primary *Quistclose* obligations prevents secondary consensual *Quistclose* obligations arising does not mean that it also precludes similar obligations from arising by operation of law. In *Thiess Watkins White v Equiticorp Australia*,[90] the plaintiff had lodged money into an account with the first defendant to meet obligations to the second defendant which were discharged leaving a surplus in the account. de Jersey J held that the parties had intended that the monies in the account be trust monies and that a resulting trust over the surplus arose in favour of the plaintiff. Here, the primary obligations had been carried into effect, so that, in principle, no secondary *Quistclose* obligations could arise; hence the resulting trust identified by de Jersey J was not a secondary *Quistclose* obligation[91] but rather a traditional resulting trust arising where there has been a transfer on an express trust which failed to dispose of the full beneficial interest.

If, however, the purpose cannot be carried into effect, the secondary *Quistclose* obligation to return the money will arise. Whether the purpose has failed is a question of fact in each individual case. In *Quistclose*, the loan was made by Quistclose Investments to the company only to enable the payment of the dividend and for no other purpose;[92] and it seems to have been assumed that the subsequent liquidation of the company without the

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88 *Twinsectra* [69] *per* Lord Millett.

89 (1988) 85 ALR 218.

90 [1991] 1 Qd R 82 (de Jersey J).

91 As he seemed to regard it: *ibid*, 84.

92 [1970] AC 567, 580 (Lord Wilberforce).

payment of the dividend worked the failure of this purpose,[93] and the secondary obligation in favour of Quistclose Investments was enforced.

2.5 The Duty to Repay.

The duty to repay on failure of the specific purpose is usually expressly set out in the contract. Nevertheless, in *Quistclose* itself, Lord Wilberforce held that a necessary consequence from the specific purpose for which the money had been loaned, "by process simply of interpretation, must be that if, for any reason, the dividend could not be paid, the money was to be returned to the respondents".[94] Similarly, in *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd*, Gibbs ACJ regarded *Quistclose* as "authority for the proposition that where money is advanced by A to B, with the mutual intention that it should not become part of the assets of B, but should be used exclusively for a specific purpose, *there will be implied* (at least in the absence of an indication of a contrary intention) a stipulation that if the purpose fails the money will be repaid, and the arrangement will give rise to a relationship of a fiduciary character, or trust".[95]

However, although the duty of repayment arose in those cases by necessary implication, where this has not been expressly provided for by the parties in the contract, this will not always, perhaps not even usually, be an appropriate inference to draw. In *Australasian Conference Association*, the defendant builder was put into receivership, the plaintiff exercised its right under a contract of guarantee with the bank to call for $126,140. The plaintiff used $116,000 to pay off unpaid subcontractors for work done for the defendant before its receivership, and the bank sought the return of the balance. Gibbs ACJ held that any such right of the bank would derive from the contract, which was silent as to what was to be done with the balance; and he concluded that "nothing at all in the contract … suggests … that the Bank is entitled to have any of the money returned to it".[96] Not only had the parties not expressly agreed that any surplus should be returned to the bank, but,

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[93] *Cf* Goodhart & Jones (1980) 494; Millett (1985) 275-276, 288; Bridge (1992) 351-352; Burns (1992) 163; Oditah (1992) 474-475; McCormack (1994) 96-97; *Re Northern Developments* (6 October 1978, Megarry VC); *Twinsectra*, [98] (Lord Millett).

[94] [1970] AC 567, 580; *cp* 581; (1819) 2 B & Ald 683, 684 (Abbott CJ) (implied stipulation); *Moore v Barthrop* (1822) 1 B&C 5 (same); *Tropical Capital Investment Ltd v Stanlake Holdings Ltd* (Court of Appeal, unreported, 24 May 1991); Rickett (1992); *Twinsectra* [74]-[76] (Lord Millett).

[95] (1976-1978) 141 CLR 335, 353 (emphasis added); *cp Re Groom* (1977) 16 ALR 278, 292 (Riley J); *cf Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443.

[96] *Ibid*, 353; not only was a contractual obligation to return the money excluded, so also was a secondary *Quistsclose* obligation. *Cp Ausintel* (1990) 19 NSWLR 637 647-648 (Meagher JA).

having regard to the terms which they had actually agreed, this could also not fairly be inferred from the contract. Similarly, in *Re Associated Securities Ltd*,[97] where shareholders advanced cheques to purchase a further issue of shares in a company which was put into receivership before the shares could be issued, there was no express stipulation as to what would happen to the advances upon failure of the allotment, and no basis upon which one could fairly be inferred.[98]

Furthermore, the mere fact of such a duty to return the money is not of itself sufficient to give rise to the priority which Quistclose Investments enjoyed over the company's other creditors. In *Cargill International SA v Bangladesh Sugar and Food Industries Corp*,[99] it was held that the defendant, who had called in a performance bond on the other's breach of contract, was under a duty to return any surplus once its losses from the breach had been calculated. Although the payment of the performance bond was for a specific purpose, and the duty to repay any surplus arose as a matter of construction of the parties' agreement,[100] nevertheless, this duty to repay was a simple contract debt,[101] that is, a personal liability. Had the defendant gone into liquidation after receipt but before repayment, the plaintiff's claim for the surplus would therefore not have had the priority over the defendant's other creditors which Quistclose Investments' claim enjoyed. Consequently, it is clear that the payment for a specific purpose is a necessary but not a sufficient condition for the generation of the relevant priority.

2.6 The Segregated Fund.

In *Quistclose*, on the same day that Quistclose Investments had made the loan to the company for the purpose of paying the dividend, the company, by letter, opened a new bank account with Barclays to lodge the proceeds of the loan. In that letter, the company confirmed their agreement with Quistclose that the lodgment would only be used to meet the dividend.

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97 [1981] 1 NSWLR 743 (Needham J).

98 *Ibid*, 749 (no evidence that the company intended to declare a trust of the advances), 750 (no special arrangement creating a trust).

99 [1996] 4 All ER 563; *affd* [1998] 2 All ER 406.

100 [1998] 2 All ER 406, 413 (Potter LJ).

101 [1996] 4 All ER 563, 571, 573 (Morrison J); *affd* [1998] 2 All ER 406; *cp ACA v Mainline* (1976-1978) 141 CLR 335, 360 (Stephen J), 376 (Aicken J) (duty to return, a simple contract debt).

Not much was made in *Quistclose*[102] of the fact that the fund was segregated; everything was said to turn on the intentions of the parties. However, Lord Wilberforce suggested that the parties' mutual intention that there be a trust could be inferred from "some special arrangement"[103] on the facts. Perhaps the paradigm such arrangement is the segregation of the transferred funds into a separate bank account pending application to the specific purpose or return to the payor.[104] The presence or absence of such a segregated fund is often crucial, especially in combination with the presence or absence of a promise to pay a third party or repay the payor. Hence, the segregated fund is often crucial in the inference of both the primary and the secondary *Quistclose* obligations.

As to primary *Quistclose* obligations, the inference that the money is to be held on trust is often easily drawn from the combination of the separate account and a promise to pay on to the intended recipient.[105] In such circumstances, the separate account is often "little more than a conduit pipe"[106] by which the funds flow from the provider to the intended recipient, and though they flow through the borrower's account, the borrower is never free to deal with them. In *Re Fleet Disposal Services*,[107] because Fleet Disposal had stressed that the proceeds of sales of Nortel's cars would be lodged into a separate account, Lightman J inferred that Fleet Diposal intended to hold the proceeds on trust for Nortel. However, everything turns on intention, and such intention can be inferred without such an account. In *Stephens Travel Service International Pty Ltd v Qantas Airways*[108] the terms of the agreement[109] were such that a travel agent held payments received from travellers for air tickets on trust for an airline, notwithstanding that there was no obligation on the travel agent to segregate the payments, which were therefore not available to the travel agent's

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102 *Cf Thiess* [1991] 1 Qd R 82, 84 (de Jersey J).

103 [1970] AC 567, 581; a factor relied upon in *Re Associated Securities Ltd* [1981] 1 NSWLR 743, 750 (Needham J) and in *Re Miles* (1988) 85 ALR 218, 220 (Pincus J).

104 Worthington (1996) 55-58; *Re Holiday Promotions (Europe) Ltd* [1996] 2 BCLC 618, 622 (Timothy Lloyd QC).

105 *Northern Developments* (6 October 1978, Megarry VC); *Carreras Rothmans* [1985] 1 Ch 207 (Peter Gibson J); *Twinsectra*, [1999] Lloyd's Rep Bank 438, 455-456 (Potter LJ); [95] (Lord Millett).

106 *Carreras Rothmans* [1985] 1 Ch 207, 220 (Peter Gibson J).

107 [1995] 1 BCLC 345 (Lightman J).

108 (1988) 13 NSWLR 331.

109 *Ibid*, 339-344 (Hope JA); *Re Barrington and Associates Pty Ltd* [1989] VR 940 (Beach J) (funds impressed with trust, even though lodged to general bank account); *Walsh Bay* (1995) 130 ALR 415, 426 (Beaumont and Sackville JJ).

receivership. There can be no trace of segregated account and yet be a trust, as here, because the proper focus is upon whether the parties intended that there be a trust, and the segregated account is merely one matter from which such an intention can be inferred.[110]

However, in most of the segregated account cases, the question is whether, the purpose of the payment having failed, a secondary *Quistclose* obligation has arisen by which it is held on trust for the provider. In this context, the combination of a promise to repay upon failure of the purpose and the segregation of the fund in the meantime is most potent; but in most situations short of this combination, it will be difficult to infer an intention to create a trust.

In the absence of a promise to repay, it will be very difficult to infer the intention to create a trust,[111] a conclusion often bolstered by the absence of a segregated account.[112] In *Neste Oy v Lloyds Bank*,[113] where there was no evidence that the plaintiff, a Finnish shipping company, intended that its payments to the defendant, its English agent, to meet port expenses for its ships in Britain, would be kept in any way separate, or that the defendant had operated a separate account for these payments, or that they had been received by the defendants on terms that they would be used only for port expenses or returned, Bingham J held that there was no trust in respect of those payments. Quite simply, there was neither segregation nor a promise to segregate, and thus nothing from which to infer a trust. Similarly, in *Re Australian Elizabethan Theatre Trust*,[114] donations to three arts organisations were made through the Trust, but it neither promised to segregate the

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110 *Rayack Construction v Lampeter Meat Co Ltd* (1979) 12 Build LR 30 turned on the fact that there was an express segregation obligation in the contract (followed: *Re Arthur Sanders Ltd* (1981) 17 Build LR 125; *Re Jartay Developments Ltd* (1983) 22 Build LR 134; *Murphy Bros (Dublin) v Morris* (Irish High Court, unreported, 6 October 1975, Kenny J); *Glow Heating v Eastern Health Board* (1992) 8 *Constr LJ* 56 (Ir HC, 4 March 1988, Costello J); *Wates Construction v Franthom Property Ltd* (1991) 53 Build LR 23). Prentice (1983); McCartney (1992).

111 *Re Associated Securities* [1981] 1 NSWLR 743.

112 *Ibid*; *cp Re AETT* (1991) 102 ALR 681, 690-691 (Gummow J); *Re Money Markets International Stockbrokers Ltd* (High Court, unreported, 20 October 2000, Carroll J) (no segregation, no *Quistclose* trust). In *Roxborough v Rothmans of Pall Mall*, in the Full Court of the Federal Court of Australia, the providers conceded that no *Quistclose* trust arise, primarily because the recipients had no obligation to segregate the money received ((1999) 95 FCR 185, 203, 206). Though criticised (Bryan & Ellinghaus (2000) 664) this was approved by Kirby J in the High Court (2001) 208 CLR 516 [145].

113 [1983] 2 Lloyd's Rep 658 (QBD, Bingham J).

114 (1991) 102 ALR 681 (FCA, Gummow J).

donations nor did so, and for Gummow J, this was "a significant factor tending against the conclusion that a trust arose".[115]

Indeed, the absence of a promise to repay can negative the inference of an intention to create a trust even if there is what might look like a segregated account. In *Re Fada (Australia) Ltd*[116] where the company had gone so far as to open an account which it called a "trust account" into which it lodged the subscriptions for a failed share allotment, it used the account for general business purposes, and had neither promised to segregate the subscriptions into such a separate account nor informed the subscribers of its existence; and Piper J concluded that no trust arose.[117]

However, even if there is a promise to repay, it does not necessarily follow that the money received is to be held on trust, and the inference of an intention to create a trust is often negatived in such circumstances by the absence of a segregated account. In *Moseley v Cressey's Co*, the plaintiffs' subscriptions for shares in the defendant, on foot of a prospectus which provided that such subscriptions would be returned if no allotment were made, had not been set aside in a separate fund, and though the shares were never allotted, Page Wood VC no trust had been created.[118] Hence, even if there is a promise to pay, but the money is lodged to a general business account, it will be difficult to infer that the money was intended to be segregated or impressed with a trust.[119]

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115 (1991) 102 ALR 681, 689, 696; *Walker v Corboy* (1990) 19 NSWLR 382, 385, 389, 397-398.

116 [1927] SASR 590 (Piper J); *cp Swiss Bank Corporation v Lloyd's Bank Ltd* [1982] AC 584 (inference of trust rebutted on the facts despite segregation of relevant funds).

117 *Dines* (1989) 4 NZCLC 65,298, 65,304 (Ellis J); *Re Lewis's of Leicester Ltd* [1995] 1 BCLC 428, 436 (Robert Walker J).

118 (1865-1866) LR 1 Eq 405, 409-410; *Stewart v Austin* (1866) LR 3 Eq 299; *Re Associated Securities Ltd* [1981] 1 NSWLR 743, 745-746 (Needham J); *Dines* (1989) 4 NZCLC 65,298, 65,302-65,304 (Ellis J); *Re HB Haina & Associates Inc* (1978) 86 DLR (3d) 262; *Re Holiday Promotions (Europe) Ltd* [1996] 2 BCLC 618; *Re Chelsea Cloisters*, (1981) 41 P&CR 98, 101 (Lord Denning MR), *cf* 102-103 (Bridge LJ), 104 (Oliver LJ).

119 *Re Fada (Australia) Ltd* [1927] SASR 590, 593-594 (Piper J); *Neste* [1983] 2 Lloyd's Rep 658, 664 (Bingham J); *Re AETT* (1991) 102 ALR 681, 696 (Gummow J); *Guardian Ocean Cargoes Ltd v Banco do Brasil SA* [1994] 2 Lloyd's Rep 152, 159-160 (Saville LJ); *Re Holiday Promotions (Europe) Ltd* [1996] 2 BCLC 618, 623 (Timothy Lloyd QC). However, if it otherwise appears that there was a trust, this will not be negatived by lodgment into a general account (*Stephens Travel* (1988) 13 NSWLR 331, 339-341 (Hope JA)) which might therefore constitute a breach of trust (*ibid*).

Finally, an inference that the money is to be held on trust is often easily drawn from the combination of the separate account and a promise to repay.[120] In *Re Nanwa Gold Mines Ltd*[121] the company proposed to issue shares to raise capital to undertake a mining operation, on condition that the money would be returned if the mining could not go ahead and would in the meantime be kept in a separate account. The subscriptions were so maintained. However, there was an insufficient subscription to the share offer, a receiver was appointed, and the mining operation was abandoned. Harman J held that a trust in favour of the subscribers arose because of the combination of the existence of the separate account with the express promise to open and maintain it.[122]

The inference becomes well nigh irresistible where the promise to repay (which is coupled with the segregated account) is couched in the language of trust. In *Walsh Bay Developments Pty Ltd v Federal Commissioner of Taxation*,[123] the owner of property granted a developer the exclusive right to develop it. While the developer sought necessary development consents, he made a substantial prepayment of rent; which the contract required would be placed in a separate bank "on trust", to be returned if the consents were not obtained. The court had no difficulty in finding that the owner held the prepayment on trust,[124] and had to return it when the consents were not forthcoming and the development did not proceed.

Although, in *Nanwa*, the important point for Harman J was that the promise to repay was coupled with the promise to retain the money in a separate account, nevertheless, as a matter of principle, this must be because these promises were the reflection of the parties' intentions that there would be a trust. What counts are the intentions of the parties; the

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[120] Though not always: in *Re Multi Guarantee Ltd* [1987] BCLC 257, despite a promise to repay and a segregated fund, Nourse LJ held that no trust arose because the necessary certainty of words was absent (see also n153 below).

[121] [1955] 3 All ER 219; *Re Eastern Capital Futures (in liq)* [1989] BCLC 371.

[122] [1955] 3 All ER 219, 223-224; *cp Henry v Hammond* [1913] 2 KB 515, 521 (Channell J); *Re HB Hain* (1978) 86 DLR (3d) 262, 266; *Re Chelsea Cloisters* (1981) 41 P&CR 98, 101 (Lord Denning MR); *Neste* [1983] 2 Lloyd's Rep 658, 664 (Bingham J); *Walker v Corboy* (1990) 19 NSWLR 382, 385, 389, 397-398; *Walsh Bay* (1995) 130 ALR 415, 424 (Beaumont and Sackville JJ); *Re Lewis's of Leicester Ltd* [1995] 1 BCLC 428, 436, 439 (Robert Walker J); *Associated Alloys Pty Ltd v CAN 001 452 106 Pty Ltd* (2000) 202 CLR 588.

[123] (1995) 130 ALR 415.

[124] *Ibid*, 424 (Beaumont and Sackville JJ); generally 422-427; *cp Stephens Travel* (1988) 13 NSWLR 331, 339-341 (Hope JA).

promises to repay and to segregate, and segregation in fact, though indicative[125] of this intention, are not essential; and, even in the absence of a separate account or a promise to segregate, the relevant intention may arise. Hence, looking for segregation into a separate account, or for a promise so to do, are only proxies for the actual intentions of the parties – good proxies, to be sure, but still only proxies, and as such may be misleading: there may be a separate account but no relevant intention, as in *Fada*,[126] or there may be intention but no separate account, as envisaged by Megarry J in *Re Kayford*: "[p]ayment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust …".[127] A mail order company, whose main supplier faced financial difficulties, had been advised by an accountant to open a separate bank account for customers' advance payments so that if the company went into liquidation they could be refunded. The supplier ceased to make deliveries, and the company was put into liquidation. The company had used an existing dormant account rather than opening a new one, but Megarry J had "no doubt that the intention was that there should be a trust".[128] The focus was not upon the status of the bank account but – as it ought to have been – upon the intentions of the parties.

In the end, that is the essential point: the trust – or more precisely, in this context, the primary or secondary *Quistclose* obligation – arises because the parties mutually so intend; this intention is usually express, but it may be inferred from the evidence; and one important piece

[125] *ACA v Mainline* (1976-1978) 141 CLR 335, 352 (Gibbs ACJ); *Neste* [1983] 2 Lloyd's Rep 658, 664 (Bingham J); *Thiess* [1991] 1 Qd R 82, 84 (de Jersey J); *Anglo Corp Ltd v Peacock AG* (Court of Appeal, unreported, 12 February 1997) (Brooke LJ).

[126] Indeed, a bank account is often opened to hold a disputed fund, as occurred in *ACA v Mainline* (1976-1978) 141 CLR 335 and *Stephens Travel* (1988) 13 NSWLR 331. Such a segregation, of course, gives rise to no issue as to the existence of a trust. Furthermore, where such a dispute has been resolved in favour of one party, but the other goes into liquidation before the fund can be paid out, there may still be no trust, as occurred in *Re Multi Guarantee Ltd* [1987] BCLC 257.

[127] [1975] 1 WLR 279, 282; although *Kayford* is not an example of *Quistclose* obligations (see n282 below), it is sufficiently similar to allow analogies safely to be drawn

[128] *Ibid*, 281; to like effect: 282. *Cp Re Chelsea Cloisters* (1981) 41 P&CR 98, 101-102 (Lord Denning MR), 103-104 (Bridge LJ), 104 (Oliver LJ) (segregation evidence of intention to declare a trust); *Re Lewis's of Leicester Ltd* [1995] 1 BCLC 428, 434-438 (Robert Walker J) (same).

of such evidence is the existence of a segregated fund in a separate bank account, often coupled with a promise to pay the money in that the fund to relevant party.

2.7 The Priority of the Intended Beneficiary or Provider.

The discharge of primary *Quistclose* obligations will give the intended beneficiary a priority over competing creditors; the failure of this purpose, and the consequent secondary obligations, will give the original provider priority over competing lenders. Such priorities arise because the normal relationship of debt has, in such cases, been supplemented with one of fiduciary obligation or trust.[129] This infiltration[130] of equitable doctrine into commercial transactions has long given rise to not inconsiderable judicial disquiet.[131] The classic statements to this effect are often the precursor to analysis in modern *Quistclose* cases,[132] though they often now honoured more in the breach than in the observance,[133] and the modern cases are more sanguine about the effects of equity upon commerce.[134] Of course, some of those effects have been benign, even valuable,[135] and the classic *dicta* object not so much to this process itself as to equity's producing legal and commercial uncertainty,[136] imposing impractical standards of investigation, upsetting commercial bargains, or generating unfair priorities in insolvencies.[137] In the *Quistclose* context, the

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129 *Quistclose* [1970] AC 567, 581 (Lord Wilberforce); *Daly v Sydney Stock Exchange* (1985-1986) 160 CLR 371, 379-380 (Gibbs CJ); *Associated Alloys Pty Ltd v CAN 001 452 106 Pty Ltd* (2000) 202 CLR 588.

130 See Goodhart & Jones (1980); Priestley (1988) (equitable principles precipitating burgeoning maelstrom in contract); *cf* Seddon (1994).

131 *Barnes v Addy* (1874) LR 9 Ch App 244, 251, 255 (Lord Selborne LC); *New Zealand and Australian Land Co v Watson* (1881) 7 QBD 374, 382 (Bramwell LJ); *Manchester Trust v Furness* [1895] 2 QB 539, 545 (Lindley LJ); *Re Wait* [1927] 1 Ch 606, 634, 640-641 (Atkin LJ); *Henry v Hammond* [1913] 2 KB 515, 521 (Channell J); *Scandanavian Trading Tanker v Flota Petrolera Ecuatoriana* [1983] QB 529 540-541 (Goff LJ), *affd* [1983] 2 AC 994 703-704 (Lord Diplock); *Westdeutsche*, 704 (Lord Browne-Wilkinson).

132 *Hospital Products Ltd v United States Surgical Corporation* (1984-1985) 156 CLR 41, 118-119 (Wilson J); 149-150 (Dawson J); *Re Goldcorp* [1995] 1 AC 74, 98 (Lord Mustill); *Walker v Corboy* (1990) 19 NSWLR 382.

133 *Neste* [1983] 2 Lloyd's Rep 658 (QBD) 665 (Bingham J); *Dines* (1989) 4 NZCLC 65,298, 65,305 (Ellis J); *Re Fleet Disposal Services* [1995] 1 BCLC 345, 350 (Lightman J); *Walsh Bay* (1995) 130 ALR 415, 422-423 (Beaumont and Sackville JJ); *Twinsectra* [1999] Lloyds Rep Bank 438, 454-455 (Potter LJ).

134 *Hospital Products Ltd v United States Surgical Corporation* (1984-1985) 156 CLR 41, 100-101 (Mason J); *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180, 193-194 (Somers J); *Walsh Bay* (1995) 130 ALR 415, 422-423 (Beaumont and Sackville JJ); *Walker v Corboy* (1990) 19 NSWLR 382.

135 Austin (1986) 452.

136 Kennedy (1987) 1; Millett (1995) 40; Millett (1998) 214.

137 Austin (1986) 450-452.

appropriate mischief against which analysis must guard is the possibility of unfairness in the priority of the intended beneficiary or the provider over the recipient's other creditors. For this reason, Pincus J in *Re Miles* was unhappy with the *Quistclose* principle and concerned not to extend it beyond very narrow confines:

> Experience suggests that bankruptcy or the liquidation of an insolvent company often awkwardly interrupts the progress of an intended transaction or set of transactions. If goods are delivered under a contract of sale and the property has passed, but bankruptcy supervenes just before an intended payment is made for them, the vendor cannot get them back. He must submit to their being sold to satisfy the general body of creditors - or perhaps even more galling, to satisfy a secured creditor or one having statutory priority. The common sense claim of such an unpaid vendor to recover 'his' goods rather than prove for the price may be no less appealing than Quistclose's claim to repayment of the money it advanced and the same may be said of any number of types of transactions interrupted by bankruptcy. This illustrates the unwisdom of extending the *Quistclose* principle to cover more situations in which money or property comes to the bankrupt, in contemplation of a transaction which bankruptcy forestalls.[138]

Even so, the balance of fairness seems to be on the side of *Quistclose*.[139] Other creditors are rarely if ever misled by the existence of a separate account into advancing further credit;[140] and any benefit to them if the conduit pipe from the provider to the intended beneficiary breaks down would amount to little more than a windfall.[141] Indeed, given that many *Quistclose* cases involve situations of attempted corporate rescue, it is in the interests of general creditors that lenders be encouraged to make such loans, since, if they are successful in rescuing the borrowers' businesses, then the general creditors can be paid; if they are unsuccessful, they are no worse off.[142] There seems then to be no ground for complaint that the *Quistclose* arrangement is unfair to the recipient's general body of unsecured creditors.

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[138] (1988) 85 ALR 218, 221; Goodhart & Jones (1980) 510-512; *Re AETT* (1991) 102 ALR 681, 700 (Gummow J); Rickett (1991) 625-627; Oditah (1992) 474-476.

[139] Austin (1986) 454-455; Bridge (1992); Rickett (1993) 325; Belcher & Beglan (1997); *Re Fleet Disposal Services* [1995] 1 BCLC 345, 350 (Lightman J).

[140] This was certainly so in *Quistclose* itself: Goodhart & Jones (1980) 494; see also Priestley (1987) 237.

[141] Rickett (1991) 648; Bridge (1992) 348; McCormack (1994) 94-96.

[142] Rotherham (2001) 161-163.

The same concern underlies the debate as to whether the priority of the intended beneficiary or the lender constitutes a fraudulent preference. Nevertheless, the return of the loan was held not to do so in *Edwards v Glynn*[143] and *Re Vautin*;[144] and in *Re Kayford*, Megarry J held that no question of fraudulent preference would arise where the case concerned "not … preferring creditors but … preventing those who pay money from becoming creditors, by making them beneficiaries under a trust".[145] Hence, in *Re Australian Elizabethan Theatre Trust*, Gummow J explained that the essential reason the insolvency law did not strike at the transaction in *Quistclose* "was that the moneys represented by the cheque drawn by Quistclose in favour of Rolls Razor and banked in the special account of Rolls Razor never at any stage became the beneficial property of Rolls Razor".[146] Consequently, the *Quistclose* relationship does not seem as a matter of principle to amount to fraudulent preference,[147] or otherwise contravene public policy.[148]

The objection that there is no justification to confer proprietary status upon the beneficiary under the primary obligation or of the lender under the secondary obligation is most potent where the conferral happens as a matter of law, but loses most of its force where it is the product of the parties' intentions. The lender would not have lent to allow the intended beneficiary to be paid unless the risk of the impact of the borrower's insolvency upon the

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[143] (1858) 2 E&E 29; *Ex p Craven, Re Craven and Marshall* (1870) LR 10 Eq 648, 655 (Bacon CJ) *affd sub nom Ex p Tempest*, *Re Craven and Marshall* (1870) LR 6 Ch 70, 75 (James LJ).

[144] *Re Vautin*, *ex p Saffery* [1900] 2 QB 325, 328 (Wright J).

[145] [1975] 1 WLR 279, 281, an explanation that applies by analogy to the *Quistclose* context; *cp* Goode (1983) 18; Priestley (1987) 233-234; *cf* Goodhart & Jones 496; McCartney (1992); on the limits of this rationale, see *Re Chelsea Cloisters Ltd* (1981) 41 P&CR 98, 105 (Oliver LJ) querying whether, although there would be no preference if the trust is declared before the money comes in, one would arise if money already in is then clothed with a trust; see Worthington (1996) 59; *Re Lewis's of Leicester Ltd* [1995] 1 BCLC 428 (Ch D) 438-439 (Robert Walker J).

[146] (1991) 102 ALR 681, 692.

[147] Milman & Parry (1997); Keay (2000) 245-246: the preference requires a motive on the part of the company to improve the lot of an existing creditor on an insolvency (*cf* Keay (1996); Keay (1998)); but this requirement probably saves most *Quistclose* relationships: *Re Vautin* [1900] 2 QB 325, 238; *Re Lewis's of Leicester Ltd* [1995] 1 BCLC 428, 438-439 (Robert Walker J); McCormack (1990) 216-217; McCormack (1994) 99-106; Anderson (1992) 176-180; *cf* McCartney (1992) 360, 368-370.

[148] Not within *British Eagle International Airlines v Compagnie International Air France* [1975] 1 WLR 758; *Carreras Rothmans* [1985] 1 Ch 207, 226 (Peter Gibson J); *Murphy Bros (Dublin) v Morris* (High Court, unreported, 6 October 1975, Kenny J); *Glow Heating v Eastern Health Board* (1992) 8 *Constr LJ* 56 (Ir HC, 4 March 1988, Costello J); *Re Lewis's of Leicester Ltd* [1995] 1 BCLC 428, 439 (Robert Walker J); *cf Mullan v Ross* [1996] NI 618.

transaction were removed. In this respect, the *Quistclose* relationship is functionally equivalent to a bargained-for security interest.[149]

2.8 Conclusion.

The primary and secondary obligations of the *Quistclose* relationship are generated by the mutual intentions of the parties that the money provided be applied for a specific purpose or returned to the lender and in the meantime that it not form part of the borrower's assets. This is usually achieved by an intent that the money be held on trust, but a fiduciary relationship will be sufficient. The relevant intention can be gleaned from the segregation of the money into a separate account, but segregation is merely a fact from which the inference of intention can be drawn, and the proper focus ought always to be upon that intention. The specific purpose for which the money is provided is not limited to corporate rescue loans, and of itself does not give rise to the *Quistclose* obligations, which are generated by the mutual intentions of the parties. If the purpose is carried into effect, the primary obligations will be spent; if not, the secondary obligations will arise. And these obligations, though they confer priorities upon, respectively, the intended beneficiaries or the lenders, do not raise insolvency concerns. These, then, are the contours against which the primary and secondary obligations of the parties to a *Quistclose* relationship fall to be examined.

3. Primary *Quistclose* obligations

3.1 Introduction.

The primary rights and obligations of the various parties to the *Quistclose* relationship, – the provider, recipient, and intended beneficiary, – and of other parties such as the recipient's bank, can be determined by reference to three basic facts. First, the primary *Quistclose* obligation of the recipient to perform the specific purpose is founded upon the contractual mutual intentions of the provider and recipient. Second, it is often given effect by means of a trust; but, third, such a trust is not necessary, it being sufficient if the recipient is under fiduciary obligations to the provider.

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149 Bridge (1992) 342-345.

3.2 The Rights and Obligations of the Provider.

The provider of the money to be applied by the recipient to the specific purpose has a legitimate interest in ensuring the consummation of that purpose. In *Quistclose*, Lord Wilberforce said that "when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose".[150] Consequently, the provider can enforce the recipient's primary *Quistclose* obligation to apply the money for the stated purpose. In *Northern Developments*[151] various banks lent money to a holding company for the express purpose of rescuing a subsidiary by paying its creditors. When the subsidiary was put into receivership, most of the fund remained, and Megarry VC held that the banks had an interest in seeing that the subsidiary's creditors be paid. Again, in *Carreras Rothmans*,[152] an advertising company incurred liabilities with media creditors in advertising a tobacco company's products. A bank account was opened to allow the tobacco company to pay sums to the advertising company for the sole purpose of meeting these liabilities, and the cheques from the tobacco company were payable only into this account. When the advertising company went into liquidation, the tobacco company sought to compel the liquidator to apply the sum remaining in the account to the media creditors. Unusually for the modern cases, the provider sought to enforce the primary *Quistclose* obligations. It did so because it had felt compelled for its own commercial reasons to pay the advertising company's outstanding debts to the media creditors, which then assigned their interests to it. Nevertheless it sought to compel such payment in its own terms as the provider, and not as assignee from the creditors,[153] and succeeded: "the plaintiff can be equated with the lender in *Quistclose* as having an enforceable right to compel the carrying out of the primary trust".[154]

There is a simple means of achieving the provider's right to enforce the recipient's primary

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[150] [1970] AC 567, 581.

[151] 6 October 1978, Megarry VC.

[152] [1985] 1 Ch 207

[153] Millett (1985) 280.

[154] [1985] 1 Ch 207, 222 (Peter Gibson J).

Quistclose obligations: the relationship between the provider and recipient is founded upon a contract, usually a contract of loan between a lender and borrower; that contract embodies as a term the specific purpose for which the transfer is made; it follows then that all that the provider has to do to ensure the implementation of the specific purpose is simply to seek specific performance of the contract.[155] If the obligations have been given effect by means of a trust, then, specific performance of the contract would amount to the execution of the trust; if the obligations have been given effect by means of fiduciary duties imposed upon the recipient, then specific performance of the contract would amount to the enforcement of those duties.

Notwithstanding that there is a simple explanation for the provider's positive right to enforce the recipient's primary obligation to apply the money for the stated purpose, Lord Millett described the provider's right as merely a negative one to see that the money lent "is applied for the stated purpose, *or more accurately to prevent its application for any other purpose*",[156] but even he could not avoid the broader language.[157] Chambers provides a similarly limited explanation of the provider's right to enforce the recipient's primary *Quistclose* obligations, arguing that the provider has merely a contractual right enforceable by injunction to prevent the recipient from misapplying the funds.[158] Nevertheless Lord Millett has objected to Chambers' view on the grounds that it amounts to "a kind of a kind of restrictive covenant enforceable by negative injunction yet creating property rights in the money. But restrictive covenants, which began life as negative easements, are part of our land law. Contractual obligations do not run with money or a chose in action like money in a bank account".[159] Whether or not this objection is fatal to Chambers' explanation, it does not undercut the specific performance explanation advanced here: since the provider's right arises simply out of the contract between the provider and the

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155 A promise to apply a fund in a particular way founds an injunction so to apply it, but does not necessarily give the promisee proprietary rights in the fund: *Palmer v Carey* [1926] AC 703, 706 (Lord Wrenbury); *Swiss Bank v Lloyds Bank* [1982] AC 584.

156 *Twinsectra*, [69] (emphasis added); *Edwards v Glynn* (1858) 2 E&E 29, 50 (Compton J) (equity would prevent recipient from using the money for any other purpose); *Re Rogers* (1891) 8 Morr 243, 248 (Lindley LJ) (provider can obtain an "injunction to restrain the [recipient] from using that money for any purpose except that of paying his pressing creditors"); *Re Watson*; *ex p Schipper* (1912) 107 LT 783, 783 (Cozens-Hardy MR) (same).

157 *Twinsectra*, [96] (primary trust enforceable).

158 Chambers (1997) 74-75; *cp Twinsectra* [1999] Lloyd's Rep 438, 456 (Potter LJ).

159 *Twinsectra*, [94]; Ho & Smart (2001) 276-277.

recipient, there is no question of it running with the money or taking on the character of a restrictive covenant.

There should be no conceptual difficulties with the specific performance explanation, but the exclusive focus upon the language of trust to the exclusion of the potential parallel fiduciary relationship or of the underlying contractual matrix, has muddied the waters on this issue.[160] Indeed, Lord Millett rejected the specific performance explanation in favour of an analysis located exclusively in trust, arguing that "Lord Wilberforce's remarks in the *Quistclose* case were wide enough to embrace cases where the money was provided by [the provider] by way of gift or on a non-contractual basis, and there is no reason to confine them to cases of loan".[161] However, the claim here is not that the specific performance explanation is an exclusive one, rather it is that giving specific performance of the underlying contract will have the effect also of enforcing the trust or fiduciary obligations embodied in the contract: it does not displace but rather complements any overlying trust or fiduciary obligations. Furthermore, the specific performance explanation does not confine *Quistclose* to cases of loan but extends to all contractual examples; and there will, in fact, be contracts in most cases. Finally, the specific performance explanation can easily accommodate fiduciary *Quistclose* obligations, cases which are difficult to bring within an exclusively trust-based analysis.

However, the essential gravamen of Lord Millett's objection here is that any "analysis of the *Quistclose* trust must be able to accommodate gifts".[162] But the kind of gift that it must accommodate is a conditional one, where the provider makes the gift on condition that it will be applied for a specific purpose; this condition and its acceptance creates a consensual arrangement from which a contractual arrangement could if necessary almost certainly be spelt out. Furthermore, Lord Millett also argued that the specific performance explanation would be "subversive of the whole basis of Lord Wilberforce's approach, which rests [the recipient's] obligations firmly on an equitable and not on a contractual footing".[163] This contrast between contractual and equitable footings is a false dichotomy: as Lord Wilberforce himself recognised, there is no problem with the co-existence of debt

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160 Millett (1985) 287-288; *Twinsectra*, [80]-[81], [96], [100] (Lord Millett).

161 Millett (1985) 287.

162 *Twinsectra*, [89], [76], [95].

163 Millett (1985) 288.

and trust.[164] Furthermore, it is Lord Wilberforce's insistence that the *Quistclose* relationship arises from the mutual intentions of the parties which justifies a contractual analysis as the foundation of the relationship. Consequently, Millett's exclusively trust-based analysis neither precludes nor displaces the specific performance explanation of the provider's right to enforce the recipient's primary *Quistclose* obligations.

So much for the primary *Quistclose* obligations arising out of a trust. In the Court of Appeal in *Twinsectra*[165] Potter LJ advanced an explanation of the right of the provider to enforce primary *Quistclose* obligations which seems appropriate to the context of a fiduciary relationship. He explained that

> when a loan is made for a special purpose, equity will interfere in appropriate cases to prevent the borrower from using that money for any other purpose. The purpose imposed at the time of the advance creates an enforceable restriction on the borrower's use of the money. Although the lender's right to enforce the restriction is treated as arising on the basis of a 'trust', the use of the word does not enlarge the lender's interest in the fund. The borrower is entitled to the beneficial use of the money, subject to the lender's limited right to prevent its misuse; the lender's limited interest in the fund is sufficient to prevent its use for other than the special purpose for which it was advanced.[166]

This need not be an exclusive explanation of the provider's right to enforce the recipient's primary *Quistclose* obligations where those obligations are fiduciary in nature; if the specific performance explanation can apply in parallel with a trust-based explanation, it can also apply in parallel with a fiduciary duty-based explanation. Furthermore, since the specific performance explanation applies equally to cases of trust and fiduciary relationship, it unites the explanation of the provider's rights across the full range of primary *Quistclose* obligations in a manner achieved neither by Lord Millett's exclusively trust-based explanation nor by Potter LJ's fiduciary language.

The provider's rights to enforce the recipient's primary *Quistclose* obligations cease, of course, when the recipient has fully performed, though if the obligations arise out of a contract of loan, the provider's rights as lender – a personal creditor – will continue.[167]

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164 See n129 above.

165 [1999] Lloyds Rep Bank 438; Baughen (2000); Fox (2000); Speirs (2000); Stafford (2001); Tettenborn (2000).

166 *Ibid*, 456 (Potter LJ).

167 *Quistclose* [1970] AC 567, 581 (Lord Wilberforce); *Re EVTR* [1987] BCLC 646, 650 (Dillon LJ); *Twinsectra* [69] (Lord Millett).

The provider's right to enforce the recipient's primary *Quistclose* obligations flows from the contract underpinning the relationship. Whether the provider also retains equitable title to the money equally depends on the contract. Certainly, the parties must mutually intend restrictions on the recipient's use of the money pending either the implementation of the specific purpose or the return of the money, and this restriction can be effected by means either of a trust or fiduciary obligations. If there is a trust, then the recipient as trustee will hold legal title and the provider as beneficiary will hold equitable title, and this division of title will give rise to fiduciary obligations on the part of the trustee. If there is merely a fiduciary relationship but no trust, the division of title will depend on the contractual intentions of the parties. In either case, the location of the equitable interest is a function of the parties' intentions,[168] and there is no need to contemplate that the equitable interest is in suspense, as Megarry VC seemed to suggest in *Northern Developments*.[169]

In sum, then, whether the recipient's primary *Quistclose* obligations arise from a trust or are fiduciary in nature, the right of the provider to enforce those obligations arises in the first instance from his right to seek specific performance of the contract between the parties (though of course trust and fiduciary remedies will also apply in parallel).

3.3 The Rights and Obligations of the Recipient.

As the converse of the point in the previous section, the primary *Quistclose* obligation of the recipient is either to apply the money provided for the specific purpose or at least not to use for any other purpose. If it is unused, or there is an attempt to use it for another purpose,[170] the provider can compel the recipient to apply it for the promised specific purpose. If it is used for another unauthorized purpose, the recipient will have committed both a breach of contract and a breach either of trust or of fiduciary duty, with consequential accessory[171] or receipt-based[172] liability for parties who aid in or receive the proceeds of such breach.

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[168] *General Communications* [1990] 3 NZLR 406, 434 (Hardie Boys J).

[169] See text after nn181, 194 below.

[170] Unless the other purpose is also envisaged in the contract: *Patel v Brent LBC* [2003] EWHC 3081.

[171] This was the second issue in *Twinsectra*: Mitchell (2002).

[172] Birks (2002).

3.4 The Rights and Obligations of the Intended Beneficiary.

In the usual *Quistclose* situation, the provider and recipient will come to their arrangement without the involvement or knowledge of the intended beneficiary. It is unlikely, for example, that all of the shareholders in *Quistclose* were aware that their dividend was to be paid out of a loan provided by Quistclose Investments, or, more usually, that trade creditors are aware that the capital from which they are to be paid is supplied by the various providers. This lack of involvement or knowledge on the part of the intended beneficiaries has no negative impact upon the validity of the *Quistclose* arrangement. Once the primary obligations have been validly established, the intended beneficiary will always as a matter of fact have the benefit of the implementation of the specific purpose.

Some cases have gone further. In *Hassall v Smithers*,[173] Grant MR held that the beneficiary could compel the recipient to make the intended payment. And in *Northern Developments*[174] Megarry VC, having held that the banks could compel the holding company to pay its subsidiary's creditors, went on to hold that the creditors could also compel the company to perform, even though they did not have a beneficial interest in the loan. This was approved by Peter Gibson J in *Carreras Rothmans*,[175] but criticized Millett, who pointed out that in *Northern Developments*, once the fund was in place, creditors of the subsidiary "who applied for payment of their debts or who expressed concern were told of the existence, size and purpose of the fund, *viz* to keep [the subsidiary] going and to save it from being wound up"[176] and argued that this feature ought to have been "decisive; for on well-settled principles communication of the arrangements to [the creditors], followed by forebearance by [them], raises an equity against [the company] which prevents [them] from revoking the arrangements or otherwise intercepting payment to [the creditors]".[177] This analysis was adopted by the New Zealand Court of Appeal in

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173 (1806) 12 Ves Jun 119, 121-122; *cf Leen v President of the Executive Council* [1928] IR 408; [1928] IR 594) (no statutory (*Quistclose*) trust (*cf* n42 above): the statute conferred no right on the claimant to demand payment in a manner enforceable by courts).

174 6 October 1978.

175 [1985] 1 Ch 207.

176 Millett (1985) 278.

177 *Ibid*; Chambers (1997) 82.

General Communications.[178] The bank made a loan to enable a video company to purchase new equipment, and the money was paid to the company's solicitors for disbursement against invoices. The plaintiffs supplied equipment to the company, after the bank had advised them that they would be paid through the solicitors. Hardie Boys J held that the solicitors held the money on a trust primarily for payment of the suppliers and secondarily for repayment to the bank,[179] and that the bank's advice to the plaintiffs allowed them to enforce the primary trust.[180]

The language of enforcing the trust employed by Megarry VC leads to severe difficulties. Since only the beneficiary can enforce a trust, the cases concern themselves with a search for the beneficial interest. Finding it difficult to conceptualise where it might be if both the provider and the intended beneficiary can enforce the trust, Peter Gibson J in *Carreras Rothmans* was driven to holding that the consequence of Megarry VC's analysis in *Northern Developments* was that the beneficial interest was "in suspense".[181] Millett's analysis avoid this problem: the beneficial interest remains with the provider as the beneficiary of the primary trust, while the intended beneficiary of the purpose enforces not that trust so much as the equity raised against the provider.

Millett's analysis smacks of promissory estoppel as a cause of action;[182] but, the same facts which generate Millett's equity can also be pressed into the service of another – contractual – doctrine which would have the like effect of allowing intended beneficiaries in the circumstances of the creditors in *Northern Developments* or the suppliers in *General Communications* to maintain an action against the recipients. The main reason why the provider can compel the performance of the recipient's primary *Quistclose* obligations is because it can compel specific performance of the underlying contract. The doctrine of

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178 [1990] 3 NZLR 406.

179 *Ibid*, 433-434.

180 *Ibid*, 435.

181 [1985] 1 Ch 207, 222; *Twinsectra* [1999] Lloyd's Rep 438, 456 (Potter LJ); Rickett (1991) 619; Tettenborn (2000) 162. *Walsh Bay* (1995) 130 ALR 415, 427-430 Beaumont and Sackville JJ: the interests of the owner and developer in the fund were not for tax purposes vested in them but rather contingent upon either development or cancellation, which seems to support the "in suspense" analysis. *Cp* the "floating trust": *Birmingham v Renfrew* (1937) 57 CLR 666; *Ottaway v Norman* [1972] Ch 698; see n194 below.

182 Which it is not in England (Treitel (2002) 29-41), though it is in Australia (Spence (1999); *Giumelli v Giumelli* (1999) 196 CLR 101). Nevertheless, if the contractual alternative outlined below is not adopted, then this aspect of Lord Millett's analysis could be adopted with the remainder of the contractual scheme discussed here.

privity[183] meant that, at common law, only parties to a contract could sue on it; and, since the intended beneficiaries are not parties to the contract between the provider and the recipient, it would seem that the intended beneficiaries would have no contractual claim against the recipients. However, by way of exception, where a promisee undertakes to a third party to hold the benefit of the promise on trust for that third party, the promisee is a trustee of the promise, the third party is the beneficiary of that trust, and, in enforcing that trust, can stand in the promisee's shoes as against the promisor.[184] Thus, "the parties to a contract can create a trust of contractual rights for the benefit of a third party and … the third party can himself enforce those rights, if his trustee does not enforce them for him, by suing the person placed under a duty to him by the contract and by joining his trustee as co-defendant …".[185] In a *Quistclose* situation, the recipient promises the provider that the money will be applied to the intended beneficiary, and the provider as promisee can hold the benefit of that promise on trust for the intended beneficiary; and the provider's intention to create a trust in favour of the intended beneficiary can be inferred from an *irrevocable* intention on tthe provider's part to benefit the intended beneficiary.[186] The intended beneficiary can then sue the recipient to enforce the promise made to the provider. The provider's intention to benefit the intended recipient had become irrevocable in both *Northern Developments*[187] and *General Communications*[188] by virtue of the provider's representations to the intended beneficiaries, but it will be a question of fact in every case as to whether the provider's intention to benefit the intended recipient is irrevocable from the start or becomes so at some stage.

This analysis is entirely consistent with the nineteenth century landscape in which the trust of a promise exception to privity was quite broadly conceived[189] and in which the

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183 This doctrine was in full force when all of the major *Quistclose* and related decisions were taken, but is now reformed by the Contracts (Rights of Third Parties) Act, 1999.

184 *Tomlinson v Gill* (1756) Amb 330; *Shannon v Bradstreet* (1803) 1 Sch&Lef 64; *Les Affréteurs Réunis v Walford* [1919] AC 801; Feltham (1982); Young (1992); Wright (1996); Jaconelli (1998); Stewart (1999).

185 *Cadbury Ireland Ltd v Kerry Co-Op* [1982] ILRM 77, 80 (Barrington J); *Inspector of Taxes' Association v Minister for Public Service* (High Court, unreported, 16 May 1993, Murphy); *affd* on other grounds: [1986] ILRM 296.

186 Jaconelli (1998) 96 (*irrevocable* intention); Feltham (1982); Wright (1996) 916-919 (intention).

187 Millett (1985) 278.

188 [1990] 3 NZLR 406, 435.

189 Corbin (1930); Palmer (1992); Jones (1997).

foundation cases for the modern *Quistclose* relationship were decided. Furthermore, the trust of a promise exception, though substantially narrowed in the twentieth century, was nevertheless carefully preserved in the cases which hardened the privity requirement[190] and formed part of the landscape in which *Quistclose* itself was decided. And the analysis is now strongly supported by the revival of the trust of a promise exception in Australia,[191] the tendency to downplay privity and expand its exceptions in Canada,[192] and the recent statutory reform in England and Wales.[193]

This analysis, grounded in the contract underlying the relationship between the provider and the recipient, explains why an intended beneficiary can enforce the recipient's primary *Quistclose* obligations whether those obligations are given effect by means of a trust or a fiduciary relationship. Where they are given effect by means of a trust, what the intended beneficiary is enforcing is not a primary *Quistclose* trust at all but the very different trust of the promise the benefit of which is held on trust by the provider for the intended beneficiary. In these circumstances, there are two trusts in play, not one. It is the belief that there is only the primary *Quistclose* trust being enforced against the recipient by both the provider and the intended beneficiary which leads to the misguided conclusion that the beneficial interest under the primary trust is in suspense.[194] Such a view is unnecessary.[195] The location of the beneficial interest is a matter to be agreed between the parties; when it is vested in the provider, it gives title to sue the recipient; furthermore, if the benefit of the very different trust of the recipient's promise is vested in the intended beneficiary, the latter also has title to sue the recipient.

3.5 The Rights and Obligations of Other Parties.

Primary *Quistclose* obligations, though creatures of contract, are given effect by means either of trust or fiduciary duty. The essential obligation is that of the recipient to

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190 *Dunlop v Selfridge* [1915] AC 847, 853 (Lord Haldane LC); *Vandepitte v Preferred Accident Insurance Corpn of NY* [1933] AC 70, 79 (same); *Beswick v Beswick* [1968] AC 58, 72 (Lord Reid).

191 *Trident General Insurance v McNiece* (1988) 165 CLR 107, 146-149, 152 (Deane J); *cp* 115, 120-121 (Mason CJ and Wilson J); 155-157 (Dawson J); *cf* 135 (Brennan J), 167 (Toohey J).

192 *London Drugs v Kuehne & Nagle International* (1992) 97 DLR (4th) 261; *Fraser River Pile & Dredge v Can-Drive Services* (1999) 176 DLR (4th) 257.

193 Treitel (2002) 47-53, 97-102.

194 Above, nn169, 181.

195 *Cp* Millett (1985) 282-283; Austin (1988) 73; Worthington (1996) 43, 67; *Twinsectra* [1999] Lloyds Rep Bank 438 456, 458 *per* Potter LJ.

implement the specific purpose, usually the payment of money to the intended beneficiary. If the obligation is given effect by means of a trust, and the money is lodged to a bank account in the meantime, then the bank will be bound by the trust if it has notice of it. Thus, in *Quistclose* itself, although the mere request to the bank to lodge the proceeds of the loan into a separate account would not have been sufficient to put the bank on notice of the trusts attaching to the money, nevertheless Lord Wilberforce held that a covering letter was sufficient to give the bank notice of the trust[196] with the result that the bank could not set off the money in the account against the company's indebtedness to it.[197] Again, in *Re Groom*,[198] an advance to a bankrupt made for a specific purpose of which the Official Receiver had knowledge was held to be trust property outside the bankruptcy.

In *Stephens Travel*,[199] the court held that a travel agent held payments received from travellers for air tickets on trust for an airline, and that as the bank into which the payments were lodged was fully aware of the agreement between the travel agent and the airline it had notice of and was bound by the trust.[200] A bank with such notice which applies the funds in a manner inconsistent with the trust is therefore in breach of trust. In *General Communications*,[201] the defendant bank made a loan to a video company to purchase new equipment and the money was paid to the company's solicitors for disbursement against invoices. The plaintiffs supplied video equipment to the video company on 90 days credit. However, during that period, the bank first instructed the solicitors to make no further payments out of the loan funds, then appointed a receiver to the company, and finally reclaimed the remainder of the funds from the solicitors. Hardie Boys J held that the solicitors held the money on a trust primarily for payment of the suppliers which the suppliers could on the facts enforce, that the bank had notice of the trust and that it acted in breach of the trust when it reclaimed the money from the solicitors, which it held on constructive trust for the suppliers.[202]

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196 [1970] AC 567, 582.

197 *Cp Neste* [1983] 2 Lloyd's Rep 658, 666-667 (Bingham J).

198 (1977) 16 ALR 278.

199 (1988) 13 NSWLR 331.

200 *Ibid*, 358 (Hope JA).

201 [1990] 3 NZLR 406.

202 *Ibid*, 436.

Finally, here, a recipient under primary *Quistclose* obligations to pay the money to the intended beneficiary who misapplies the money thereby commits a breach of trust or of fiduciary duty, with consequential accessory or receipt-based liability for parties who aid in or receive the proceeds of such breach.[203]

3.6 Conclusion.

Many of the primary rights and obligations of the various parties to the *Quistclose* relationship, – the provider, recipient, and intended beneficiary – are founded in the contract underlying the relationship between the provider and recipient. Hence, all that the provider has to do to ensure the implementation of the specific purpose is merely to seek specific performance of the contract. Similarly, if the provider holds the benefit recipient's promise to implement the purpose on trust for the intended beneficiary, then the intended beneficiary can also enforce the contract against the intended beneficiary. As this analysis is grounded in the contract underlying the relationship between the provider and the recipient, it explains why the recipient's primary *Quistclose* obligations can be enforced by both the provider and sometimes the intended beneficiary, whether those obligations are given effect by means of a trust or fiduciary obligations. The addition of these equitable incidents means that related parties can also come under obligations: a bank with which the money is lodged will be bound by a trust of which it has notice; and if the recipient breaches its obligations, those who aid in or receive the proceeds of such a breach can also be liable.

4. Secondary *Quistclose* obligations

4.1 Introduction.

The *Quistclose* relationship is founded upon the mutual intentions of the provider and recipient that the recipient will use money provided for the specific purpose or return it to the provider. In *Quistclose*, Lord Wilberforce held that "if the primary purpose cannot be carried out, the question arises if a secondary purpose (*ie* repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it".[204] In other words, secondary *Quistclose* obligations are just as much creatures of the parties' mutual intentions as are the primary obligations. This is reflected in his conclusion that "the intention to create a secondary trust for the benefit of the lender, to arise if the primary trust, to pay the dividend, could not be carried out, is clear and I can

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[203] Whether such liabilities were made out were issues in the *Twinsectra* litigation.

[204] [1970] AC 567, 581.

find no reason why the law should not give effect to it".[205]

When *Quistclose* obligations are given effect by means of an express trust, the parties are free to agree what its subject matter will be. It is usually the money or other property transferred by the provider, but there is no reason in principle not to extend it to proceeds generated by that property, provided that this is what the parties intended. In *Re McKeown*,[206] an arbitrator found in favour of McKeown in an arbitration with Belfast Corporation and awarded him costs. However, to get up the award, McKeown needed to discharge the arbitrator's fees, and arranged a loan for this purpose from the applicant on terms that the applicant would be repaid out of the award. McKeown was declared bankrupt, the Corporation paid the award including costs to the Official Assignee; and the applicant sought a declaration that the Official Assignee held the costs on trust for him. Lord MacDermott focussed upon "the full extent of the agreement which the applicant and the bankrupt made"[207] and could see no reason why *Quistclose* "should be limited to alternative trusts or one trust arising on the breach of another and should not apply to successive trusts as here".[208] The parties having mutually intended that the payment of the award would be impressed with a trust in favour of the provider, the court enforced it.

A similar result was reached on deeply flawed reasoning in *Re EVTR*.[209] The provider made a loan to the recipient for the purchase of equipment, the recipient paid the supplier but went into liquidation before taking possession of the equipment, and the supplier substantially returned the money. Dillon LJ held that the supplier held the returned money on trust for the provider:

> True it is that the [money] was paid out by the company with a view to the acquisition of new equipment, but that was only at half-time, and I do not see why the final whistle should be blown at half-time. The proposed acquisition proved abortive and a large part of the [money] has therefore been repaid by the payees. The repayments were made because of, or on account of, the payments [originally made to the recipients] … and those were payments of trust moneys. It is a long-established principle of equity that, if a person who is a trustee receives money or

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205 *Ibid*, 582; *Box v Barclays* [1998] Lloyd's Rep Bank 185.

206 [1974] NI 226.

207 *Ibid*, 231.

208 *Ibid.* Similarly, in *Re Independent Air Travel Ltd* [1961] 1 Lloyd's Rep 604 Plowman J held that a company which had insured the lives of its employees held the proceeds of such insurance on trust for the named beneficiaries.

209 [1987] BCLC 646.

> property because of, or in respect of, trust property, he will hold what he receives as constructive trustee on the trusts of the original trust property.[210]

The problem with this analysis is that the long-established principle of equity to which Dillon LJ refers applies to situations of *breach* of trust, whereas here, the recipient held the money on trust to do exactly what it did, that is, to buy equipment, and there is no question of breach of trust on the facts. Nor will recourse to *Re McKeown* do, as the parties had not addressed their minds to the possibility of the refund and thus could have had no mutual intention that it be held on trust for the provider. In *Jackson v Lombard and Ulster Bank*[211] a bank lent money to a broker to allow the company for which it was acting to pay insurance premiums. After the company had encountered financial difficulties, the broker negotiated the cancellation of the policies and obtained a partial refund of the premiums. Costello J rejected an argument that the broker held the money on trust for the bank on the grounds that it did not accurately reflect the parties' agreement.[212] The parties not having mutually intended that the refund would be impressed with a trust in favour of the provider, there was no trust for the court to enforce. Similar reasoning would have precluded a similar trust in *EVTR*.[213]

Secondary *Quistclose* obligations are triggered by the failure of the specific purposes, because the parties mutually so intend, and can be given effect by means of fiduciary obligations as easily trust, but the trust is by far the more common means. Such a trust is a creature of the parties' mutual intentions – the cases which seek to determine whether the trust arises if the primary obligation failed by reference to a promise to repay coupled with segregation of the money[214] are engaged upon a search for the parties' intentions – and is thus a species of express trust.[215] As it does not arise by operation of law, whether by

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210 *Ibid*, 651

211 [1992] 1 IR 94; *cp Re Miles* (1988) 85 ALR 218: most of a loan was applied for the specific purpose, but the payment was subsequently recovered as a voidable preference which Pincus J held did not come within a secondary *Quistclose* obligation which had arisen in respect of the loan surplus. If this is right, it can only be because the parties had no actual or fairly inferred relevant mutual intention with respect to the recovered preference. Ho & Smart, 281-284.

212 [1992] 1 IR 94, 101-102; he held that they were caught by a debenture containing a valid fixed charge over "book debts and other debts" (*ibid*).

213 This does not necessarily mean that *Re EVTR* is wrong; merely that the trust is not generated by the mutual intentions of the parties; as to whether it properly arose by operation of law, see text with 281-290 below.

214 See s2.6 above.

215 Worthington (1996) 45.

reference to the parties presumed intentions or to reverse an unjust enrichment or otherwise, the trust is neither resulting nor constructive.

Nevertheless, the secondary *Quistclose* obligation is often mischaracterized as an automatic resulting trust.[216] In *Twinsectra*, Potter LJ in the Court of Appeal commented that "[t]he preponderance of academic opinion supports that view",[217] and it commanded the support of Lord Millett in the House.[218] On the other hand, as Harman LJ pointed out in the Court of Appeal in *Quistclose*, this is a recent mischaracterisation: "the bankruptcy cases never so suggest. It is a trust always attaching to the money involved in the conditions of the loan … the second trust did not arise on failure of the first; it was present throughout".[219] Sachs LJ agreed with Harman LJ that there was throughout a further trust in favour of the plaintiffs, but gave a resulting trust explanation as an alternative,[220] thereby giving legs to a hare which has dogged analysis ever since. The balance of the argument is with the Harman LJ: secondary *Quistclose* obligations arise because it is the mutual intention of the parties that the money be returned if it cannot be applied for the specific purpose. It is not necessary – indeed it is wrong – to attempt to explain it either as an automatic resulting trust arising by operation of law, or as a constructive trust,[221] which is *a fortiori*.[222]

Of course, there may be a trust resembling a primary *Quistclose* obligation, and if it fails,

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216 *Quistclose Investments Ltd v Rolls Razor Ltd* [1968] 1 Ch 540, 566-567 (Sachs LJ); *Re Securitibank Ltd* [1978] 1 NZLR 97, 164 (Barker J); *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 294 (Megarry VC); *Swiss Bank v Lloyds Bank* [1979] Ch 584, 568 (Browne-Wilkinson J); *Re Associated Securities Ltd* [1981] 1 NSWLR 742, 749 (Needham J); *Rose v Rose* (1986) 7 NSWLR 679, 685-686 (Hodgson J); *Re EVTR* [1987] BCLC 646 650 (Dillon LJ); *Re Miles* (1988) 85 ALR 218, 221-222 (Pincus J) *Thiess* [1991] 1 Qd R 82, 84 (de Jersey J); *Rowan v Dann* (1992) 64 P&CR 202, 209 (Scott LJ); *Westdeutsche*, 708 (Lord Browne-Wilkinson); see also Rickett (1991) 614-615, 618, 620, 627-628; Bridge (1992) 352, 355; Mitchell (1995) 455; Payne (2000) 77; Rotherham (2001) 156-157; Birks (2003) 176-178.

217 [1999] Lloyds Rep Bank 438, 455 (Potter LJ).

218 *Twinsectra*, [80], [100].

219 [1968] 1 Ch 540, 544.

220 *Ibid*, 566-567.

221 *Carreras Rothmans* [1985] 1 Ch 207, 222 (Peter Gibson J) (in *Quistclose* cases, equity fastens on recipient's conscience); *Re EVTR* [1987] BCLC 646, 650 (Dillon LJ) (resulting or constructive); *Dines* (1989) 4 NZCLC 65,298, 65,302 (Ellis J) (constructive trust); *Guardian Ocean Cargoes Ltd v Banco do Brasil SA* [1991] 2 Lloyd's Rep 68, 87 (claimants characterised it as resulting, Hirst J as constructive) *rvsd* [1994] 2 Lloyd's Rep 152; Rickett (1991), (1993) (resulting, but with a strong dose of remedialism).

222 *Re McKeown* [1974] NI 226 (Lord MacDermott), *Neste* [1983] 2 Lloyd's Rep 658 (Bingham J), *Re AETT* (1991) 102 ALR 681 (Gummow J) treated *Quistclose* and constructive trust claims separately.

either an automatic resulting trust may arise on general principles, or a court may find grounds to impose a constructive trust. But these trusts do not amount to secondary *Quistclose* obligations, though they resemble them. In *Re Australian Elizabethan Theatre Trust*, Gummow J clearly distinguished the operation of a resulting trust from the operation of secondary *Quistclose* obligations,[223] but in *Rose v Rose*[224] Hodgson J failed to do so, finding an orthodox result trust, but then explaining it in *Quistclose* terms.[225] The analysis of Dillon LJ in *Re EVTR*[226] is similarly confused. The provider had made a loan to the recipient for the sole purpose of buying new equipment. The recipient went into liquidation before taking delivery of the equipment; much of the money was repaid, and Dillon LJ held that the liquidator held this repayment on trust for the provider. That claim had been dismissed at first instance on the ground that "nobody gave a conscious thought to any possibility that, after the documents had all been signed up and the [money paid] … the purchase … might yet fall through and the [money], or a large part of it, might be repaid".[227] Given that the trust claim had been advanced on *Quistclose* terms, this was an entirely correct conclusion: if the parties had not contemplated the failure of the express purpose and had not therefore mutually intended the return of the money, then no secondary *Quistclose* obligations could arise. However, as Dillon LJ rightly observed, this "is not conclusive against the appellant, since a resulting or constructive trust most normally arises by implication of law when circumstances happen to which the parties have not addressed their minds".[228] Indeed, he went on to impose a trust by operation of law, which he variously described as resulting or constructive, but spoiled it all by explaining this trust as a secondary *Quistclose* obligation.[229]

A trust which resembles secondary *Quistclose* obligations could be one of three kinds. First, it may be an orthodox automatic resulting trust; and this is the best explanation for *Rose v Rose*. Second, it may be a remedial constructive trust; certainly Rickett has

223 (1991) 102 ALR 681, 692.

224 (1986) 7 NSWLR 679.

225 *Ibid*, 686.

226 [1987] BCLC 646.

227 *Ibid*, 650.

228 *Ibid*.

229 *Ibid*, 650-651.

demonstrated that there is space for such an analysis here,[230] and this is the best explanation for *EVTR*.[231] Third, it might arise to reverse unjust enrichment; this is Chambers' view (whether or not the trust is further glossed as resulting):[232] on this view, the obligation to reverse the unjust enrichment arises because the failure of the specified purpose works a failure of consideration, and it is proprietary because in the circumstances of the case, the money never became the unfettered property of the recipient. Despite the criticism it has attracted,[233] it is a very elegant explanation which provides the most coherent analysis of why a trust might arise by operation of law in circumstances like *Neste Oy* or *EVTR*, and Birks has adopted it to explain proprietary claims arising from his meta-unjust-factor of failure of basis.[234] Nevertheless, though it purports to do so, it cannot provide an explanation of all of the *Quistclose* cases: it would be unreal to believe that in none of the cases was any thought given to what might happen if the primary purpose were not carried out. *Quistclose* is concerned with those cases – surely the great majority – in which such thought was in fact given;[235] Chambers' explanation can only be concerned with those cases – surely the minority – in which it was not.[236] Although it purports to do so, it cannot therefore provide an explanation of the *Quistclose* case; nor is any such unjust enrichment trust justified on *Quistclose* principles.

In the end therefore, secondary *Quistclose* obligations, like their primary counterparts, arise by virtue of the mutual intentions of the parties, as expressed or reflected in their contract. They are often given effect by means of a trust; it is therefore not wide of the mark to say that both primary and secondary *Quistclose* obligations are express trusts, or to describe the *Quistclose* relationship, as Gummow J has done, as "an express trust with two

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230 Rickett (1991) 613-614, 630, 646; Rickett (1993) 325; *cp* Austin (1988) 72-74; Burns (1992) 157-160; Moffat (1999) 595-596; *cf* Worthington (1996) 49-50; Wright (1998) 191 [6.10]; see chapter 5 below.

231 Rotherham (2001) 155; McCormack (1997) 68. If so, then in this respect *EVTR* resembles *Neste Oy*.

232 Chambers (1997) chapter 3.

233 The more general unjust enrichment reasoning has been criticised in chapter 2 above; the specific *Quistclose* reasoning has been criticised by Ho & Smart (2001); *Twinsectra*, [92]-[97] (Lord Millett); Millett (1998)b 284; Rotherham (2001) 157-160.

234 Birks (2003) 176-178.

235 Birks (2003) 177 concedes that where such thought is given and distribution occurs accordingly, there is no failure of basis "for the basis of the transfer includes that eventuality".

236 With *Neste Oy* and *EVTR*, *cp* Mitchell (1995) 455, arguing that the Abbey National's claim in *Boscawen v Bajwa* [1996] 1 WLR 328; [1995] 4 All ER 769 ought to have been a resulting trust for failure of basis.

limbs".[237] But these descriptions are incomplete insofar as they omit the possibility that the obligations can also arise where there is a fiduciary relationship, though again they do so because of the mutual intentions of the parties.

4.2 The Rights and Obligations of the Provider.

The provider has the right to compel the recipient to perform its secondary *Quistclose* obligation to return the money when the primary obligation to implement the specific purpose has failed. As Lord Wilberforce put it in *Quistclose*, "if the primary purpose cannot be carried out, the question arises if a secondary purpose (*ie* repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it".[238] One such equitable remedy is that of specific performance. The relationship between the provider and the recipient is founded upon a contract, usually a contract of loan between a lender and borrower; that contract embodies as a term the duty to return the money if it is not applied for the specific purpose; it follows then that all that the provider has to do to ensure the return of the money on failure of the specific purpose is to seek specific performance of the contract.

4.3 The Rights and Obligations of the Recipient.

As the converse of the point in the previous section, the secondary *Quistclose* obligation of the recipient is to return the money when the primary obligation to implement the specific purpose has failed. Such an obligation arises because of the mutual intentions of the parties. Superficially similar obligations can be founded upon the intention of only one of the parties, as in the important decision of Megarry J in *Re Kayford Ltd*.[239] The main supplier of a mail order company faced financial difficulties; and the company's accountant advised it to open a separate bank account for customers' advance payments, so that if – as happened – the supplier ceased to make deliveries and the company went into liquidation, the customers could be refunded: Megarry J held that the company had thereby declared itself a trustee for the customers' money.[240] Since the trust was declared unilaterally by the company and not mutually by the customers and the company, though

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[237] *Re AETT* (1991) 102 ALR 681, 691 (Gummow J); *cf* Burns (1992).

[238] [1970] AC 567, 581.

[239] [1975] 1 WLR 279.

[240] *Ibid*, 282; *cf* McCormack (1994) 104.

they are often treated together,[241] *Kayford* is not a *Quistclose* case.[242]

Kayford was applied in *Re Lewis's of Leicester Ltd*.[243] A department store which agreed to pay to its licencees, less commission, the proceeds of their sales which had gone into store tills and then lodged to a separate bank account, was held to have constituted itself trustee of the proceeds. Again, in *Foreman v Hazard*,[244] it was held that a holding company had constituted itself trustee for the subscribers to a property investment syndicate, holding the subscriptions and then the property purchased with them on trust for the subscribers.[245] On the other hand, in *Re Goldcorp Exchange*[246] Lord Mustill held that the company had not constituted itself trustee for the subscribers to a gold syndicate; the facts disclosed merely a contract for the purchase and sale of bullion. Unlike *Foreman v Hazard*, there "was nothing in the express agreement … which constrained in any way the company's freedom to spend the purchase money as it chose, or to establish the stock from any source and with any funds as it thought fit".[247] Similarly, in *Re Multi Guarantee Ltd*,[248] a retail chain sold insurance on its products and paid the customers' premiums on to the insurer. When difficulties arose, the insurer put the premiums already received into a bank account in the joint names of the parties' solicitors. The parties' eventual agreement that the money would be paid out to the retailer had not been executed by the insurer when it was wound up. The Court of Appeal could find no evidence that the insurer had intended at any stage to constitute itself trustee of the money in the solicitors' account for the retailer.

The key to the application of the *Kayford* principle is the finding that the recipient has constituted itself an express trustee for the provider, and the case itself it did so in advance of receipt. In *Re Chelsea Cloisters Ltd*,[249] the question arose whether the recipient can declare the trust subsequent to receipt. Deposits were paid by tenants in advance of taking

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241 *Re Goldcorp Exchange* [1995] 1 AC 74, 100 (Lord Mustill).

242 Rickett (1991) 609; Cope (1997) 57.

243 [1995] 1 BCLC 428.

244 [1984] 1 NZLR 586.

245 *Ibid*, 596 (Richardson J).

246 [1995] 1 AC 74.

247 *Ibid*, 100-101.

248 [1987] BCLC 257; Arora (1990) 226-229; Rickett (1991) 614-615.

249 (1981) 41 P&CR 98.

up their leases. When the landlord got into financial difficulties, a financial consultant segregated all further deposits into a separate account, and paid into the account a sum to cover those deposits paid for the period between his appointment and the opening of the

account. On the landlord's liquidation, the Court of Appeal held that the actions of the financial consultant constituted the group express trustee for all of sums in the account.[250]

4.4 The Rights and Obligations of the Intended Beneficiary.

In the context of secondary *Quistclose* obligations, the intended beneficiary has no role to play. The specific purpose of the primary obligations is, by definition, the intention to benefit the intended beneficiary; and if the specific purpose has failed so as to trigger the secondary obligations, the intended beneficiary must, by definition, be out of the picture.

4.5 The Rights and Obligations of Other Parties.

The position of parties other than the three main protagonists in the *Quistclose* relationship is broadly speaking the same with respect to both primary and secondary *Quistclose* obligations. If either obligation is given effect by means of a trust, and the money is lodged to a bank account in the meantime, then the bank will be bound by the trust if it has notice of it.[251] A bank with such notice which applies the funds in a manner inconsistent with the trust is therefore in breach of trust. Furthermore, a recipient under secondary *Quistclose* obligations to return the money who misapplies it thereby commits a breach of trust or fiduciary duty, with consequential accessory or receipt-based liability for parties who aid in or receive the proceeds of such breach.

In *Twinsectra*, Yardley had obtained a loan from Twinsectra for one reason, but used it for various others in breach of its primary *Quistclose* obligations. Baughen suggested that when the primary obligations were breached, they had then failed just as much as if they had become incapable of being performed, at which time secondary obligations should have arisen.[252] This would have made little difference to the outcome: the Court of Appeal would then have found that Yardley's misapplication of the loan constituted a breach of his secondary rather than primary *Quistclose* obligations, and all of their other conclusions as to accessory liability and so forth would have followed *mutatis*; whilst the House of Lords would still have reversed the Court of Appeal on the issue of Sims' liability for dishonest assistance in Yardley's breach of trust.

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[250] Bridge (1992) 355-356 criticises extending *Kayford* to retrospective appropriation; on whether that constituted a fraudulent preference, see s2.7 above.

[251] The examples with respect to primary obligations are collected in section 3.4 above; as to the secondary obligations, see *Dines* (1989) 4 NZCLC 65,298, 65,304 (Ellis J).

[252] Baughen (2000) 353.

4.6 Conclusion.

Many of the secondary rights and obligations of the various parties to the *Quistclose* relationship, – the provider, recipient, and intended beneficiary – are founded in the contract underlying the relationship between the provider and recipient. Hence, all that the provider has to do to ensure the return of the money upon failure of the specific purpose is to seek specific performance of the contract. As this analysis is grounded in the contract underlying the relationship between the provider and the recipient, it explains why the recipient's secondary *Quistclose* obligations can be enforced by the provider whether those obligations are given effect by means of trust or fiduciary obligation. The addition of these equitable incidents means that related parties such as the recipient's bank can also come under obligations. All of this parallels the situation pertaining in the context of the primary obligations. It cannot be stressed enough that it is the failure of implementation of the specific purpose which triggers the recipient's secondary obligation to return the money, because the parties mutually so intended and neither because the recipient so intended (though *Re Kayford* illustrates that a similar obligation might arise in such circumstances) nor by operation of law where neither party so intended (though *Re EVTR* illustrates that a similar obligation might also arise, and this is the only proper role for Chambers' unjust enrichment analysis).

5. Conclusion: The contractual nature of the *Quistclose* relationship

In the Court of Appeal in *Quistclose*, Harman LJ rather haughtily observed that this "is a branch of the law of trusts created by the common lawyers, but it is, after all, none the worse for that".[253] In grounding the *Quistclose* relationship in contractual doctrines, the analysis here reconnects this branch of the law of trusts with its common law origins. The contractual foundations of the *Quistclose* relationship direct attention to the *mutual* intentions of the provider and recipient that the money provided should be used for a specific purpose or returned. The parties usually mutually intend that the obligations be given effect by means of a trust, though it is in principle sufficient that they mutually intend a fiduciary relationship, and the relevant intention is often inferred from the segregation of the money into a separate account.

The recipient is under a primary obligation either to apply the money provided for the specific purpose or at least not to use it for any other purpose; this obligation can be

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253 *Quistclose Investments Ltd v Rolls Razor Ltd* [1968] 1 Ch 540, 552.

enforced by the provider by seeking specific performance of the recipient's contractual promise; and, if the provider irrevocably intended to hold the benefit of that promise on trust for the intended beneficiary, the latter can also enforce this quite separate trust against the recipient. If the primary obligations have failed, the secondary obligations – in particular of the recipient to return the money – will then arise, again because the parties mutually so intend. As an express obligation, it is not imposed, and thus when it is a trust, it is express, and neither resulting nor constructive. In particular, it does not respond to unjust enrichment. Although a trust on a similar pattern might arise, Chambers' analysis in the end does not provide an explanation of the *Quistclose* relationship.

CHAPTER 4. SUBROGATION

Quest for a Holy Grail

1. Introduction

"Subrogation is literally 'substitution':"[1] one person is substituted for another in the exercise of that other's rights against a third person. It is "a transfer of rights from one person to another … which takes place by operation of law".[2] In the classic triangular fact pattern, it arises where a creditor has rights against a debtor, and the claimant is subrogated to the rights of the creditor against the debtor.

In such cases, the payment by the claimant, A, has had, as Ashburner explained, "the effect of swelling the assets or diminishing the liabilities of C … [so that] a court of equity allows A to stand in the shoes of B to enforce against C in equity corresponding rights to those which B would have against him at law or in equity".[3] However, as Meagher, Gummow & Lehane point out, "the quest is always to isolate that attribute of the relations between A, B and C … which makes A more than a stranger to the nexus between B and C and generates in his favour an equity satisfied only by requiring B to pursue his legal rights against C for the benefit of and at the direction of A".[4] This mercurial limiting factor is the holy grail of modern subrogation scholarship.

To undertake this quest, it is necessary to sketch some of the detail of the specific contexts – such as sureties and lenders – in which this pattern has been followed; this will be the work of section 2. Those on this quest have reached three different destinations. The first is an archipelago: for Meagher, Gummow & Lehane, subrogation largely follows a similar pattern in a series of otherwise unconnected islands. The second is a confederation: for Hedley, and Lord Salmon in *Orakpo v Manson Investments*,[5] there are some relatively loose connections between the specific contexts but only at an abstract level. The third is a

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1 Mitchell (1994).

2 *Orakpo v Manson Investments* [1978] AC 95, 104 (Lord Diplock).

3 Ashburner (1933) 243, Meagher, Gummow & Lehane (1992) 260 [901].

4 *Ibid*, 261 [902].

5 [1978] AC 95.

federation: for Mitchell and the House of Lords in *Banque Financière de la Cité v Parc (Battersea) Ltd*,[6] there are tight connections and similarities where the specific contexts are explained and united by the principle against unjust enrichment. Each of these views will be considered in turn in section 3, concluding that, whilst the first two views are so flawed that the third is a significant improvement, nevertheless this view too has its flaws, and ought to be replaced by another federation view based upon intention which will be seen to emerge organically from analysis of the specific contexts.

2. The categories of subrogation

In the classic triangular fact pattern, the claimant is subrogated to the rights of a creditor against a debtor. Hence, where a surety has paid off the debtor's debt to the creditor, the surety can be subrogated to the creditor's rights against the debtor; where a lender has advanced a loan for the purchase of real property, the lender can be subrogated to the vendor's lien against the purchaser; and where a claimant has paid off a mortgage, the claimant can be subrogated to the mortgage. These three categories of subrogation are very similar, and will be taken first and in that order, to establish some of the basic principles; other species of subrogation, such as invalid loans and insurance, will then be measured against them, followed by a consideration of intention on the one hand and voluntariness on the other, to distil some themes from the various categories.

There is no wholly satisfactory terminology here. Many writers and judges simply refer to the parties as A, B and C,[7] but this is apt to be confusing for the reader (if not the author[8]). Mitchell has proposed a more sophisticated nomenclature: because there is a primary obligation under which one party is primarily liable to the other who is the holder of that right, Mitchell describes these as PL (primarily liable) and RH (right holder) respectively; and because the party seeking subrogation is secondarily liable on that obligation, Mitchell describes him as S; he then applies this nomenclature consistently across all of heads of subrogation.[9] This is an important advance upon A, B and C; but PL, RH and S are still

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[6] [1999] 1 AC 221 (HL).

[7] See n3 above; Hedley (2001) chapter 5 refers to P, C and D.

[8] In *Re Cleadon Trust* [1939] Ch 286, 323-324 Clauson LJ seems to have mixed up his letters: Goff & Jones (1998) 154.

[9] The benefits of this nomenclature – (pp 114-115 below) – are such that other authors have adopted it: Degeling (2003) chapter 7.

confusing: the relationship between the party claiming subrogation and the party against whom the claim is being made is the relationship in issue in the litigation and ought therefore to be the primary relationship in the analysis; but Mitchell's nomenclature gives priority, not to that relationship, but instead to the relationship between the two parties other than the claimant. Taking a leaf out of Mitchell's book, this analysis will seek to use consistent terminology across the various categories of subrogation; however, to avoid the confusion of focusing on the wrong relationship, the three parties will always be referred to simply as the claimant (the party seeking subrogation), the creditor (to whose rights the claimant seeks to be subrogated), and the debtor (the defendant whose debt the claimant has met).[10]

2.1 Sureties Subrogating to Creditors' Securities.

A surety who has paid the guaranteed debt is entitled to be reimbursed by the principal debtor.[11] In support of this direct personal action, a surety is entitled to be subrogated to every remedy which the creditor has against the principal debtor.[12] The surety's right to subrogation is an ancient one[13] which finds a specific statutory example in section 5 of the Mercantile Law Amendment Act, 1856.[14] It arises only if the surety has paid off the

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[10] *Cf* Mitchell (2003) 5 [1.05], using, in respect of the underlying personal claim, "claimant", "creditor" (despite some misgivings) and "defendant".

[11] Mitchell (2003), *passim* but esp 70-74 [4.11-4.14] (at common law), 86-88 [4.39-4.42] (statute), 115 [5.29] (procedure); 208-211 [10.54-10.59] (claims against co-sureties), 250-251 [12.34-12.35] (discharge of co-sureties).

[12] *Craythorne v Swinburne* (1807) 14 Ves 160, 164; (Lord Eldon LC); *Yonge v Reynell* (1852) 9 Hare 809, 817 (Turner VC); Johnston (1998) 279-287, [9.57-9.68]; Mitchell (1994) 54-60.

[13] Mitchell (1994) 54-56; Baker (1998) 37; Ibbetson (1995) 121; Jones (1995) 149.

[14] See *Scholefield Goodman and Sons v Zyngier* [1986] 1 AC 562 construing a derivative Australian section and applying *Craythorne v Swinburne*. The section confirmed that even if the payment by the claimant surety had discharged the debt and its security (as on some views it had: Mitchell, (1994) 56-57), the security could nevertheless be revived so to allow the claimant surety to subrogate to it. The section has been repealed in Ireland (s1 Statute Law Revision Act, 1983, and the First Schedule, Part IV of the Act) though without affecting "any existing principle or rule of law or equity, or any established jurisdiction", notwithstanding that they derive from the repealed Act (s2(1) of the 1983 Act). Donnelly (1999) 185-198 argues that the saver is such that the repeal of the 1856 Act has not altered the law. Certainly the judiciary have been content to make just such an assumption: *PMPA (Longmile) Ltd v PMPS* [1993] 1 IR 190 (following the s5 case of *Re Parker* [1894] 3 Ch 400); *Re Chipboard Products* [1994] 3 IR 164.

principal debt in full,[15] and the surety is entitled to recover the full value of his payment but no more.[16]

The right to subrogation arises as a matter of law[17] because it is rebuttably presumed that the claimant surety intended that the creditor's securities be kept alive for his benefit. In *Craythorne v Swinburne*, Lord Eldon LC put the right as depending upon a principle of equity rather than any contract between the parties "unless perhaps in this sense: that, the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of the principle by all persons".[18] Because all who deal as and with sureties know the equitable principle, it will be presumed that they intend it to apply;[19] in this sense, he says that although it might be expressed as a matter of contract, it would be better[20] to see it simply as an equity arising as a matter of law on foot of this presumption of intention. Similarly, in *Rotherham v Flynn*, referred to "the common rule of this Court,

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15 *Re Sass* [1896] 2 QB 12, 15 (Vaughan Williams J); *Huggard v Representative Church Body* [1916] 1 IR 1, 19-20 (O'Connor MR). A payment of part of the debt will not trigger subrogation (*Ulster Bank v Lambe* [1966] NI 161; *Re an Arranging Debtor, No A 1076* [1971] NI 96; *Re the 19th Ltd* [1989] ILRM 652) unless the surety is surety for part only of the principal debt, and has paid off that part in full (*ibid*; *Huggard v Representative Church Body* [1916] 1 IR 1, 19-20 (O'Connor MR); *Barclays Bank v TOSG Trust Fund Ltd* [1984] AC 626, 643-644 (Oliver LJ); *Re Butler's Wharf* [1995] BCC 717; *Liberty Mutual Insurance Company (UK) Ltd & Another v HSBC Bank* [2002] EWCA Civ 691); though in the case of a part-paying surety, the underlying personal claim will still arise (Mitchell (1994) 55 n20; Mitchell (2003) 4 [1.03], 9 [1.14].

16 *Reed v Norris* (1837) 2 My&Cr 361, 374 (Lord Cottenham LC): surety "not entitled to demand more than he has actually paid", plus interest (*Chipboard*) and costs (*Reed*); *Williams v Frayne* (1937) 58 CLR 710, 718 (Latham CJ). Hence, a claimant cannot subrogate to a surplus in a debtor's hands: *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd* (1976-1978) 141 CLR 335, 348-349 (Gibbs ACJ).

17 *Morgan v Seymour* (1637) 1 Chan Rep 120; *Parsons & Cole v Briddock* (1708) 2 Vern 608; *Rotherham v Flynn* (1816) Beatty 555.

18 (1807) 14 Ves 160, 164 *cp* 170; *Aldrich v Cooper* (1803) 8 Ves 382, 388 (Lord Eldon LC) ("against conscience"). Much has subsequently been made of such phrases (*Hodgson v Shaw* (1834) 3 My&K 183, 191 (Brougham LC); *Watts v Shuttleworth* (1860) 5 H&N 235, 247-248 (Pollock CB); *Jenner v Morris* (1861) 3 DeGF&J 45, 51-52 (Lord Campbell LC)), even in more modern cases (*Morris v Ford Motor Co* [1973] 1 QB 792, 800 (Lord Denning MR); *Australasian Conference Association Ltd v Mainline Constructions Pty Ltd* (1976-1978) 141 CLR 335, 348 (Gibbs ACJ); *Re the 19th Ltd* [1989] ILRM 652, 656 (Lynch J); *China and South Seas Bank Ltd v Tan Soon Gin* [1990] 1 AC 536, 544-545 (*semble*); *JGL Investments Pty Ltd v Maracorp Financial Services Ltd* [1991] 2 VR 168). Indeed, in *Barclays Bank v TOSG Trust Fund Ltd* [1984] AC 626, 646-648 Oliver LJ referred to the "broad equity" of subrogation, and balanced the equities. Nevertheless, such sentiments should not be pressed beyond their meaning to support untrammelled equitable discretion in this context ((*Yonge v Reynell* (1852) 9 Hare 809, 818-819 (Turner VC); *Duncan Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, 13 (Lord Selborne LC)).

19 In *Duncan Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, 14, Lord Selborne LC, dealing with endorsers by analogy from sureties, drew similar inferences of intention from the parties' knowledge of the law.

20 Not least because the claimant surety seldom if ever stipulated with the debtor for the benefit of the creditor's security: *Yonge v Reynell* (1852) 9 Hare 809, 818 (Turner VC).

that where one person pays off the debt of another, he is entitled to have an assignment of the security originally possessed for the debt".[21]

In *Re Chipboard Products*,[22] the claimant, the Minister for Finance, had guaranteed the debts of the debtor to the creditor bank, which then called in the guarantee. On the claimant's attempt to subrogate to the creditor's charge over the debtor's book debts rather than to enforce his own security against the debtor, Barr J held:

> If the Minister did not have any debenture or other security from the Company, he would be entitled, having paid the Company's debt, to stand in the shoes of the bank and secure an indemnity of his loss out of, *inter alia*, the assets of the company in the hands of the liquidator which derive from book debts. In my view the fact that the Minister holds debentures which provide *partial* security only in respect of the Company's indebtedness to him, does not deprive him of recourse to a wider range of company assets through subrogation of the bank's rights.[23]

By holding that merely taking another security doesn't necessarily imply a waiver of the surety's right to subrogation,[24] *Chipboard* demonstrates that the presumption in favour of subrogation is very strong unless affirmatively excluded. However, although the surety's right to subrogation arises as a matter of law, the mere fact of payment is not sufficient;[25] it is the claimant's *status as a surety* that allows the payment to discharge the liability and generates the presumption which gives rise to the claimant's right to subrogate to the creditor's security against the principal debtor.

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[21] (1816) Beatty 555, 558; *Lord Harberton v Bennett* (1829) Beatty 386; *Re Kirkwood's Estate* (1878) 1 LR (Ir) 18; *Re Davison's Estate* (1893) 31 LR (Ir) 249, 255 (Monroe J), *affd* [1894] 1 IR 56.

[22] [1994] 3 IR 164 (HC, Barr J); *cp Brandon v Brandon* (1859) 3 DeG&J 524; *cf Cooper v Jenkins* (863) 32 Beav 337.

[23] [1994] 3 IR 164, 174-175; emphasis added; the alternative remedy was partial, and subrogation would have been excluded if the contract had provided for a full indemnity having the same effect as subrogation: *Barclays Bank v TOSG Trust Fund Ltd* [1984] AC 626, 654 (Kerr LJ).

[24] *Cf Vassos v State Bank of New South Wales* [1993] 2 VR 316 (Hayne J) (the existence of a valid security should preclude subrogation).

[25] *Barclays Bank v TOSG Trust Fund Ltd* [1984] AC 626, 638 (Oliver LJ).

The presumption will generate the right to subrogation unless it has either been expressly[26] or impliedly[27] waived (or postponed[28]) by the claimant or is precluded for some reason of public policy. In *Re Byfield*,[29] the bankrupt's mother used some of a loan from the bank to pay off some of her bankrupt daughter's creditors, and then sought to subrogate to their claims in the bankruptcy. Goulding J wondered whether the remedy should properly be described as subrogation,[30] and although he found a "somewhat slender judicial basis for the subrogation claim", he concluded against it,[31] because statute[32] provides a remedy for the bank in this type of case. To have gone beyond that scheme would have wholly frustrated the policy underlying the statutory administration of bankruptcies.[33]

There are at least[34] four developments of this head of subrogation. First, in *Duncan, Fox & Co v North and South Wales Bank*,[35] by means of a presumption of intention analogous to that in *Craythorne v Swinburne*,[36] the House of Lords held that an endorser of a bill of exchange who pays the holder of the bill is in a position sufficiently analagous to that of a surety to be subrogated to any securities held by the holder against the acceptor of the bill

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26 *Craythorne v Swinburne* (1807) 14 Ves 160, 165, 170 (Lord Eldon LC) (subrogation excluded by contract); *Midland Banking Co v Chambers* (1869) 4 Ch App 398, 400 (Selwyn LJ) (waiver). *Barclays Bank v TOSG Trust Fund Ltd* [1984] AC 626 turned on the extent to which the contract modified the right to subrogation. See also *Scholefield Goodman and Sons v Zyngier* [1986] 1 AC 562, 571-572; *Re TH Knitwear (Wholesale) Ltd* [1987] 1 WLR 371, 376 (Browne-Wilkinson VC), *affd* [1988] 1 Ch 275.

27 *Brandon v Brandon* (1859) 3 DeG&J 524 (no implied waiver by conduct on the facts); *Liberty Mutual Insurance Company (UK) Ltd & Another v HSBC Bank* [2002] EWCA Civ 691 (express wavier requires clear words, implied waiver requires that it be necessary; neither established).

28 *Liberty*, *ibid* (not established).

29 [1982] 1 All ER 249; *Public Trustee v Shultz* [1973] 1 NSWLR 564; *Re Sara Properties Pty Ltd* [1982] 2 NSWLR 277; *Re Towey. A Bankrupt* (High Court, unreported, 24 March 1994, Carney J).

30 *Ibid*, 252, the remedy was best "describe[d] as a right or remedy that defeats classification except as an empirical remedy to prevent a particular kind of unjust enrichment" (*ibid*, referring to *Orakpo* [1978] AC 95, 104 (Lord Diplock))

31 *Ibid*, 255.

32 S4 of the Bankruptcy (Amendment) Act, 1926.

33 It would unnecessarily "complicate the administration of bankrupt's estates and add to the costs thereof": [1982] 1 All ER 249, 255; *cf* Meagher, Gummow & Lehane (1992) 285, [958] (the decision is "curious" and "unjust").

34 The categories are not closed: Mitchell (1992) 65-66.

35 (1880) 6 App Cas 1 (HL); *Commissioner of State Savings Bank of Victoria v Patrick Intermarine Acceptances Ltd* [1981] 2 NSWLR 175; *Dalgety Ltd v Commercial Bank of Australia* [1981] 2 NSWLR 211.

36 See n18 above.

Second,[37] where a trustee or personal representative carrying on a business, has incurred business debts, the business creditors of the trust or estate can be subrogated to the right of indemnity[38] which the trustee or personal representative enjoys against the trust or estate.[39] Third, a similar direct payment by the claimant to the creditor arises where an original tenant (or early assignee) is compelled to pay to the landlord the rent owed by an assignee (or subsequent assignee):[40] not only is the claimant entitled to direct personal restitution from the debtor assignee,[41] he is also entitled to be subrogated to the creditor landlord's rights against the debtor assignee.[42] And fourth, directors, who as sureties for their companies are compelled to pay their companies' rates, are[43] entitled to subrogate to the statutory priority accorded to the rates collectors.

2.2 Lenders Subrogating to Vendors' Liens.

The vendor who has delivered possession of real property has a lien over the property until the purchase monies are paid.[44] Thus, "a party advances money for the express purpose of the purchase of property, it is well settled that *prima facie* he is entitled by subrogation to the unpaid vendor's lien on the property for the amount of the advance",[45] but only if it

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37 *Yonge v Reynell* (1852) 9 Hare 809, 819 (Turner VC). *Cf* Meagher, Gummow & Lehane (1992) 272 [929].

38 *Morison v Morison* (1855) 7 DeGM&G 284.

39 *Re Johnson* (1880) 15 ChD 548, 552-553 (Jessel MR); *Dowse v Gorton* [1891] AC 190; *Re Morris, dec'd. Morris v Latchfort* (1889) 23 LR (Ir) 333, 335 (Porter MR); *Re Hodges* [1899] 1 IR 480; *McAloon v McAloon* [1900] 1 IR 367; *Kirkwood v Hamilton* (1902) 36 ILTR 155; *O'Neill v McGrorty* [1915] 1 IR 1; *Re Geary* [1939] NI 152; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 (HCA); *Octavo Investments v Knight* (1979) 144 CLR 362. Opinion is divided on the analogy: Goff & Jones (1998) 150-152 (suggesting not); Hedley (2001) 124 n17 (same); Mitchell (1994) 155-156 (uncritical; examples of "simple" subrogation); Rotherham (2002) 267 (uncritical).

40 This liability no longer persists at common law in England and Wales (Landlord and Tenant (Covenants) Act 1995), but the position in Ireland is less clear-cut (Wylie (1998-) [21.30] discussing s16 of the Landlord and Tenant Law (Amendment) (Ireland) Act, 1860 (Deasy's Act)).

41 *Moule v Garrett* (1872) LR 7 Exch 101; *O'Loughlin v Dwyer* (1884) 13 LR Ir 75, 84 (Chatteron VC).

42 Mitchell (1994) 61-63. *Re Downer Enterprises Ltd* [1974] 2 All ER 1074; *Kumar v Dunning* [1989] QB 193, 196 (Browne-Wilkinson VC). There may also be a salvage claim on these facts; see chapter 5.

43 By means of s5 of the Mercantile Law (Amendment) Act, 1856: *Re Lamplugh Iron Ore Co* [1927] 1 Ch 308; *Re PJ Courtney Ltd* (1960) 94 *ILTSJ* 240n; Mitchell (1994) 63-64.

44 Wylie (1996) 343-347 [12.13]-[12.29]; *Munster and Leinster Bank v McGlashan* [1937] IR 525; *Tempany v Hynes* [1976] IR 101. However, if "the vendor has stipulated for and has received a legal charge on the property there is no vendor's lien" (*Bank of Ireland v Daly* [1978] IR 79, 82 (McMahon J)), and thus nothing to which the claimant can subrogate.

45 *Highland Finance v Sacred Heart College of Agriculture* [1998] 2 IR 180, 187; [1997] 2 ILRM 87, 94 (Blayney J); *UCB Group v Hedworth* [2003] 3 FCR 739, [134]-[150] (Jonathan Parker LJ); Meagher, Gummow & Lehane (1992) 263 [906]. The payor of seamen's wages can similarly subrogate (Mitchell (1992) 148) to their lien (*Johnson v Royal Mail Steam Packet* (1867) LR 3 CP 38), though only where the

> was the intention of the parties that the lender should have security over the property for his loan. Having made the loan on this understanding, it would be inequitable to deny him the security for which he had stipulated, and the appropriate manner in which to give it to him is by subrogating him to the position of the vendor.[46]

In *Nottingham Permanent Building Society v Thurstan*,[47] the purchaser of property was an infant who had borrowed the purchase monies from the claimant building society. Because of her infancy, the contracts of loan and security were void. However, the purchase of the property was merely voidable, and she adopted it on coming of age, so that the vendor's lien was valid. Unable to rely on their own invalid security, the society successfully sought to subrogate to the vendor's lien.[48]

The availability of this right to subrogation turns on the intentions of the parties. If it is clear that claimant's advance to the debtor was intended[49] to be secured, then the claimant can be subrogated to the creditor's rights as against the debtor.[50] It follows, of course, that if the parties did not intend such a security, there will be no such subrogation. In *Paul v Speirway*[51] the claimant made a loan to his company, the debtor, to enable it to purchase development land. When the company failed, he sought to subrogate to the vendor's lien, but his claim failed: Oliver J found that the loan was intended to be unsecured: "where on all the facts the court is satisfied that the true nature of the transaction between the payer of

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payment of wages was by leave of the court (*The Duna* (1861) 6 Ir Jur (ns) 358; *The Guisseppe di Vittorio (No2)* [1998] 1 Lloyd's Rep 661). And in *Station Motors Ltd v AIB* [1985] IR 756, the claimant, whose money was lent to pay wages of employees of an insolvent company, was subrogated to the employees' preferential claims to the wages; see also s10 of the Protection of Emplyees (Employers' Insolvency) Act, 1984.

46 *Evandale Estates Pty v Keck* [1963] VR 647, 652 (Hudson J). As with sureties (n20, above), the cases here are replete with references (like Hudson J's "inequitable to deny" here, *cp* his later reference to unconscionability (*ibid*, 652) – to the equitable nature of the right to subrogate; *eg*, *Bank of Ireland v Daly* [1978] IR 79, 84 (McMahon J) (subrogation "an equitable security" of equal rank with a mortgage by deposit of title deeds).

47 [1902] 1 Ch 1; [1903] AC 6.

48 [1902] 1 Ch 1, 9 (Vaughan Williams LJ), 11 (Romer LJ), 14 (Cozens-Hardy MR); [1903] AC 6, 10 (Lord Halsbury LC).

49 What matters is the intention; hence, if there was an arrangement that the loan be secured, but this arrangement never amounted to a contract, that will nevertheless be sufficient proof of intention: *Evandale Estates Pty v Keck* [1963] VR 647, 652 (Hudson J).

50 See s2.6 below.

51 [1976] Ch 220; *Re Burke's Estate* (1880) 7 LR (Ir) 57; *Re Connolly Brothers (No 2)* [1912] 2 Ch 25 (CA); *Security Trust Co v Royal Bank of Canada* [1976] AC 503.

the money and the person at whose instigation it is paid is simply the creation of an unsecured loan, this in itself will be sufficient to dispose of any question of subrogation".[52]

Subrogation can be excluded for some reason of public policy. In particular, a claimant who lends to a debtor to purchase property, but whose own security is invalid, can be subrogated to the creditor's vendor's lien only if that subrogation does not undermine the policy underlying the reason why the claimant's own security was invalid in the first place. In *Burston Finance v Speirway*,[53] the claimant, whose security became void for non-registration, was unable to subrogate to the creditor's vendor's lien, as this "would have wholly frustrated the policy underlying [the statutory registration scheme] … which was designed to ensure that holders of unregistered charges should, in a liquidation, be in no more favourable a position than general creditors".[54]

Similar considerations underlie the decision of the House of Lords in *Orakpo v Manson Investments*.[55] Following *Thurstan*, the Court of Appeal had held that the policy invalidating moneylending contracts did not preclude subrogation,[56] but "these wholesome efforts … [were] set to naught"[57] on appeal.[58] The plaintiff borrowed various loans from the defendant moneylender, to purchase and develop various properties. Having fallen into arrears, the plaintiff sought a declaration that the loans did not comply with the Moneylenders Acts[59] and were thus void; the defendant counterclaimed to be entitled by subrogation to the vendors' liens and other charges met by the money lent; and the House

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52 *Ibid*, 232; 233 (same); 234 (here merely "a perfectly ordinary unsecured borrowing").

53 [1974] 1 WLR 1648; Martin (1975); *Captial Finance v Stokes* [1969] 1 Ch 261. *Burston* is followed in Ireland on this point, *obiter*, by McWilliam J in the High Court in *Re South Coast Boatyard*; *Barbour v Burke* (High Court, unreported, 20 November 1979, McWilliam J; *affd* without reference to this point [1980] ILRM 186).

54 Goff & Jones (1998) 166; Rotherham (2002) 272-273.

55 [1978] AC 95.

56 *Congresbury Motors Ltd v Anglo-Belge Finance* [1971] Ch 81, 93-94 (Russell LJ); Birks (1971); *Coptic v Bailey* [1972] Ch 446; *cf* Meagher, Gummow & Lehane (1992) 269 [920]; *Deposit & Investment Co v Kaye* (1962) 63 SR (NSW) 453.

57 Meagher, Gummow & Lehane (1992) 265 [910].

58 *BFC v Parc* [1999] 1 AC 221, 234 (Lord Hoffmann) (*Orkapo* an example of policy denying subrogation); *Dimond v Lovell* [2002] 1 AC 384, 398 (Lord Hoffmann); *Smith v Bridgend CC* [2002] 1 AC 336, 360 (Lord Scott); *Niru Battery Manufacturing v Milestone Trading (No 2)* [2003] 2 All ER (Comm) 365 [45], [53] (Moore-Bick J).

59 In particular, s6 of the Moneylenders Act 1927. See now Consumer Credit Act, 1995 Part VIII (Ireland).

of Lords held that the analogy with *Thurstan* failed because to allow subrogation would frustrate the policies which rendered the loans void in the first place.[60] Indeed, in many ways *Orakpo* is a stronger case than *Burston*; there, the security was void, whereas in *Orakpo*, it was not merely the security but the entire moneylending contract which was void – a state of affairs in which it is much more likely that a court might (though of course need not[61]) conclude that the policy precluding the contract also precludes subrogation.

However, merely taking another security does not necessarily imply a waiver of the lender's right to subrogation.[62] In *Bank of Ireland Finance v Daly*,[63] McMahon J held that an agreement to deposit title deeds by way of security did not preclude subrogation to the lien, but rather was additional to it,[64] and this was approved in *Highland Finance Ireland Ltd v Sacred Heart College of Agriculture*.[65] The claimant lender, Highland Finance, sought to be subrogated to the rights of the vendor creditor, a local Co-Operative, which had sold two milk quotas to the debtor purchaser, the College. The lender's contract with the debtor contained a detailed repayment schedule, which was followed by the debtor until another bank appointed a receiver. The claimant-lender therefore sought to be subrogated to the co-operative's vendor's lien[66] against the purchaser-debtor. In the Supreme Court,[67] Blayney J held that although the right to subrogation *prima facie* arose, nevertheless "there may be circumstances which preclude or prevent the application of the doctrine".[68] Because of the repayment schedule, "a clear contrary intention"[69] appeared,

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[60] [1978] AC 95, 114-115 (Lord Edmund-Davies), 105-106 (Lord Diplock) (in part because the origin of the right to subrogation here lies in the void contract), 111 (Lord Salmon), 121 (Lord Keith); *cf* 109 (Viscount Dilhorne).

[61] *Cp* s2.4 below.

[62] *Hughes v Kearney* (1803) 2 Sch & Lef 132 (promissory note for balance did not exclude vendor's lien).

[63] [1978] IR 79. *Cf O'Keeffe v Russell* [1994] 1 ILRM 137; Doyle (1994); *affg O'Keeffe v Flynn Exhams* (High Court, unreported, 22 July 1992, Costello J) noted Coughlan (1992).

[64] *Ibid*, 83-84.

[65] [1992] 1 IR 472, [1993] ILRM 260; *affd* [1998] 2 IR 180; [1997] 2 ILRM 87; Breslin (1994).

[66] Notwithstanding that the vendor's lien was over personalty: the milk quotas as choses in action; *cp Re Wait* [1927] 1 Ch 606, 636, 639 Atkin LJ (unpaid vendor's common law possessory lien); *Re Bond Worth* [1980] Ch 228, 251 (Slade J) (unpaid vendor's equitable lien); Waters (1988) 25; Phillips (1998) 984-986.

[67] [1998] 2 IR 180; [1997] 2 ILRM 87.

[68] *Ibid*, 187; 94.

[69] *Ibid*, 191; 98; *ie*, a clear intention contrary to subrogation.

and the "only conclusion open [was] that it was intended to be an unsecured borrowing … a borrowing unsecured on the quotas themselves".[70] Thus, although subrogation was in the end excluded on the facts as inconsistent with the terms of the loan, it was not *automatically* excluded for that reason.[71]

Hence, although subrogation will usually be sought where the claimant's own security is void,[72] or voidable and avoided,[73] it can also be sought where the security is not invalid, and the presence of that valid security will not of itself and without more preclude subrogation. Nevertheless, some cases come close to suggesting that subrogation should be denied because the claimant has taken an alternative security;[74] but the denial of subrogation in those cases can be sustained on policy grounds,[75] and other heads of do not seem to be automatically excluded by the taking of other securities.[76] On balance, then, *Daly* and *Highland Finance* properly represent the law on the point, that subrogation is not automatically excluded by the taking of another security. It is, in every case, a matter of the intentions of the parties, as gathered from all the circumstances of the case.

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70 *Ibid*, 192; 98.

71 *Cp Burston Finance v Spierway* [1974] 1 WLR 1648, 1653 (Walton J).

72 As in *Thurstan*.

73 *Castle Phillips Finance Co Ltd v Piddington* [1995] 1 FLR 783; Dixon (2001); *UCB Group v Hedworth* [2003] 3 FCR 739 [134]-[150] (Jonathan Parker LJ).

74 One of the reasons given for denying subrogation in *Burston v Speirway* and *South Coast Boatyard* (n55 above) was that the charge was initially valid and thus excluded subrogation, which remained excluded even where the charge subsequently became void for want of registration, because the claimant got all that he bargained for (*Capital Finance v Stokes* [1969] 1 Ch 261, 279 (Harman LJ); *Burston Finance v Spierway* [1974] 1 WLR 1648, 1653, 1657 (Walton J); *Paul v Spierway* [1976] Ch 220, 232 (Oliver J); *Bank of Ireland v Daly* [1978] IR 79, 82-83 (McMahon J); *Boodle Hatfield v British Films Ltd* [1986] FLR 134 (Nicholls J); *cf Coptic v Bailey* [1972] Ch 446 not followed on this point in *Burston*). McWilliam J in *South Coast Boatyard* commented (*obiter*) that the report in *Daly* "does not make clear whether the title deeds were in fact deposited with the Bank as security. The importance of this being that the cases appear to decide that until *an agreement for security is implemented the right of subrogation* would continue whether the agreement to create another security itself gave rise to an equitable right or not" (9; emphasis added; *cp Ghana Commercial Bank v Chandiram* [1960] AC 732, 745 (Lord Jenkins)). But in *Daly*, McMahon J followed *Stokes* for the proposition that "where the vendor has stipulated for *and has received a legal charge* on the property there is no vendor's lien" (*ibid*, 82; emphasis added), strongly suggesting that since McMahon J allowed subrogation, the vendor had not received the charge stipulated for. However, this is not a real point of distinction, since, even if the agreement had merely been unperformed (rather than invalid) the lender would have been able to obtain specific performance and perfect his security.

75 See p81 above.

76 *Re Chipboard Products* [1994] 3 IR 164, text after n23 above; *cf Orakpo*, 111 (Lord Salmon): immediate subrogation "a strange result" where there is a contractual repayment scheme.

2.3 Dischargers of Mortgages Subrogating to the Mortgages Discharged.

Where a claimant pays off a mortgage, he may be entitled to be subrogated to the mortgage. The cases of subrogation by sureties and by lenders demonstrate two patterns, and both patterns arise in the case of subrogation by dischargers of mortgages. In the case of subrogation by a surety to the creditor's security, the claimant (surety) pays the creditor directly. In the case of subrogation by a lender to the vendor's lien, the claimant (lender) pays the debtor (purchaser) who transmits the purchase monies on to the creditor (vendor). In either case, the creditor receives the money (directly from the claimant in the first, and indirectly *via* the debtor in the second), and the claimant is subrogated to the creditor's rights against the debtor. In the case of a mortgage paid off by the claimant, both patterns arise, and the claimant is entitled to be subrogated to the mortgage both when he has paid the creditor (mortgagee) directly and when he has paid the debtor (mortgagor) who has then transmitted the money on to the creditor. However, is not enough that the claimant have merely paid off the mortgage;[77] there must be something more before the right to subrogation will arise;[78] and that limiting factor is found in the intentions of the parties.

However, the role of intention differs depending on which fact pattern is in issue.[79] Where the claimant has paid[80] the creditor (mortgagee) directly, "he is presumed, unless the contrary appears, to intend that the mortgage shall be kept alive for his own benefit".[81] This is exactly the same as in the context of sureties. On the other hand, where the claimant (usually[82] pursuant to a contract of loan between the claimant and the debtor) pays the debtor (mortgagor), who then transmits the money on to the creditor, "the real

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77 *Wylie v Carlyon* [1922] 1 Ch 51, 63 (Eve J); *cp Orakpo*, 105 (Lord Diplock), 112 (Lord Edmund-Davies); *Highland Finance v Sacred Heart College of Agriculture* [1998] 2 IR 180, 187; [1997] 2 ILRM 87, 94 (Blayney J).

78 *Paul v Spierway* [1976] Ch 220, 230, 232, 233 (Oliver J); *Orakpo*, 105 (Lord Diplock); *Bank of Ireland v Daly* [1978] IR 79, 83 (McMahon J); *Highland Finance v Sacred Heart College of Agriculture* [1998] 2 IR 180, 187-189; [1997] 2 ILRM 87, 94-96 (Blayney J).

79 See s2.6 below.

80 It is *a fortiori* where the claimant did not so much pay the creditor mortgagee directly as have his property used to do so without his consent (*McCullough v Marsden* (1919) 45 DLR 645) (stolen money); *Boscawen v Bajwa* [1996] 1 WLR 328; [1995] 4 All ER 769, (misapplied money); Mitchell (1994) 114-115; Rotherham (2002) 255-257.

81 *Ghana Commercial Bank v Chandiram* [1960] AC 732, 745 (Lord Jenkins); *Smith v Green* (1844) 1 Coll 555, 562; *Patten v Bond* (1889) 60 LT 583, 585 (Kay J); *Butler v Rice* [1910] 2 Ch 277, 282 (Warrington J); *Western Trust & Saving v Rock* (Court of Appeal, unreported, 26 February 1993); *Cochrane v Cochrane* (1985) 3 NSWLR 403, 405 (Kearney J).

82 But not necessarily: *Evandale Estates Pty v Keck* [1963] VR 647, 652 (Hudson J).

intention of the parties may be critical”.[83] In such cases, if the parties did not intend such a security, there will be no such subrogation; but if it is clear that claimant’s advance to the debtor was intended to be secured, then the claimant can be subrogated to the creditor’s rights as against the debtor. This is exactly the same as in the context of lenders.

Direct-payment claims on the first pattern can arise where the claimant is a purchaser of land encumbered with a mortgage which he is then compelled to pay; he can then subrogate to the creditor mortgagee’s rights under the mortgage as against the debtor mortgagor who sold the property to him, because a claimant with an interest in property who repays a debt that is secured by an encumbrance over that property can be subrogated to that security.[84] These are usually cases of an owner of a partial[85] interest in property paying off a charge of another party with an interest in the property; it is usually in the payor’s interest that the payment not extinguish the charge, and it will therefore be presumed that he intended to keep that charge alive for his benefit.[86] However, as it is a presumption of intention, it yields to evidence of actual intention, whether evidence to support the payor’s intention to keep the charge alive,[87] or to demonstrate an intention to

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83 Goff & Jones (1998) 152.

84 *Countess of Shrewsbury v Earl of Shrewsbury* (1790) 1 Ves Jun 227; *Burrell v The Earl of Egremont* (1844) 7 Beav 205; *Morely v Morely* (1855) 5 DeGM&G 610; *Adams v Agnell* (1876) 5 ChD 634 *affd* (1877) 5 ChD 645; *Re Pride. Shackell v Colnett* [1891] 2 Ch 135; *Re Harvey. Harvey v Hobday* [1896] 1 Ch 137; *Whiteley v Delaney* [1914] AC 132; *Reddington v Reddington* (1809) 1 Ball & Beat 131; Donnelly (1999) 231-233; Rotherham (2002) 262; Sutton (1991) 82. This may be a specific example of the more general duty owed by the vendor of an incumbered estate to indemnify the purchaser against the burden of the incumbrances (presumably the purchase price reflected the incumbrance): *Waring v Ward* (1802) 7 Ves 332, 337; *Adair v Carden* (1892) 29 LR (Ir) 469: *Re Mainwaring’s Settlement Trust* [1936] 3 All ER 540. The court would “independent of contract, raise upon the vendor’s conscience, an obligation to indemnify … [and the vendor] must be supposed to intend [so] to indemnity …” (*Waring v Ward* (1802) 7 Ves 332, 337 (Lord Eldon)); this presumption is “based on good sense” (*Mills v United Counties Bank* [1912] 1 Ch 231, 241 (Fletcher-Moulton LJ)) and is now said to be an equity arising independently of contract (*Mills*, 242 (Farwell LJ)) and thus imposed by operation of law (*Simpson v Forrester* (1973) 132 CLR 499, 514-517 (Gibbs J), 522 (Stephen J discussing the Irish case of *Adair*). Given the repeated references to conscience (*Waring* (*ibid*); *Mills*, 243 (Farwell LJ); *Simpson*, 516 (Gibbs J), 523 (Stephen J)) it is unsurprising that this equity has attracted an unjust enrichment explanation (*Guaranty Trust Co of Canada v Bailey* (1985) 18 BLD (4th) 576, 584-585).

85 *Morely v Morely* (1855) 5 DeGM&G 610, 620 (Lord Cranworth LC).

86 In *Mackenzie v Gordon* (1839) 6 Cl&Fin 875, 890-891 Lord Cottenham LC focussed on what the payor’s intention must have been. The presumption was expressly stated in *Burrell v The Earl of Egremont* (1844) 7 Beav 205, 226, 232 (Lord Langdale MR); *Morely v Morely* (1855) 5 DeGM&G 610, 619-620, 624 (Lord Cranworth LC); *Adams v Agnell* (1876) 5 ChD 634 *affd* (1877) 5 ChD 645, 645 (Jessel MR); *Patten v Bond* (1889) 60 LT 583, 585 (Kay J); *Re Harvey. Harvey v Hobday* [1896] 1 Ch 137, 140 (Lindley LJ); *Re Wallace’s Estate* [1907] 1 IR 91, 96 (Walker LC); *Re Gore Booth’s Estate* [1910] 1 IR 139, 146 (Wylie J).

87 In *Lord Gifford v Lord Fitzhardinge* [1899] 2 Ch 32 (followed in Ireland in *Connolly v Barter* [1904] 1 IR 130, 135-136 (Porter MR)) North J accepted the payor’s evidence that he intended to keep the charge alive.

extinguish it.[88] The presumption has arisen where a life tenant or a tenant in tail in remainder[89] has paid off a charge affecting the estate,[90] or where one spouse with an interest in the property of the other spouse pays a charge on that property.[91] The classic application of these principles occurs where the claimant is a puisne mortgagee who pays off a more senior mortgage to which he is then subrogated:[92] the effect is to elevate his security.[93] The Court of Appeal has recently confirmed that a subsequent encumbrancer who pays off a prior one will be subrogated to the rights of the prior encumbrancer .[94]

Cases on this pattern cases should be distinguished from cases in which an owner of an interest in property pays off a charge over his own interest in the property, in particular where he is the owner of the full interest in the property, such as the holder of the fee simple. There, it is usually in his interest that the payment extinguish the charge and clear his interest, and it will therefore be presumed that he intended to extinguish that charge;[95] again, as this is a presumption of intention, it yields to evidence of actual intention,[96]

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88 Most of the cases in the previous footnotes contain statements of principle which include this qualification. In *Re Wallace's Estate* [1907] 1 IR 91, 97 Walker LC found evidence that the claimant payor intended to discharge the mortgage and clear the estate.

89 Though not the tenant in tail in possession (*Re Toppin's Estate* [1915] 1 IR 330, 343 (Lord O'Brien LC)), presumably because he is a full owner to whose payments the presumption of merger (n91, below) would apply.

90 *Earl of Buckinghamshire v Hobart* (1818) Swans 186; Mitchell (1994) 112-113.

91 *Pitt v Pitt* (1823) Turn & R 180; *Outram v Hyde* (1876) 24 WR 268; *Cowcher v Cowcher* [1974] 1 WLR 425, 432 (Bagnall J); *Stronge v Johnston* [1997] NIJB 56, 64 (Girvan J); Capper (1997).

92 *Mackenzie v Gordon* (1839) 6 Cl&Fin 875, 883 (Lord Cottenham LC) (claimant "entitled to stand in the place" of creditor); *Watts v Symes* (1851) 1 DeM&G 240, 244 (Knight-Bruce LJ) (same); *Walcott v Condon* (1853) 3 Ir Ch Rep 1, 14 (Lord Blackburne LC); *affd* (on reargument) 16 (Lord Brady LC).

93 Reflecting the position in equity (*Steele v Phillips* (1812) Beatty 188) there is a specific statutory example of this principle in s15 of the Conveyancing and Law of Property Act, 1881 and s 12 of the Conveyancing Act, 1882 (*Simitheett v Hesketh* (1890) 44 ChD 161 (North J)) which are still in force in Ireland, and in s115 of the Law of Property Act 1925: where there is a first legal mortgage, any person having an interest in the equity of redemption is entitled to redeem that first mortgage, and have a conveyance of the first mortgagee's interest. On the duty owed to such subsequent encumbrancers: *Downsview Nominees v First City Trust Corpn* [1993] AC 295, 317-318 (Lord Templeman).

94 *Faircharm Investments v Citibank International* [1998] Lloyd's Rep Bank 127 (Staughton LJ).

95 *Morely v Morely* (1855) 5 DeGM&G 610, 620 (Lord Cranworth LC). This was merely one of a number of presumptions of intention, based on the courts' perceptions of the payors' interests, which operate in these kinds of circumstances; another is the presumption associated with *Toulmin v Steere* (1817) 3 Mer 210 that mortgagors pay off earlier incumbrances for the benefit of later ones (*cp Re Davison's Estate* (1893) 31 LR (Ir) 249, 255 (Monroe J) *affd* [1894] 1 IR 56); and that too is subject to evidence of actual intention (*Re The Cork Harbour Docks and Warehouse Co Ltd's Estate* (1885) 17 LR (Ir) 515).

96 *Re Howard's Estate* (1892) 29 LR (Ir) 266, 272 (Monroe J)

whether evidence to support his intention to extinguish the charge,[97] or to demonstrate an intention to keep it alive.[98] (And in this territory of potentially competing presumptions, if it is a matter of indifference to the payor, and there is no other evidence of intention, the relevant presumption applies[99]).

All of these cases – those relating both to puisne mortgagees and to full owners – search for intention, guided first by presumption, and then by evidence to support or rebut the relevant presumption. It is structurally the same enquiry, and in the later cases conducting it, earlier authorities are cited interchangeably whether in respect of the intention of the puisne mortgagee to keep the charge alive or that of the full owner to discharge it.[100]

In sum, then, the direct-payment cases establish a very clear principle; in the words of Lord Cranworth LC in *Morely v Morely*:

> The result of a long series of authorities, proceeding on a very intelligible principle, I take to be this, that when an incumbrance is paid off by the person having a partial interest (that is, an interest less than the whole inheritance), unless there is something to shew a contrary intention, the presumption is, that he meant to do that which in law and in equity he might have done, namely, to keep it alive for his own interest … [101]

On the other hand, indirect-payment claims on the second pattern arise where the claimant, on foot of an intended (but usually absent or invalid security[102]) has paid the debtor

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97 *Re Nunn's Estate* (1880-1890) 23 LR (Ir) 286; *Re Butlin's Estate* [1907] 1 IR 159.

98 *Lindsay v Earl of Wicklow* (1873) IR 7 Eq 192 (no merger; evidence of contrary intention); *Keogh v Keogh* (1874) IR 8 Eq 182, *aff'd* 449, (same); *Smith v Smith* (1887) 19 LR (Ir) 514 (same); *Re Burke's Estate* (1904) 38 ILTR 174. The presumption of merger can also be rebutted if the presumed intention is vitiated by mistake: *Earl of Buckinghamshire v Hobart* (1818) Swans 186 (payor, tenant in tail, believed himself to be the full owner); *Connolly v Barter* [1904] 1 IR 130 (Porter MR) (same).

99 *Burrell v The Earl of Egremont* (1844) 7 Beav 205, 232 (Lord Langdale MR) (in the absence of evidence, the presumption of subrogation arose; legal personal representatives of the testator entitled the benefit of the charges paid off testator); *Forbes v Moffatt* (1811) 18 Ves Jun 384, 393 (Grant MR) (presumption of discharge by merger not rebutted, as it was a matter of indifference to the payor); similar: *Purcell v Purcell* (1856) 8 Ir Jur Rep [1 *Ir Jur* (*ns*)] 141, 145 (Brady LC); *Tyrwhitt v Tyrwhitt* (1863) 32 Beav 244; *Re Bury's Estate* [1898] 1 IR 379; *Re Lloyd's Estate* [1903] 1 IR 144; *Re Toppin's Estate* [1915] 1 IR 330, 339 (Lord O'Brien LC); *Re Alexander's Estate* [1938] IR 23.

100 To take only one important example, a common source for the presumption that a puisne mortgagee intends to keep the charge alive is Grant MR's statement of general principle in *Forbes v Moffatt* (1811) 18 Ves Jun 384, 393 which gathers all of these issues together, and then applies them in the context of an unrebutted presumption of merger.

101 (1855) 5 DeGM&G 610, 620, *cp* 625; *cp Burrell v The Earl of Egremont* (1844) 7 Beav 205, 226-227 (Lord Langdale MR).

102 Cranston (1996) (many ways for security to be ineffective). *Quaere* whether the ineffectiveness of the security is *necessary* to allow subrogation? See pp81-83above.

(mortgagor) who transmits the money on to the creditor. Where such a claimant "has advanced money intending to take security, and the money has been used to pay off a secured debt and he does not receive the security he expected to receive, he should in general be subrogated to the rights of a secured creditor whom he has paid off".[103] In *Highland Finance*, Blayney J held that the right of a lender to subrogate to the vendor's lien "is an instance of a general right which exists in equity where money is advanced for the purpose paying off an encumbrance".[104] In *Butler v Rice*,[105] the claimant advanced the money to the debtor (mortgagor) to allow him to pay off the creditor (mortgagee), but the debtor refused to execute the promised security, and the creditor subrogated to the discharged mortgage. These principles apply not only where the borrowing is applied to the discharge of a mortgage[106] but also where it is applied to the discharge other securities or encumbrances. In these cases, everything turns on the actual intentions of the parties; if they did not intend the claimant to be secured, then there will be no subrogation; but if it is clear that claimant's advance to the debtor was intended to be secured, then the claimant can be subrogated to the creditor's rights as against the debtor.

The first pattern concerns direct payment by a claimant who is a surety or a person having an interest in land; the second pattern involves payment by a claimant to the debtor for transmission to the creditor. There is an intermediate case, which concerns a claimant lender paying the creditor vendor directly at the request of the debtor purchaser. Because it is a direct payment, such a case would seem at first blush to within the first pattern rather than the second, but the payor does not have the necessary status[107] as surety or owner of an interest in property to justify the benefit of the presumption, and it should instead be regarded as a special case of the second pattern, which turns on the actual intentions of the parties. Hence in *Ghana Commercial Bank v Chandiram*,[108] two banks had a common customer, at whose direction one paid off an equitable mortgage held by the other and subrogated to that mortgage. Lord Jenkins both stated the presumption appropriate to the

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103 *Eagle Star v Karasiewicz* (Court of Appeal, unreported, 25 April 2002) [19] (Arden J).

104 [1998] 2 IR 180, 187; [1997] 2 ILRM 87, 94.

105 [1910] 2 Ch 277.

106 A common scenario: *eg Bowers v Bowers* (unreported 3 February 1987, Hoffmann J); *Chohan v Saggar* [1993] BCLC 661; *Bankers Trust Co v Namdar* [1997] NPC 22.

107 See pp98-99 below.

108 [1960] AC 732.

first pattern and conducted an enquiry as to the claimant's actual intention appropriate to the second. The case itself is very close on its facts to the first,[109] but it would be better in future to treat intermediate cases of direct payment by claimants who are neither sureties nor otherwise interested in the property and who therefore lack the necessary status for a presumption to arise as cases on the second pattern in which subrogation is a function of the actual (rather than presumed) intentions of the parties.

In sum, then, in direct-payment cases, the claimant's right to subrogation turns on his presumed intention. But in indirect-payment cases, the claimant's right to subrogation turns on whether he intended the advance to the debtor to be secured. Consistently with their analogues in the cases of sureties and lenders, the right to subrogation on both patterns of mortgage-payors is based upon a species of intention.[110]

2.4 Lenders of Invalid Loans Subrogating to the Rights Discharged by the Application of the Loans

In the vendor's lien cases, the claimant seeks subrogation to the creditor's vendor's lien because the security for which he had bargained with the debtor failed to materialise. Similarly, in the analogous indirect-payment strand of mortgage-payor cases, the claimant seeks subrogation to the mortgage because the security for which he had bargained with the debtor failed to materialise. But suppose that in the advance from the claimant to the debtor, it is not the security but the entire contract is invalid. If the claimant can be subrogated to the creditor's rights where the claimant's security is invalid, it is not too much of a stretch for the law to allow the claimant to be subrogated to the creditor's rights where the contract underlying the security is invalid. And, indeed, the law does allow just such subrogation.

An ancient example arose where a claimant had lent to the debtor, a wife, who applied to proceeds to pay off debts; the creditors on those debts had rights of action against the wife's husband; the loan to the debtor (wife) being unenforceable, the claimant (the lender to the wife) was entitled instead to be subrogated to the creditors' rights against the

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[109] If the claimant bank could plausibly be treated as a subsequent surety, then *Chandiram* could be treated as a case on the first pattern, but no surety cases seem to have been cited to or relied upon by Lord Jenkins.

[110] See, further, s2.6 below.

husband.[111] Similarly, where a claimant makes a loan to an infant debtor to pay off debts owed to creditors but the loan is void for infancy, the lender can be subrogated to the creditor's security against the infant;[112] and it is likewise where the lender's loan is invalid for the debtor's mental incapacity.[113] Furthermore, where a claimant deals with an executor who is conducting an unauthorised business for the benefit the estate, the claimant can be subrogated to executor's indemnity to the assets of the estate.[114] Again, where an agent borrows without the principal's authority and applies the loan to discharge the principal's debt, the claimant can be subrogated to the principal's creditor's security;[115] and it is likewise where a partner[116] or a company director[117] so acts. In *Liggett v Barclays Bank*,[118] cheques had been signed by only one director (rather than the necessary two or three), and when paid out by the bank they were thus paid without authority. Although the company was *prima facie* entitled to recover from the bank the amounts of those payments,[119] Wright J held that the bank could subrogate to the claims of the trade creditors against the company paid off by the cheques.[120]

If the equity in such cases arises by analogy with the indirect payment vendor's lien and mortgage cases, then the approach taken there should also apply here; and the right to subrogation in this context should arise by operation of law by reference to the intentions

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[111] *Jenner v Morris* (1861) 3 DeGF&J 45, 55 (Turner LJ) (it is an "ancient head" of Chancery); *Harris v Lee* (1718) 1 P Wms 482; *Dean v Soutten* (1869) LR 9 Eq 151; *Weingarten v Engel* [1947] 1 All ER 425; Meagher, Gummow & Lehane (1992) 267 [915]; Goff & Jones (1998) 158-160.

[112] *Marlow v Pitfield* (1719) 1 P Wms 558; *Lewis v Alleyne* (1888) 4 TLR 560; *Re National Permanent Building Society* (1869) LR 5 Ch App 309; *City Bank of Sydney v McLaughlin* (1909) 9 CLR 615; *semble* only if the infant's payment is for necessaries: Goff & Jones (1998) 159.

[113] *Re Beavan* [1912] 1 Ch 196; *Bank of Nova Scotia v Kelly* (1973) 41 DLR (3d) 273.

[114] *Ex p Edmonds* (1862) 4 DeGF&J 488; *Re Johnson* (1880) 15 ChD 548; *Re London United Breweries Ltd* [1907] 2 Ch 511; *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319.

[115] *Reid v Rigby* (1894) 2 QB 40; *Bannatyne v MacIver* [1906] 1 KB 103; *Rogers v Resi-Statewide Corpn Ltd* (1991) 105 ALR 145.

[116] Goff & Jones (1998) 162-163; *Turner v Webb* (1941) 42 SR (NSW) 68 (partner borrowed without authority, applied the loan to discharge partnership debts, lender subrogated to the creditor's security).

[117] *Underwood v Bank of Liverpool* [1924] 1 KB 775, 794-795 (Scrutton LJ).

[118] [1928] 1 KB 48; Ellinger & Lee (1984); De Silva (1993).

[119] Where a bank pays contrary to instructions, it pays with its own money and not that of its customer (*Barclays Bank v Simms* [1980] QB 677 (Goff J, discussing, *inter alia*, *Liggett*) but it can recover the mistaken payment from the payee (*ibid*).

[120] [1928] 1 KB 48, following the *ultra vires* loan cases and *Underwood v Bank of Liverpool* [1924] 1 KB 775. If the *Simms* direct action in mistake is unavailable or worthless because the payee is not a mark, then the bank may want to take advantage of the indirect *Liggett* action, as in *Westpac v Rae* [1992] 1 NZLR 338; De Silva (1993) 209.

of the parties. It would therefore follow that, apart at all from the underlying invalidity of the contract, if the parties did not intend such a security, there will be no such subrogation; but if the claimant's advance to the debtor was intended to be secured, and that intention was frustrated by the invalidity of the contract, then the claimant can be subrogated to the creditor's rights as against the debtor.[121]

Furthermore, if a policy affecting a security can be strong enough to preclude subrogation, then a policy affecting not only the security but also the underlying contract can be even more so. Consequently, the right of a lender of an invalid loans to subrogate to the rights discharged by the application of that loan is peculiarly susceptible to preclusion for reasons of policy. Indeed, such policy considerations are often perceived to be stronger in the context of invalid loans, where the policy is said to deny subrogation if it would amount to the indirect enforcement of the loan.[122] Whatever about a policy bar to subrogation, it is not helpful to cast the bar in terms of the indirect enforcement of the contract. Non-contractual remedies are not about enforcement or performance. Indeed, contractual and non-contractual remedies look in different directions: enforcement of the loan would seek to reach the position the parties would have been in had the contract been valid and performed; whereas a non-contractual remedy such as personal restitution[123] – or subrogation as here – instead returns the parties to the positions they were in before the contract was entered into. But even if it is inapt to speak of subrogation in terms of enforcement of the invalid contract of loan, nevertheless important policy considerations will often count against subrogation as a remedy in the context of such invalid contracts.

Many of the difficulties are illustrated by *Re Cleadon Trust*.[124] A director of one company paid debts owed by two of the company's subsidiaries, but the company's purported subsequent adoption of the payments was invalid. When the company and the subsidiaries went into liquidation, the director sought to subrogate to the claims against the company,[125] but the majority of the Court of Appeal disagreed. Mitchell argues that the

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121 See s2.6 below.

122 Goff & Jones (1998) 153.

123 O'Dell (1999) 162-167, O'Dell (2000) 43-47.

124 [1939] Ch 286.

125 It seems to have been accepted that, in respect of the claims against, them the subsidiaries would have had claims against the company; and so the claims paid off were treated as claims not against the subsidiaries but against the company.

claim ought to have failed because the director's payments did not discharge the subsidiaries' liabilities,[126] but all three members of the Court assumed that they had so discharged,[127] and the majority held that the claim failed because the plaintiff had acted voluntarily:[128] Neither could the company ever have formed the requisite intent.[129] Clauson LJ held that mere payment was insufficient to justify subrogation; rather, in his view, the company must have thereby obtained a benefit; and there was therefore on the facts nothing "unconscientious"[130] in the subsidiaries' receiving and using the director's money. And for Goff & Jones, the case illustrates the denial of subrogation for policy reasons.[131]

Perhaps the best statement of the law as it emerges from *Liggett* and *Cleadon* is provided by Pill LJ in *Crantrave v Lloyds Bank*.[132] He took *Cleadon* as establishing that, "in the absence of authorisation or ratification by the company of the bank's payment to the third party, the 'mere fact' that the bank's payment enured to the benefit of the company does not establish an equity in favour of the bank against the company",[133] and *Liggett* as establishing that, "in order to establish the equity, the bank would have to show that the payment discharged (at least partially) a legal liability of the customer".[134] Hence, in the absence of evidence that the bank's payment had been made on the customer's behalf or subsequently ratified by him, the payment to the creditor did not discharge the company's liability to the creditor, and there was nothing to which the bank could subrogate. It the end, then, *Cleadon* is simply an agent acting without authority paying off his principal's

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126 Mitchell (1994) 128-129, 163-165.

127 [1939] Ch 286, 304 (Greene MR), 308-309 (Scott LJ), 319, 328 (Clauson LJ). In *Crantrave v Lloyds Bank* [2000] QB 917, 923 Pill LJ observed, parenthetically, that it "appears to have been assumed that the subsidiaries' liabilities to their creditors had been discharged in law by the appellant's payment".

128 *Ibid*, 315 (Scott LJ) (*semble*); 321-324 (Clauson LJ) (clearly); both referring to *Falcke v Scottish Imperial Insurance Co Ltd* (1886) 34 ChD 234.

129 *Ibid*, 315 (Scott LJ).

130 *Ibid*, 324; *cp* 316 Scott LJ (not "unconscionable").

131 Goff & Jones (2002) 158-162 [3.048]-[3.052]; (the case is an "unusual but cogent" illustration of the principles that "subrogation … should not be granted if such relief frustrates the policy underlying the legal rule which has invalidated the loan transaction" and that the claimant "must demonstrate that [the debtor] … has adopted the benefit of the invalid loan"), though, unfortunately, they nowhere clarify precisely what the relevant policy might be.

132 [2000] QB 917; *Electricity Supply Nominees v Thorn EMI Retail* (1991) 63 P&CR 143; *Gulf International Bank v Albaraka Islamic Bank BSC* (QBD, unreported, 24 July 2003, Judge Kealey QC).

133 *Ibid*, 923 (Pill LJ); *Vickery v JPP Custodian* [2002] NSW SC 782 Austin J took this view of the law, but hoped that Lord Greene MR's views dissenting in *Cleadon* might prevail in the future.

134 *Ibid.*

debts; all of the reasons why subrogation failed assume that such a claim could in principle lie, and provide recognised reasons why it should not be available in any given case. In particular, it illustrates that it may be quite easy to hold that that the agent without authority acted voluntarily. But it in no way casts doubt on the principle of an agent's right, upon payment of his principal's debt without authority, to subrogate to his principal's creditors' claims.[135]

An important application of this species of subrogation arises where the claimant makes a loan which is *ultra vires* the debtor but which the debtor nevertheless applies to discharge a valid liability owed to a creditor; the claimant can subrogate to the creditor's valid claim against the debtor, at least where the monies borrowed "were applied for the *benefit* of the company".[136] In *Blackburn Building Society v Cuniffe*, *Brooks & Co*, Lord Selborne LC held that there was in reality

> merely for the convenience of payment, a change of the creditor, there is no substantial borrowing in the result, so far as relates to the position of the Company. Regarded in that light, it is consistent with the general principle of equity that those who pay legitimate demands which they are bound in some way or other to meet, and have had the benefit of other people's money advanced to them for that purpose shall not retain that benefit so as, in substance, to make those other people pay their debts.[137]

In *Re Lough Neagh Ship Company*; *Ex parte Workman*,[138] Porter MR held that the claimant had in effect paid the creditor, and, as a result "became equitable assignees of [the creditor's] rights, including the right to sue the Company; and on that ground are, in my

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[135] *Pace* Goff & Jones (2002) 161 [3.051] n21: *Cleadon* "must cast doubt on the reasoning, if not the decision" in *Liggett*. They do not notice that their logic also undercuts the *Bannatyne* cases, which they record uncritically, and which demonstrates (*pace* the majority of the Court of Appeal in *Cleadon* ([1939] Ch 286, 316-318 (Scott LJ), 326-327 (Clauson LJ)) that the right to subrogation is really only necessary in this context because the agent lacked the authority to pay the debts.

[136] *Re German Mining ex p Chippendale* (1854) 4 De GM&G 19, 39; (Turner LJ); *Re Cork and Youghal Railway Company* (1868-69) LR 4 Ch App 748.

[137] (1883) 22 Ch. Div 61, 71 (Lord Selborne LC); *Baroness Wenlock v The River Dee Company* (1884-1885) 10 AC 354, (finding the borrowing *ultra vires*); (1887) 19 QBD 155, 165-166 (Fry LJ) (following *Blackburn* to provide a partial remedy). In *Redman v Rymer*, Kekewich J at first instance ((1889) 110 LT (ns) 385) found a transaction *ultra vires*, but allowed a remedy following *Blackburn Building Soc* and *Baroness Wenlock*; the Court of Appeal ((1891) 115 LT (ns) 270) held that the transaction was *intra vires*, and did not need to reach the issue. See also *Re Durham Co Permanent Investment Land and Building Society* (1871) LR 12 Eq 516; *Re Wrexham, Mold & Connah's Quay Rly Co* [1899] 1 Ch 440; *Re Harris Calculating Machine Co* [1914] 1 Ch 920.

[138] [1895] 1 IR 533; *Troup's Case. The Electric Telegraph Co of Ireland* (1860) 29 Beav 353; 54 ER 664; *Ulster Railway v Banbridge, Lisburn and Belfast Railway* (1868) IR 2 Eq 190; *Re Bagnalstown and Wexford Railway Co* (1870) Ir 4 Eq 505; *Re Irish Provident Assurance Co* [1913] 1 IR 353; *cf Re Cummins: Barton v Bank of Ireland* [1939] IR 60.

opinion entitled to sustain the present claim. There has been in the result no real borrowing by the company at all. … It is simply a change of creditor, not a new debt".[139] And this remedy has been granted where the contract is not so much *ultra vires* as merely beyond the power of the organ of the company concluding it.[140]

In these *ultra vires* loan cases, the pattern of these cases is clearly restitutionary: the claimants are simply seeking restitution of the amount lent as a personal remedy. Indeed, in *Re Wrexham, Mold & Connah's Quay Rly Co*, Lindley LJ doubted that subrogation was necessary to provide independent personal remedies to the plaintiffs in such cases,[141] and in *BFC v Parc*, Lord Hoffmann distinguished classical "subrogation to security" from "subrogation to a mere debt, as in cases of *ultra vires* borrowings".[142] In truth, it is difficult to accommodate this species of subrogation with the genus:[143] the cases are hard to rationalise in terms of an intent to take a security. This distortion of subrogation provided an imperfect[144] and indirect remedy against the debtor in circumstances in which a direct personal action seemed not to lie; it would have been easier simply to allow the lender to have the direct action;[145] and it is un-necessary any longer to rely upon the indirect action now that the swaps[146] litigation has (re)established the direct action. Although the aim of this indirect action was the reversal of unjust enrichment,[147] it would be unsafe to assume that this is true of other species of subrogation. Indeed, in *Halifax v Omar*, Jonathan Parker

[139] *Ibid*, 540; *Re German Mining ex p Chippendale* (1853) 4 DM&G 19.

[140] *Reversion Fund and Insurance Co Ltd v Maison Cosway* [1913] 1 KB 364*; Re Airedale Worsted Society* [1933] 1 Ch 639.

[141] [1899] 1 Ch 440, 446-447.

[142] [1999] 1 AC 221, 233 discussing *Paul v Spierway* [1976] Ch 220.

[143] Birks (1971) 208: it is an animal "which looks very like subrogation, but manages to leave a very puzzling footprint"; *cp* Martin (1975) 582. It forces Mitchell (1994) 11-23, 255-256 into drawing unpersuasive analogies between these cases and the trustees' business cases (nn39-41 above).

[144] "The doctrine has rarely, if ever, done more for any one than snatch a few brands from the burning. In the present case the utmost extension the doctrine will leave the plaintiffs heavy losers" (*Baroness Wenlock v The River Dee Company* (1887) 19 QBD 155, 166 (Fry LJ)).

[145] Burrows, 120-124; Goff & Jones (2002) 124 [3.005]; Mitchell (1994) 153-154 ("disguised personal claim"); Rotherham (2002) 247.

[146] *Westdeutsche* [1996] AC 669; *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349; Birks & Rose (1999).

[147] "… the right of an innocent lender to recover form a company moneys borrowed *ultra vires* to the extent that these have been expended on discharging the company's lawful debts … [is] an empirical remedy to prevent a particular kind of unjust enrichment." *Orakpo* 104 (Lord Diplock).

LJ *confined* the restitutionary approach to subrogation in *BFC* to such personal claims.[148] Consequently, the *ultra vires* loan cases will be left to one side in the analysis below.

2.5 Subrogation by Insurers to the Rights of the Insured.

An indemnity insurer, having paid an insured on the happening of the insured event, is entitled to be subrogated to the claims of the insured against any third parties who caused the happening of that event.[149] Thus, "all claims of the insured arising out of any ground of legal responsibility vest in the insurer by subrogation",[150] and are exercised by the insurer in his own name.[151] This right is usually a matter of contract, but where the contract is silent, it arises by operation of law.[152] The insurer's right can be waived expressly or impliedly;[153] and it does not arise until the insurer has provided a full indemnity.[154] Indeed, having indemnified the insured, the insurer is entitled to receive any sums subsequently received by the insured which reduce his loss,[155] and the insured holds any such sums

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148 *Halifax v Omar* [2002] EWCA Civ 121 [70]-[71] (Jonathan Parker LJ).

149 Derham (1985); Walmsley (2001); Hardy Ivamy (1993) chapter 46; Merkin (1997) chapter 8, section 3.

150 *Doyle v Wicklow Co Co* [1974] IR 54, 72 (Griffin J); *Zurich Insurance Co v Sheild Insurance Co* [1988] IR 174, 178-179 (Gannon J), *affd* 185 (McCarthy J); *Belton v Carlow Co Co* [1997] 1 IR 173, 182; [1997] 2 ILRM 405, 415 (Keane J); *Napier and Ettrick v Kershaw* [1993] AC 713, 728 (Lord Templeman); *Caledonia North Sea Ltd v BT plc* [2002] 1 Lloyd's Rep 553 [11] (Lord Bingham), [89] (Lord Hoffmann). *Rayner v Preston* (1881) 18 ChD 1 is a particular application of this principle which has been embodied in statute: s47 of the Law of Property Act 1925; Rotherham (2002) 171.

151 Hardy Ivamy (1993) 503.

152 Where it is "a principle of very broad impact" (*Arab Bank plc v Wood* (Court of Appeal, unreported, 11 November 1999, Robert Walker LJ). Such principles are of general application to contracts of indemnity insurance, but they have been statutorily codified in the context of marine insurance in ss79 and 80 of the Marine Insurance Act, 1906;:Hardy Ivamy (1985) 455-460. *Caledonia North Sea Ltd v BT plc* [2002] 1 Lloyd's Rep 553, [11] (Lord Bingham), [62] (Lord Mackay).

153 Hardy Ivamy (1993) 497; Mitchell (1996).

154 *Andrews v The Patriotic Assurance Co of Ireland (No 2)* (1886) 18 LR Ir 355; *Re Driscoll* [1918] 1 IR 152, 159 (O'Connor MR). Hence, if the relevant insurance contract is not a contract of indemnity, as in the case of life assurance and personal accident insurance, then the right will not arise: *Edwards v Motor Union Insurance Co* [1992] 2 KB 429; though it can be reserved by contract.

155 *Mason v Sainsbury* (1782) 3 Doug KB 61; *Darrell v Tibbitts* (1880) 5 QBD 560; *Castellain v Preston* (1883) 11 QBD 380; *Jones v Belfast Corporation* (1897) 32 ILT 32; *Ballymagauran Co-Operative Agricultural and Dairy Society v Cavan and Leitrim County Councils* [1915] 2 IR 85; *British Traders Insurance Co v Monson* (1964) 111 CLR 86; *Doyle v Wicklow Co Co* [1974] IR 55, 72-73 (Griffin J). Of course, if the sums received are not in respect of the loss or otherwise do not diminish it (such as gifts), the insurer has no entitlement to such payments (*Stearns v Village Main Reef Gold Mining Co* (1905) 10 Com Cas 89; Rotherham (2002) 283-284; *cf Burnand v Rodocanachi* (1882) 7 App Cas 333). Hence, as *Andrews*, *Driscoll*, and *Doyle* demonstrate, if the insurer pays the insured first, this does not reduce the tortfeasor's liability to the insured, though payment by the tortfeasor triggers the insurer's remedies against the insured. The insurer thus has up to four separate actions against the insured: (a) subrogation to the insured's claims against the tortfeasor; (b) a right to compel the insured to account; (c) a direct action in money had and received against the insured; and (d) a lien or constructive trust over money received by the insured (Mitchell (1994) 67-86; Mitchell (2003) 40-41, 143-144, [2.42]-[2.44], [7.07]-[7.09]). Although they are directed at the

either subject to a lien[156] or on trust[157] for the insurer. However, as insurance is a contract of indemnity only, recovering that indemnity is the full extent of the insurer's rights; and an insurer who recovers on subrogation more than he has paid the insured must account to the insured for the excess.[158]

This species of subrogation seems similar to the others already examined, but there are some very significant differences, in particular because the flavour of this species is contractual. In the insurance context, there is always a contract between insurer and insured. If there were not, there would be no insurance, nothing insured, and no obligation on the insurer to pay. Furthermore, subrogation is essential[159] to the operation of the insurance industry: along with premia, the exercise of the rights of the insured in respect of the insured event constitutes a significant revenue stream for the insurers; without such subrogation, the insurance industry as we know it simply would not exist. The ubiquity of a contract, and the necessity of subrogation to that contractual relationship, are often cited to justify understanding subrogation in this context as a consequence of an implied term;[160] but even if the classical[161] and majority modern[162] view is taken that it arises here by

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same underlying policy, they are separate remedies (Mitchell (*ibid*); Meagher, Gummow & Lehane (1992) 273 [932]) and any conflation (as in *England v Guardian Insurance Ltd* [2000] Lloyd's Rep IR 404) is not justified by *Maison*, *Darrell* or *Castellain* (James (1971) 154).

156 *Napier and Ettrick v Kershaw* [1993] AC 713; Cope (1997) 58-61; Harris (1993) 308; Mitchell (1993); Yin (1994); Luey (1995); Rotherham (2002) 275-284; Mitchell (2003) 41 [2.44]; *England v Guardian Insurance Ltd* [2000] Lloyd's Rep IR 404; *cf North Atlantic Insurance v Nationwide General Insurance* [2003] EWHC 449 [66] (Cooke J).

157 *Re Casey* (High Court, unreported, 1 March 1993, Hamilton P).

158 *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1962] 2 QB 330; and may even hold that excess on trust: *Lonhro Exports v Export Credit Guarantee Department* [1996] 2 Lloyd's Rep 649; Rotherham, 284-286.

159 Quinn (1996) 1372-1373, 1398-1399 arguing that subrogation is necessary for the insurance industry, and often makes the difference between profit and loss; *cf* Hasson (1985) (insurance subrogation wasteful).

160 *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1962] 2 QB 330, 339-340 (Diplock J); *Hobbs v Marlowe* [1978] AC 16, 39 (Lord Diplock); *Orakpo*, 104 (Lord Diplock); *cp Cargill International SA v Bangladesh Sugar and Food Industries Corp* [1996] 4 All ER 563 *affd* [1998] 2 All ER 406.

161 See, eg, *Mason v Sainsbury* (1782) 3 Doug 61; *Randal v Cockran* (1748) 1 Ves Sen 98; *Castellain v Preston* (1883) 11 QBD 380.

162 *Lucas v Export Credits Guarantee Dept* [1973] 1 WLR 914, 924 (Megaw LJ); *Morris v Ford Motor Co* [1973] 1 QB 792, 800-801 (Lord Denning MR); *Ledingham v Ontario Hospital Services Commission* [1975] 1 SCR 332; *Napier and Ettrick v Hunter* [1993] AC 713, 736, 738 (Lord Templeman), 740-741 (Lord Goff), 749 (Lord Browne-Wilkinson). In *BFC v Parc* [1999] 1 AC 221, 231 Lord Hoffmann said that "the doctrine of subrogation in insurance rests upon the common intention of the parties and gives effect to the principle of indemnity embodied in the contract". This is hardly a ringing endorsement of *Hunter*, though neither is it a repudiation of Lord Diplock's views.

operation of law, nevertheless these reasons are sufficient to justify regarding the insurance context is a special case, which ought to be treated as such.

There are other significant differences between this species of subrogation and the others already considered. First, in the other cases, the direct or indirect payments discharge the debtor's liability to the creditor; whereas in insurance, the payment by the insurer does not discharge any liability owed by the party who brought about the happening of the insured event. Second, in the other cases, if the claimant has a pre-existing relationship with either party, it usually with the debtor; whereas, in insurance, the insurer is in a contract with the insured, that is to say, with the creditor.

Consequently, it would be better if insurance subrogation were put to one side in any quest to determine whether there are essential similarities between the various categories of subrogation. Insurance subrogation cases should be regarded as *sui generis*,[163] "form[ing] a category of their own".[164] To accommodate insurance subrogation within a general scheme, Mitchell has to distinguish between 'simple' and 'reviving' subrogation,[165] where insurance is the main example of 'simple' subrogation and almost[166] everything else is 'reviving'; if insurance subrogation is put on one side, this distinction is unnecessary,

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163 This is not to say that its principles cannot be applied *mutatis*, as they were in *Esso Petroleum v Hall Russell* (*The Esso Bernicia*) [1989] AC 643 (Mitchell (1994) 23, 37-38, 51-51, 164-166; Mitchell (2003) 38-40 [2.39]-[2.41]). Indeed, the speech of Lord Jauncey proceeds entirely on such an analogy. However, Lord Goff goes further, treating the subrogation at issue in both contexts as restitutionary, which begs the question.

164 *Barclays Bank v TOSG Trust Fund Ltd* [1984] AC 626, 639 (Oliver LJ) (surety case). Indeed, Mitchell's account could be seen as unnecessarily dividing up the insurance category (Hedley (2001) 134), a problem remedied by putting all of the insurance cases to one side in a separate category of their own.

165 For these terms, see below, p144.

166 Apart from insurance and true analogies like *The Esso Bernicia*, the only other significant example of 'simple' subrogation identified by Mitchell seems to be the right of an endorser of bill of exchange who has paid the holder to be subrogated to any securities held by the holder against the acceptor (Mitchell (1994) 38, 86-89). As this right was derived by the House of Lords in *Duncan, Fox & Co v North and South Wales Bank* (1880) 6 App Cas 1, by analogy with sureties, the analogy ought to have been taken sufficiently seriously to require the same treatment for both classes of subrogation. (Similarly, cases of a creditor's subrogation to a trustee's right of indemnity, which seem to proceed on a similar analogy, ought to be treated in the same way). If sureties are an example, in Mitchell's language, of reviving subrogation, then endorsers (and trustees' trade creditors) ought to be too; unless there is something in the nature of bills of exchange to justify an exception (consider Mitchell (1994) 60-61, 86-89), and if so, it to be recognised simply as such.

everything is 'reviving';[167] more to the point, everything follows the same pattern (however that pattern is described).

2.6 The Role of Intention.

In the classic triangular fact pattern, the claimant is subrogated to the rights of a creditor against a debtor; and as we have seen, this right of subrogation is often said to turn on intention. However, two separate fact-patterns and consequentially two species of intention must be carefully distinguished. First, where the claimant pays the creditor directly – as in the case of sureties, and mortgage-payors paying off a mortgage or other charge directly – the right to subrogation turns on a rebuttable presumption that the claimant intended that the security, mortgage or charge would be kept alive for his benefit. Second, where the claimant pays the debtor who in turn pays the creditor – as where the claimant lends to the debtor to purchase property, or provides money which the debtor uses to pays off an encumbrance, or lends to the debtor on foot of an invalid loan – the claimant's right to subrogation turns on the actual intentions of the claimant and debtor.

In the direct-payment cases, it is relatively easy to see why a presumption will arise in favour of sureties,[168] given their status as sureties.[169] And it is not much of a stretch to see why the authorities take the same view where a claimant pays a creditor mortgagee directly,[170] given the claimant's status as a party with an interest in the property[171] (the cases deal with owners, life tenants, tenants in tail, spouses, and mortgagees). It is this status which is the basis of the presumption; in its absence, it will not arise. Thus, in *Morely v Morely*, one of the leading mortgage-payor cases, Lord Cranworth LC declined to extend the principle beyond the context of property to the discharge of a bond debt.[172] This case in particular demonstrates that where the payment is not by an owner of an interest in property in respect of an incumbrance upon the property, the presumption does

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[167] Furthermore, as will be returned to below, if subrogation really is restitution of unjust enrichment, it is difficult in the insurance context to find an unjust factor: Mitchell suggests compulsion, but this is unreal; the insurer is as compelled as was the losing claimant in *Owen v Tate* [1976] QB 402.

[168] See p75 above.

[169] In this notion of 'status-based subrogation', there are conscious echoes of – if not necessarily analogies with – the notion of 'status-based fiduciaries'; Law Commission (1992) [2.4.4]; Worthington (2003) 129.

[170] See pp84-86 above.

[171] *Cp* Mitchell (2003) 35 [2.32].

[172] (1855) 5 DeGM&G 610, 628.

not arise. Rather, it turns on the status of the claimant as party having an interest in land. Hence, in the direct-payment cases, the limiting factor which justifies the presumption is the claimant's status as surety or owner of an interest in property. The need for such a status excludes from subrogation strangers either to the guaranteed debt or to the property; hence, if such strangers were to seek to discharge a guaranteed debt or encumbrance upon property, not having the necessary status, they would not have the benefit of the presumption of intention in favour of subrogation. The status gives rise to the presumption of intention; and if it is unrebutted, that intention in turn gives rise to the right to subrogation; and it would be inaccurate to say[173] that the right to subrogation arises automatically simply upon payment: both the appropriate status of the paying claimant and his unrebutted presumed intention are necessary to generate that right; otherwise, the claimant might well be described as merely a volunteer.

On the other hand, in indirect-payment cases, the claimant's right to subrogation turns on the actual intentions of the claimant and debtor. This is so where a lender provides either the purchase money of property or the means to discharge an encumbrance upon property. Here, rather than the status of the claimant, the limiting factor is instead seen to be the actual intention of the parties, and the courts embark upon an analysis of the particular facts[174] of the case to determine that intention.[175] If there is little warrant to postulate an automatic right to subrogation in direct-payment cases, there is even less warrant to do so[176] in the indirect payment cases. Again, in principle, such automatic subrogation cannot be right.[177] In the vendor's lien cases, the mere fact of the claimant's loan to the debtor is not sufficient to generate the claimant's right to subrogate to the creditor vendor's lien, and

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173 Though this might inaccurately be gathered from the authorities collected in n18 above.

174 In this notion of 'fact-based subrogation', there are conscious echoes of – if not necessarily analogies with – the notion of 'fact-based fiduciaries'; Law Commission (1992) *ibid*; Worthington (2003) 130.

175 See pp84, 87-88 above.

176 Though, again, it is has been done: *Chetwynd v Allen* [1899] 1 Ch 353, 357 (Romer J) may be an example; more obvious are: *Butler v Rice* [1910] 2 Ch 277, 282 (Warrington J); *Ghana Commercial Bank v Chandiram* [1960] AC 732, 745 (Lord Jenkins); *Burston Finance v Speirway Ltd* [1974] 3 All ER 735, 738 (Walton J); *Re South Coast Boatyard*; *Barbour v Burke* (High Court, unreported, 20 November 1979) 8 (McWilliam J); *Boodle Hatfield v British Films Ltd* [1986] FLR 134 (Nicholls J).

177 *Cp Wylie v Carlyton* [1922] 1 Ch 51, 63 (Eve J); *Paul v Speirway* [1976] Ch 220; *Orakpo*, 105 (Lord Diplock); *Bank of Ireland v Daly* [1978] IR 79, 83 (McMahon J); *Barclays Bank v TOSG Trust Fund Ltd* [1984] AC 626, 638 (Oliver LJ); *Highland Finance v Sacred Heart College of Agriculture* [1998] 2 IR 180, 187-189; [1997] 2 ILRM 87, 94-96 (Blayney J).

it should be likewise in the mortgage and invalid loan cases: in all these cases, subrogation only arises where it is the intention of the parties that the claimant should have security for his advance.

Furthermore, in the intermediate case of a claimant who is neither a surety nor otherwise interested in the property but who nevertheless pays the creditor directly at the request of the debtor, the claimant lacks the necessary status to generate a presumption, and subrogation still turns on the actual (rather than presumed) intentions of the parties. The intermediate cases also demonstrate the necessity to take care not to apply the presumption on facts where there is no status to justify it. In *Ghana Commercial Bank v Chandiram*,[178] Lord Jenkins stated the presumption on intermediate facts, but has been followed in indirect-payment cases.[179] On the analysis here, then it is clear when to apply the presumption (in direct payment cases where the claimant's status generates it), and when to seek the actual intentions of the parties (all other cases).

If the right to subrogation arises in these cases only where the parties intend that the claimant's advance to the debtor would be secured, it follows that if the parties *do not* intend such a security, there will be no such subrogation.[180] More generally, if the advance from the claimant to the debtor was intended to be unsecured, then the right to subrogation will not arise.[181] In particular, if a contract between the claimant and the debtor is silent on the question of security, a court can (and often will) infer that the claimant's advance was not intended to be secured.[182] However, if the claimant's advance to the debtor was intended to be secured, and the advance was indeed used to pay the creditor, but the security either never happened or was ineffective, then the claimant can be subrogated to the creditor's rights as against the debtor. Furthermore, the intention that the claimant's advance be secured may be derived not necessarily from a formal contract between the

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[178] [1960] AC 732.

[179] Examples include *Re Tramway Building and Construction Co Ltd* [1988] Ch 293; *Halifax Mortgage Services v Muirhead* (1998) 76 P&CR 418, 425-426 (Evans LJ); Mitchell (1998)a.

[180] *Paul v Speirway* [1976] Ch 220; text after n53 above.

[181] *Wylie v Carlyton* [1922] 1 Ch 51, 63 (Eve J); *Boodle Hatfield v British Films Ltd* [1986] FLR 134 (Nicholls J): presumed intention would arise, unless some factor which displaced it, as by a term in a contract inconsistent with subrogation; followed in *Highland Finance v Sacred Heart College of Agriculture* [1998] 2 IR 180, 189; [1997] 2 ILRM 87, 95-96 (Blayney J).

[182] *Paul v Speirway* [1976] Ch 220, 232 (Oliver J); *Orakpo*, 104-105 (Lord Diplock).

parties,[183] but from the "whole circumstances of the transaction".[184] Indeed, some courts have gone so far as to suggest that it is not necessary to demonstrate that the parties affirmatively intend such a security, it being sufficient if it cannot be shown that they did not intend one.[185] Whether the authorities really go quite this far is open to question, but it is clear that they have adopted not the very strict requirement of affirmative proof that security was intended but rather the less stringent standard that there be no evidence that security was not intended.

Where the right to subrogation turns on the actual intentions of the parties, the question arises as to whether the intention of the claimant is sufficient, or whether that of the debtor is also necessary. Those who take the misguided approach that subrogation occurs automatically here deny the relevance of the debtor's intention, on the grounds that the debtor is merely swapping one creditor for another when the claimant steps into the creditor's shoes.[186] But this cannot be right. As Meagher, Gummow & Lehane[187] put it in the mortgage context, the transaction must affect the conscience of the debtor mortgagor if he is still to be treated as bound by the mortgage but now for the benefit of the claimant;[188] otherwise, the claimant might be described as merely a volunteer.[189]

Neither the presumption of intention nor the search for actual intention can by itself adequately explain all the cases; both are necessary: the former explains the cases where the claimant with the appropriate status pays the creditor directly; the latter covers the cases where the claimant deals not with the creditor but with the debtor. In both cases, subrogation arises as a matter of law and independently of contract. To these two cases –

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[183] Though in some cases there will be a formal contract (especially the cases where the claimant has made a loan to the debtor for the purchase of property), in many others – especially (by definition) the invalid loan cases – there will not be one. Indeed, since the presence, between the claimant and debtor, of a valid contract which does not provide for a security may very well lead to the inference that the parties did not intend that the claimant's advance be secured and thus deny subrogation, it may even be better for the claimant that there not be such a contract!

[184] *Evandale Estates Pty v Keck* [1963] VR 647, 652 (Hudson J),

[185] *Boodle Hatfield v British Films Ltd* [1986] FLR 134.

[186] This is a theme in the authorities collected in n176 above.

[187] Meagher, Gummow & Lehane (1992) 265-266 [912]-[913].

[188] *Cochrane v Cochrane* (1985) 3 NSWLR 403, 405 (Kearney J) (must affect the conscience of the mortgagor).

[189] *Campbell Auto Finance Co v Warren* [1933] 4 DLR 509, 516; *Re Chobariuck and Canadian Johns Manville Co Ltd* (1962) WWR 680; *cf Hill v ANZ Bank* (1974) 4 ALR 634.

presumed intention, and actual intention, both giving rise to non-contractual subrogation – must be added a third case, of actual intention giving rise to contractual subrogation; this is the insurance pattern,[190] which for the reasons already given has little to say to the other categories.

On this view, not only is it possible to construct a theory of subrogation upon notions of intention, but this theory is seen to emerge organically from the cases. In *Patten v Bond*, Kay J – following *Forbes v Moffatt* and *Burrell v The Earl of Egremont* – held that

> where a person not interested in the equity of redemption pays off part of the mortgage, that is not a discharge; it is not the intention of the [payor] that this should be a complete discharge. The court always looks at the intentions of the parties, and presumes an intention to do that which is most for the benefit of the party who payed the money. The court will assume that the mortgage is not discharged, even though the whole of the debt was paid off to the mortgagee, but considered it to be kept on foot in equity for the benefit of the person who paid. … the man who pays … has a right to have the mortgage kept alive for his benefit, a right to stand in the position of the mortgagee.[191]

This is a classic statement of the presumption, in the context subrogation by an owner of an interest in property paying off a prior encumbrance. Nevertheless, Mitchell is hostile to any role for intention in this context,[192] arguing that the focus on intention "is unsound in principle, and … rests upon a flawed line of authority",[193] in part because "the true basis of these cases [*viz*, *Forbes* and *Burrell*] is that they provide an equitable exception to the doctrine of merger".[194] But this is not an objection; these cases form part of a line of authority dealing with payments by parties with interests in property, all of which turn on the search for intention, guided first by presumption, (either of subrogation in the case of payors with partial interests in the property, or of merger in the case of payors with full interests), and then by evidence to support or rebut the relevant presumption. It is, therefore, structurally the same enquiry in both contexts, and authorities in respect of one may properly be relied upon in respect of the other.[195]

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[190] See *BFC v P*arc [1999] 1 AC 221, 231 (Lord Hoffmann); *cp Orakpo*, 104 (Lord Diplock), 119 (Lord Keith).

[191] (1889) 60 LT 583, 585.

[192] Mitchell (1994) 12-14

[193] *Ibid*, 13; *cp* 145-148, 169; *cf* Hedley, 123-124.

[194] Mitchell (1994) 14.

[195] See n104 above.

Although the Court of Appeal rejected Mitchell's argument,[196] the House of Lords in *Parc* seem to have accepted it, Lord Hoffmann in particular analysing the cases identified by Mitchell and finding them wanting:[197]

> These cases seem to me to show is that it is a mistake to regard the availability of subrogation as a remedy to prevent unjust enrichment as turning entirely upon the question of intention, whether common or unilateral. Such an analysis has inevitably to be propped up by presumptions which can verge upon outright fictions, more appropriate to a less developed legal system than we now have. I would venture to suggest that the reason why intention has played so prominent a part in the earlier cases is because of the influence of cases on contractual subrogation. …[198]

Leaving aside for the time being the issue of whether subrogation is a response to unjust enrichment, there are many problems with this passage. First, although the intention cases require careful treatment and in particular require a distinction to be drawn between the direct-payment cases where the claimant's status generates the presumption, and indirect-payment cases which turn on the intentions of the parties, once that distinction is seen to emerge from the cases, it turns out to be both sound in principle and borne out by the authorities.[199] Second, the presumption cases, especially those relating to owners of interests in property, are one aspect of a finely crafted matrix of interlocking presumptions; far from being undeveloped, they instead reflect legal conceptions of extraordinary subtlety. That context – far from contract – supplies the reason why presumed intention has played a prominent part in the earlier cases. Indeed, it turns out that it is Lord Hoffmann's analysis of the cases, and not the intention theory of subrogation, which is misguided, misconceived and ahistorical.

Hence, when the right to subrogation arises as a matter of law, it turns on intention, either presumed from status or arising on the facts. However, if that necessary intention is absent, it is easy to characterise the claimant as a volunteer; and this, in turn, raises questions as to the role of voluntariness and officiousness in this context.

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[196] *Castle Phillips Finance v Piddington* [1995] 1 FLR 783, 793-494 (Peter Gibson LJ) rejecting Mitchell (1992).

[197] Mitchell begins with *Patten v Bond*; Lord Hoffmann begins with *Chetwynd v Allen* [1899] 1 Ch 353; and continued on with *Butler v Rice* [1910] 2 Ch 277; *Ghana Commercial Bank v Chandiram* [1960] AC 732; and *Paul v Speirway* [1976] Ch 220; he referred to *Boscawen v Bajwa* [1996] 1 WLR 328; [1995] 4 All ER 769, with approval.

[198] [1999] 1 AC 221, 234.

[199] Admittedly, it is a distinction which the cases have not always themselves drawn, and it is absent from Mitchell's and Lord Hoffmann's analyses.

2.7 Voluntariness and Officiousness.

It is said to be a bar to subrogation that the claimant acted voluntarily or officiously[200] in making the payment giving rise to the claim,[201] but it is notoriously difficult to pin down this concept of voluntariness. Mitchell's discussion in the context of subrogation raises more questions than it answers.[202]

In most categories of subrogation, the claimant has a direct personal restitutionary claim against the debtor, but nevertheless seeks to subrogate to the creditor's claims because they are secured. On the one hand, reflecting the Victorian "philosophy of robust individualism",[203] such common law claims are usually barred if the claimant acted voluntarily.[204] Hence, a payment to a creditor by a stranger to a debt does not discharge that debt,[205] unless it is adopted by the debtor,[206] and the stranger has no action against the debtor[207] unless the stranger has been compelled to discharge the debt.[208] This is because the stranger will be taken to have acted voluntarily if he has not been compelled.[209] It is easy to apply this concept of voluntariness to the subrogation context. If a payment to a creditor by a stranger to a debt does not discharge that debt, so that the stranger will be taken to have acted voluntarily and therefore has no direct personal action against the debtor, then that stranger seeking to subrogate to any claims which the paid-off creditor might have against the debtor should also be taken to have acted voluntarily and therefore should not be able to have a subrogated right of action against the debtor.[210]

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200 Dawson (1974); McCamus (1978); *cf* Dagan (1999). Both words are used in the cases and the literature. In this section, I will simply refer to voluntariness, and will mean it to include officiousness.

201 Goff & Jones (2002) 130 [3.015].

202 Mitchell (1994) 162-167; *quaere* how he would apply his later views in respect of contribution (n320 below) to the subrogation context?

203 *Peel v Canada* (1993) 98 DLR (4th) 140, 152 (McLachlin J).

204 Goff & Jones (2002) 51 [1.063], 64-68 [1.078]-[1.082]; *Mara v Ryan* (1838) 2 Jones 715 *Taylor v Laird* (1856) 25 LJ Ex 329, *Re Leslie; Leslie v French* (1883) 23 ChD 552; *Falcke v Scottish Imperial Insurance Co Ltd* (1886) 34 ChD 234; *Hackett v Smith* [1917] 2 IR 508 (Mitchell (2003) 126 [6.14] n37); see pp139-141 below.

205 *Walter v James* (1871) LR 6 Ex 124.

206 *Belshaw v Bush* (1851) 11 CB 191; *Purcell v Henderson* (1885) 18 LR (Ir) 466.

207 *Pownal v Ferrand* (1827) 6 B&C 439, 443-444 (Bayley J).

208 *Exall v Partridge* (1799) 8 TR 308; *East Cork Foods v O'Dwyer Steel* [1978] IR 103.

209 *Lambert Implements v Pardell* (1964) 50 WWR 310; *Owen v Tate* [1976] QB 402; Cornish (1975); Oakley (1975); Beatson & Birks (1976); Friedmann (1983); Muir (1990).

210 On one reading *Cleadon Trust* [1939] Ch 286 is authority for this: see pp91-93 above.

On the other hand, in respect of the specific kind of personal claim underlying many subrogation claims, that is to say, in claims to contribution or reimbursement, Mitchell argues that the authorities do not bear out the existence of a voluntariness *bar*, merely that it is a relevant factor to be considered,[211] so that there is in the context of claims to contribution or reimbursement no firm rule one way or the other in respect of voluntariness.[212] Furthermore, applying a strict notion of voluntariness to subrogation claims would undercut the great majority of the cases in which subrogation has been granted. As regards direct-payment cases, it would preclude subrogation by sureties: although they are of course compelled[213] under their contracts of guarantee to discharge the principal debt, they nevertheless voluntarily put themselves in the position to be so compelled.[214] It is *a fortiori* in the case of direct payors of mortgages who pay off the encumbrance to improve their security; this seems self-evidently voluntary,[215] often lacking even the veneer of compulsion which attends sureties. Indeed, since the necessary intention is presumed, it is easy to see why the voluntariness of the claimant in such cases should matter so little. As regards indirect-payment cases, there is usually a contract (or almost[216] always some arrangement) between the claimant and the debtor; that is to say, the claimant will have put himself voluntarily in the position in which he has paid the debtor. In other words, if as strict an understanding of voluntariness as applies in respect of the common law personal claim[217] were to be applied in the context of subrogation, very few claims to subrogation would succeed. Consequently, a weaker understanding of

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211 Mitchell (2003) 62, 136-139, [3.34], [6.33]-[6.40]; in part because such claims are policy-motivated (text after 319, below), so that the claimant's voluntariness need not necessarily be fatal (*ibid*, 137, [6.34]).

212 *Ibid*, 139 [6.34]; Friedmann (2003) 853-855.

213 Or liable to be compelled: *Thomas v Nottingham Incorporated FC* [1972] Ch 596, 606 (Goff J); *Stimpson v Smith* [1999] Ch 340, 352-353 (Judge LJ).

214 This was sufficient for the claimant in *Owen v Tate* [1976] QB 402 to be found to have acted voluntarily. Although sureties are often commercial volunteers doing business guaranteeing loans, they will still be volunteers even in non-commercial settings, as where friends or family member of the debtors guarantee the debts.

215 One of the reasons why the word "officious" was expressly excluded from this analysis is that it carries pejorative judgmentalist overtones, but even with that ulterior meaning, the word "officious" would not be inappropriate to describe such conduct. *Cf* s2.7 below.

216 Apart from stray cases like *McCullough v Marsden* (1919) 45 DLR 645 (*cp Boscawen v Bajwa* [1996] 1 WLR 328; [1995] 4 All ER 769 (CA)) in which the debtor stole the claimant's money; on no theory of voluntariness could the claimant here be held to have acted voluntarily. *Cp Bishopsgate Investment Management v Homan* [1995] Ch 211, 221 (Leggatt LJ) seeing the force of counsel's submission that "if an asset were used as security for an overdraft which was then discharged by means of misappropriated money, the beneficiary might obtain priority by subrogation".

217 Apart from claims to contribution and reimbursement, if Mitchell is right.

voluntariness, similar to that which Mitchell detects in the context of contribution, is plainly at work also in the related context of subrogation. Indeed, Hedley goes so far as to say that it is probably confined to cases in which the claimant's payment "is unjustifiable in strictly commercial terms".[218]

Nevertheless, even in these contexts, a much more limited notion of voluntariness *is* at work. Payment by a surety where the principal debt is not in fact due is a voluntary payment;[219] and an unrequested surety will be held to be a volunteer,[220] unless he was compelled[221] or acted out of necessity.[222] Similarly, in the context of direct payors of mortgages or other charges, if it is the claimant's status as holder of an interest in property that allows the payment to discharge the liability and generates the claimant's right to subrogate to the creditor's security against the principal debtor, this would by definition exclude from subrogation strangers to the property who seek to pay off the debt. Any such strangers would almost certainly be volunteers – unless (by parity of reasoning with the surety cases) they were compelled or acted out of necessity. However, exceptionally, in *Boscawen v Bajwa*,[223] such a stranger was not a volunteer. The claimant's money had been advanced to a purchaser's solicitor to be used only for that purchase, and the solicitors in turn paid it on to the vendor's solicitors, who used it in advance of completion to discharge the vendor's mortgage with the Halifax Building Society. Completion never took place. The claimant was plainly a stranger to the Halifax debt and mortgage, but was clearly also not a volunteer; and in the Court of Appeal, Millett LJ held that the claimant could be subrogated to the Halifax's discharged mortgage against the vendor.

Consequently,[224] there would seem to be a stricter voluntariness bar against the much of the underlying personal claim than there is against the (usually secured and thus

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[218] Hedley (2001) 128.

[219] *Sleigh v Sleigh* (1850) 5 Ex 451 (principal debt had not arisen); *Re Morris; Coneys v Morris* [1922] 1 IR 81, 90, 136 (principal debt time barred).

[220] *Cumming v Forester* (1813) 1 M&S 494, 499-500 (Lord Ellenborough CJ); *Hodgson v Shaw* (1834) 3 My&K 183, 190 (Brougham LC).

[221] *Re A Debtor (no 627 of 1936)* [1937] 1 Ch 156.

[222] *The Zuhal K and the Selin* [1989] Lloyd's Rep 151, 156 (Sheen J); Watts (1989).

[223] [1996] 1 WLR 328; [1995] 4 All ER 769; Andrews (1996); Birks (1995); Mitchell (1995).

[224] Though illogically; O'Dell (2000)a 60.

proprietary) subrogation claim.[225] However, beyond that, it is difficult to pin down this "mercurial"[226] concept, not least because other reasons why subrogation fails are often given some additional – misleading – window-dressing in the language of voluntariness. In *The Esso Bernicia*, the real reason why the claim failed was because the payment failed to discharge the debt, and not[227] because the claimant acted voluntarily. Again, where the necessary intention is absent (that is, where the presumed intent in the direct-payment cases is rebutted, or where there is no actual intent in the indirect-payment cases), it is easy to conclude that the claimant acted voluntarily, but that is no more than a conclusion from the application of separate rules, and adds nothing to understanding the notion of voluntariness.

In the end, then, all that can be said with certainty is that some notion of voluntariness is at work to preclude subrogation, but there is little consistency in the cases as to what that notion might mean.

2.8 Themes and Commonalities.

Subrogation seems to be reached for whenever a bank (or other claimant, but it is usually a financial institution of some sort) cannot enforce any other security or payment schedule, and as an argument of last resort, it developed originally in a haphazard and piecemeal way, but has recently seen some important attempts to discern underlying principles. As a first step to understanding these attempts, it is necessary to discern some common themes underlying the various categories of subrogation

The right of subrogation developed pragmatically and in discrete categories;[228] one of the consequences of this history is instability in the term "subrogation"; it covers the personal right of a lender to an *ultra vires* borrower to recover the amount lent; it covers at least one of the complex of rights which an insurer has against an insured; it has been pressed into

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225 *Niru Battery Manufacturing v Milestone Trading (No 2)* [2003] 2 All ER (Comm) 365 (Moore-Bick J) (subrogation and, contribution claims successful, recoupment claim unsuccessful).

226 Goff & Jones (2002) 130 [3.015]; more critical is Hedley: "the weasel word 'voluntary' … the meaning of which seemed [historically] almost impossible to discern" (Hedley (2001) 123; 127-132).

227 *Pace* Mitchell (1994) 164.

228 Goff & Jones (5th ed, 1998) 124; no similar statement appears in Goff & Jones (2002).

service by statute;[229] and it covers many cases where a claimant, having directly or indirectly paid a creditor, seeks to be substituted to the rights of the creditor against the debtor. Only this last usage is correct, and attempts to accommodate some or all of the others with it have led to distortions in the analysis of the doctrine. If analysis of subrogation is confined to this last usage, then some common themes can in fact be discerned (indeed many will be obvious already from the analysis which has gone before). First, on the classic triangular fact pattern, where a claimant seeks to be subrogated to the rights of a creditor against a debtor, there must – by definition – be three parties. This seems obvious, but it means that a claimant cannot subrogate to his own claim, and in particular cannot subrogate if he pays off a debt for which he is primarily liable.[230] Mitchell's language has the merit of emphasising this point, by always directing attention to the fact that it is the debtor, PL (and not the claimant, S) who is primarily liable. Furthermore, it is only when the debtor has been discharged by the payment to the creditor that there will be anything to which the claimant can be subrogated. In *Re Towey*,[231] Towey went bankrupt; the bank dishonoured various of his cheques to creditors; six of them sued the bank for negligence, and the bank settled. A claim by the bank to be subrogated to those creditors' claims against the bankrupt failed, presumably because payment by the bank did not discharge the debt to which the bank sought to be subrogated.[232] Indeed, it is only where it is clear that the claimant's money achieved that discharge that the claimant will be able to subrogate.[233] Mitchell's language has the merit

[229] Most statutory usages either refer to some aspect of insurance subrogation or adopt a usage that is analogous either with that context or with the more general genus. However, in the UK the usage in the Third Parties (Rights Against Insurers) Act, 1930 (Michel (1987); Mitchell (1004) 7-8; *Cavaliere v Legal Services Commission* [2003] EWHC 323) is consistent with neither.

[230] *Rotherham v Flynn* (1816) Beatty 555, 559 Lord Manners LC (sureties); *Huggard v Representative Church Body* [1916] 1 IR 1, 13, 18 (O'Connor MR) (same); *Simpson v Thompson* (1877) 3 App Cas 279 (insurance); similarly, the rule against double proof precludes subrogation by a claimant who is also a creditor in the debtor's insolvency: *Barclays Bank v TOSG Trust Fund Ltd* [1984] AC 626.

[231] *Re Towey; A Bankrupt* (High Court, unreported, 24 March 1994, Carney J).

[232] If, *pace* what is said above (n167 above), *The Esso Bernicia* is to be treated as a subrogation case, then Lord Goff's analysis supplies another example: "Esso's payment to the crofters [did] not have the effect of discharging Hall Russell's liability to them. That being so, I do not see how Esso can have a direct claim against Hall Russell in respect of their payments" ([1989] AC 643, 662).

[233] *Re Watson's Estate* (1898) 33 *ILTSJ* 58n (no evidence that the debtor borrower had used the funds to discharge the mortgage to which the claimant sought to be subrogated); *Parkash v Irani Finance* [1970] Ch 101 (same); Mitchell (1994) 39-41; Smith (1996) 33-34; 234 n80, 262 (all simple subrogation), 129-130, 145, 150, 152-154, 233, 283-284, 306 n58, 354 n252, 355 n257 (all reviving subrogation); *cf* Hedley (2001) 144-146. This may be a subrogation-related reason why the claim in the difficult *Re Byfield* failed: "I would point out that this is not a case in which the bank made a payment for the express purpose of paying creditors; the money was the bankrupt's own money, a credit balance, and was paid at her order to her

of emphasising this point, by always directing attention to the fact that it is to a right held by the creditor as right holder, RH, that the claimant seeks to be subrogated. Hence, in *Boscawen v Bajwa*,[234] the claimant successfully traced[235] his funds into the discharged debt, to which he was then able to subrogate.

Second, there are very great similarities between cases involving sureties and cases involving discharges of mortgages: both pay the creditor directly, and their intention to be subrogated to the security which would otherwise be discharged by that payment is presumed from their status as sureties or parties with an interest in the encumbered property, respectively. These direct-payment cases have been linked above as examples of 'status-based subrogation', and cases on one of these categories are often cited in the context of the other. Again, there are very great similarities between cases of lenders subrogating to vendor's liens, indirect mortgagor-payors, and cases of lenders subrogating to other discharged securities: in such cases, the claimants pay the debtors who pay the creditors, but the claimant's own securities *vis-à-vis* the debtors are usually ineffective, and their right to subrogation turns on whether an intention to be secured can be spelt out on the facts. These indirect-payment cases have been linked as examples of 'fact-based subrogation', and cases on one of these categories are often cited in the context of others.

Third, it will therefore be seen that subrogation turns on intention. Indeed, on closer inspection, in transpires that there are two separate species of intention, presumed from status in direct-payment cases, or arising on the facts in indirect-payment cases. Of course, it goes almost but not quite without saying, that if the relevant species of intention is not made out, then neither is the right to subrogate. Fourth – and whatever may be meant by the concept – it is clear that the right does not accrue to a volunteer. Fifth, the right to subrogate can be expressly or impliedly waived or modified by contract,[236] by statute,[237]

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mother. It was not disputed that the mother went on to pay some creditors, but there was no immediate compelling nexus between those payments and the bank's act …" ([1982] 1 All ER 249, 255 (Goulding J)).

234 [1996] 1 WLR 328; [1995] 4 All ER 769.

235 I have elsewhere (O'Dell (1999), following Smith (1996)) given my reasons for using the term "tracing" as a synonym for "identification" as distinct from "claiming", as Millett LJ does in the case itself ([1996] 1 WLR 328, 334; [1995] 4 All ER 769, 776).

236 See, *eg*, nn26-28 above; Mitchell (1994) 48, n55.

237 *Cochrance v Cochrane* [1985] 3 NSWLR 403, 405 (Kearney J); *Re TH Knitwear (Wholesale) Ltd* [1988] 1 Ch 275; *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40 [122] (Lord Hope); pp 78, 81-82 above.

and for policy reasons. Finally, equity allows the development of new categories of subrogation by analogy with the existing ones.[238]

There has been much loose usage of the language of intention; including the application of the direct-payment presumption to the intermediate and indirect-payment cases, and both wide and narrow formulations of each species of intention. This general looseness has been encouraged by the tendency to describe the right to subrogation as an equity, arising on equitable principles, indeed on *flexible* (for which read imprecise) equitable principles. This language is common, especially in the early cases;[239] and as a consequence, where subrogation is seen as predicated upon equitable principles seeking to do justice between the parties, it is then often[240] assumed to be subject to a discretion[241] to raise the right, or exclude it where its application would produce an unjust result.[242] On this view – and in modern terms especially in Australia – subrogation would turn on unconscionability.[243]

Such language may be all that we are left with if common themes of liability and defences cannot be derived; but it is hardly helpful[244] especially to the commercial parties who constitute the vast majority of claimants seeking to subrogate; the fact that a doctrine is equitable in the sense of being a creature of equity is no reason to think that it must be unprincipled; and this very imprecision and lack of principle is itself a spur to the development of more precise bases of liability. At least three have recently emerged, and it is to them that this analysis now turns.

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238 *Orakpo*, 112 (Lord Edmund-Davies); *Re TH Knitwear (Wholesale) Ltd* [1988] 1 Ch 275, 284, 286 (Slade LJ); Meagher, Gummow & Lehane (1992) 283, [952]; Ward & McCormack (1999); Ward & McCormack (2000).

239 See, *eg*, the authorities collected in n20 (sureties; *cp* n48) above; the authorities collected in nn80 and 83 (owners of interests in land) can be read in this way; see also nn163-164 (insurance).

240 Though not always: in *Bankers Trust Co v Namdar* [1997] NPC 22, Peter Gibson LJ treated subrogation as equitable but not necessarily discretionary.

241 *Morris v Ford Motor Co* [1973] 1 QB 792, 800-801 (Lord Denning MR), 807 (Stamp LJ); *Re Chipboard Products* [1994] 3 IR 164 , 174 (Barr J).

242 *Boodle Hatfield v British Films Ltd* [1986] FLR 134.

243 There are traces of this in *Re Cleadon Trust* [1939] Ch 286, 316 (Scott LJ) ("unconscionable"), 324 (Clauson LJ) ("unconscientious"); *Lord Napier and Ettrick v Kershaw* [1993] AC 13, 738 (Lord Templeman) ("unconscionable"); *Boscawen v Bajwa* [1996] 1 WLR 328, 335; [1995] 4 All ER 769, 777 (Millett LJ) ("unconscionable"); *Halifax Mortgage Services v Muirhead* (1998) 76 P&CR 418, 427-428 (Evans LJ); it is explicit in *Cochrane v Cochrane* (1985) 3 NSWLR 403 (Kearney J); *Evandale Estates Pty v Keck* [1963] VR 647 (Hudson J); *Rogers v Resi-Statewide Corpn Ltd* (1991) 105 ALR 145.

244 Rotherham (2002) 264.

3. Explaining Subrogation

For some, it is sufficient merely to set out the various categories of subrogation, possibly notice some similarities between some of the categories, and perhaps to incant that the categories are not closed, and to leave analysis there. This is the archipelago view. For others, this is insufficient, and a tighter connection is both necessary and possible. These tighter connections come in at least two levels of abstraction, confederation views which draw the cords together on the basis of a relatively vague formula, and federation views which prescribe a much more detailed principle of liability. Mitchell's unjust enrichment approach to subrogation is the pre-eminent example of such federalism, and is the ultimate focus of this chapter.

3.1 Subrogation: The Archipelago View.

The pre-eminent exemplars of the archipelago view of subrogation are Meagher, Gummow & Lehane.[245] They are content to set out the categories – which, for them, are not closed[246] - and conclude "there are no universally applicable criteria for the intervention of equity [in such cases, though] the areas considered in this chapter show equity developing empirically".[247] However, enough has been done already in this chapter to demonstrate that there are significant shared themes and commonalities across (most of) the various categories of subrogation. Failure to recognise and build upon this has led to serious doctrinal confusion; in particular, there is little in the Meagher, Gummow & Lehane approach to determine when it is appropriate or not to argue by analogy from one category of subrogation to another, or to sort out the role of intention, let alone the scope of the voluntariness bar. In an area in which doctrine meets commerce, this simply will not do.

3.2 Subrogation: The Confederation Views.

If Meagher, Gummow & Lehane spend their time in the trenches with the categories taking the archipelago view that there is no organising principle at all, then those who take a confederation view spend their time gazing at the stars taking an abstract view of the principle organising the categories of subrogation. Pre-eminent among them is Heldley's attempt to make subrogation simpler.[248] He argues that a coherent doctrine uniting

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245 (1992) chapter 9; to some extent the same might be said of Goff & Jones (2002) chapter 3.

246 See n238 above.

247 See 282 [949].

248 Hedley (2001) chapter 5 entitled "Subrogation Made Simpler".

recoupment,[249] contribution, and subrogation can be found in the broad general principle that (subject to defences) the claimant can exercise whatever rights the creditor would, but for the claimant's payment, have had against the debtor.[250] However, this claims far too much, basing subrogation merely upon payment. The cases are clear that something more than payment is required, and that something more is to be found in the intentions of the parties, presumed from status or arising on the facts. Rather than solving the problem, Hedley has simply interpreted it away.

Another confederation view emerges from the speech of Lord Salmon in *Orakpo*:

> The test as to whether the courts will apply the doctrine of subrogation to the facts is entirely empirical. It is, I think, impossible to formulate any narrower principle than that the doctrine will be applied only when the courts are satisfied that reason and justice demand that it should be.[251]

This formula is similar to, and is as unhelpful as, references to the equity of the case or the unconscionability of one or other of the parties. 'Reason and justice' – though clearly important high-level considerations – comprise an unsatisfactory formula upon which to base individuated decisions; it is a formula which provides little by way of predictive utility, it is only if they are spelt out with greater particularity that they become useful. And that level of particularity comes from federation views.

All those who take a confederation view make an equal and opposite mistake to that made by Meagher, Gummow & Lehane. Whilst the latter deny that there are any organising principles, the former present ones that are so vague and imprecise as to be unhelpful if not unworkable. Steering a middle course is the federation view exemplified by Mitchell's unjust enrichment approach.

3.3 Subrogation: The Federation View: Unjust Enrichment.

At first blush the principle against unjust enrichment seems an entirely appropriate

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[249] By which he means cases of compulsory discharge of the debt of another, (*ibid*, 119); for other related meanings of that word: Goff & Jones (2002) 375-376 [13.001]-[13.003]; Mitchell (2003) 9-10, [1.14]-[1.16]; *cf Niru Battery Manufacturing v Milestone Trading (No 2)* [2003] 2 All ER (Comm) 365.

[250] *Ibid*, 119-120, 124-125, 131, 148; *cp* Stoljar (1987) 174.

[251] [1978] AC 95, 110; *cf* Rotherham (2002) 248-249; *Re TH Knitwear (Wholesale) Ltd* [1988] 1 Ch 275, 286 (Slade LJ); *Highland Finance v Sacred Heart College of Agriculture* [1998] 2 IR 180, 192; [1997] 2 ILRM 87, 98 (Blayney J); Doyle (1994); text after n65 above; *cp Niru Battery Manufacturing v Milestone Trading (No 2)* [2003] 2 All ER (Comm) 365 [52] (Moore-Bick J).

candidate to bring order to an area of the law seemingly crying out for systematisation. Despite Lord Diplock's famous rejection of such an approach in *Orakpo*,[252] there was some support for it in the caselaw;[253] and despite some academic opposition,[254] it was systematised by Mitchell,[255] hinted at in Ireland in *Highland Finance*,[256] largely adopted by the House of Lords in *Banque Financière de la Cité v Parc (Battersea) Ltd*,[257] and has been followed since.[258]

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252 [1978] AC 95, 104: "… there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based upon civil law. … [Subrogation] takes place … in a whole variety of widely different circumstances. … This makes particularly perilous any attempt to rely upon analogy to justify applying one set of circumstances which would otherwise result in unjust enrichment a remedy of subrogation which has been held to be available for that purpose in another and different set of circumstances". Such sentiments have been followed in cases like *Byfield* and *Towey*. Each of these cases turned on other issues (text after nn29, 240) and the rejection of the unjust enrichment approach was unnecessary for each of the decisions.

253 *Re TH Knitwear (Wholesale) Ltd* [1988] 1 Ch 275, 283-284 (Slade LJ); *Boscawen v Bajwa* [1996] 1 WLR 328, 335; [1995] 4 All ER 769, 777 (Millett LJ) (though this passage is not determinative as it manages to mention almost all of the various approaches discussed in this chapter); *Halifax Mortgage Services v Muirhead* (1998) 76 P&CR 418, 425-426 (Evans LJ) (tentatively). In *Euroactividade v Mason* (QBD, unreported, 18 April 1994) Judge Milman QC held in favour of the claimant on the basis of claims he described as tracing at law and equity, subrogation, and unjust enrichment. Furthermore, if the *ultra vires* loan cases are properly restitutionary, and if the other categories of subrogation (except the *sui generis* category of insurance) also turn out to be restitutionary, then they could be re-integrated into the general law of subrogation; but they are sufficiently odd that they probably of themselves provide little support for a restitutionary view of subrogation in general. Finally, here, the cases which predicate subrogation upon formulae such as natural justice and equity, or reason and justice, might retrospectively come to be regarded as incohate statements examples of unjust enrichment reasoning, much as similar language has been in *Moses v Macferlan* (1760) 2 Burr 1005.

254 Gummow (1990) 47, 69-70.

255 James (1971); Birks (1989) 93-98, 389-393. James is criticised in Meagher, Gummow & Lehane (1992) 281-282, [948]-[950] not least because it "puts the attitude of equity to unconscientious benefits too widely, as not all benefits [so conferred] … give rise to equitable intervention; the attitude to voluntary benefits … makes this clear" (282, [949]). Birks is criticised in Rotherham (2002) 331-333 not least because "it fails comprehensively as an analysis of the positive law" (333). Mitchell is critiqued in Quinn (1996).

256 [1992] 1 IR 472, 480 [1993] ILRM 260, 266 (Murphy J); *affd* [1998] 2 IR 180; [1997] 2 ILRM 87; *cp Doyle v Wicklow Co Co* [1974] IR 54, 72.

257 [1999] 1 AC 221 (HL); Armstrong & Cerfontaine (2000)a; Bridge (1998); Mitchell (1998); Waller (1998); Watts (1998); Friedmann (1999); Halliwell (1999); Robertson (1999) Villiers (1999); Wright (1999); Worthington (2000).

258 *Re Hunter (dec'd); Currie v Hunter* (unreported, 3 March 1998; Master Ellison); *Abbey National v Haynes* (Court of Appeal, unreported, 21 May 1999) (Peter Gibson LJ); *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (Court of Appeal, unreported, 17 December 1999) (Robert Walker LJ); *Howkins and Harrison (A Firm) v Tyler* (Ch D, unreported, 18 February 2000, Judge Behrens); *Weldon v GRE Linked Life Assurance* (QBD, unreported, 14th April 2000, Nelson J); *Khan v Permayer* (Court of Appeal, unreported, 22 June 2000); *Halifax v Omar* [2002] EWCA Civ 121; *Eagle Star Insurance v Karasiewicz* (Court of Appeal, unreported, 25 April 2002); *Pratt v Medwin* (ChD, unreported, 20 September 2002, Judge Proudman QC); *Liberty Mutual Insurance Company (UK) Ltd & Another v HSBC Bank* [2002] EWCA Civ 691, [43] (Rix LJ); *Stephen Donald Architects v King* [2003] EWHC 1867 [77] (Judge Seymour QC); *North Atlantic Insurance v Nationwide General Insurance* [2003] EWHC 449 [63]-[66] (Cooke J); *Niru Battery Manufacturing v Milestone Trading (No 2)* [2003] 2 All ER (Comm) 365 [29] (Moore-Bick J).

Mitchell begins with the customary definition: "[s]ubrogation is literally 'substitution'. … [It is] a process by which one party is substituted for another so that he may enforce that other's rights against a third party for his own benefit",[259] and then introduces a stable terminology for the three parties.[260] A central case is insurance subrogation, where an insurer having indemnified an insured can subrogate to the latter's actions against the tortfeasor; notwithstanding the claimant insurer's payment, the insured's action continues to subsist,[261] and the claimant is simply subrogated to it. Mitchell therefore calls this "simple subrogation".[262] If the creditor insured were to pursue his cause of action against the tortfeasor, he would recover twice and therefore be unjustly enriched at the claimant's expense; consequently the claimant's subrogation to the creditor's cause of action prophylactially prevents that unjust enrichment. On the other hand, in the context of sureties subrogating to creditors' securities, the claimant's payment to the creditor has the effect of discharging the creditor's rights and securities as against the debtor; and the law must revive them before allowing the claimant to subrogate to them.[263] Mitchell therefore calls this "reviving subrogation".[264] Here, the claimant's rights as against the debtor having been discharged by the claimant's payment, the debtor no longer owes the debt, and is therefore unjustly enriched at the claimant's expense; consequently the claimant's subrogation to the creditor's rights and securities reverses that unjust enrichment. Thus, simple subrogation *prevents* unjust enrichment, whilst reviving subrogation *reverses* it; in Mitchell's view, both are therefore restitutionary.[265] One important consequence of the distinction is that, whilst the claimant in a simple subrogation action must (usually) pursue it in the creditor's name, he can pursue a reviving subrogation claim in his own name.[266] Finally, Mitchell organises the main examples of simple and reviving subrogation according to the recognised heads of unjust enrichment.

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259 Mitchell (1994) 1.

260 His terminology is set out above, text after n7 above, but even when describing the details of his theory, I will persist with my nomenclature of claimant, creditor and defendant.

261 See pp95-96 above.

262 Mitchell (1994) 5, 6, 37-39; Mitchell (2003) 36-41, 143, [2.33]-[2.44], [7.07].

263 Mitchell (1994) 54-60.

264 Mitchell (1994) 6; Mitchell (2003) 270-282, [14.13]-[14.31].

265 Mitchell (1994) 9-12. The language of simple and reviving subrogation has been adopted by the Inner House of the Court of Session in the *Caledonia* case (*Caledonia North Sea Ltd v London Bridge Engineering* 2000 SLT 1123; *affd sub nom Caledonia North Sea Ltd v BT plc* [2002] 1 Lloyd's Rep 553) and by the Law Commission (1999) [10.73].

266 Mitchell (1994) 6, 7, 37-39, 59-60.

There are very great merits in Mitchell's analysis. It provides a stable terminology which allows commonalities to be teased out. It provides a stable pattern of analysis, based upon the application of the principle against unjust enrichment, which simultaneously avoids the nihilism inherent in the archipelago view and the vagueness inherent in the federation views. And it has the potential to provide a ready-made answer to the problems associated with the voluntariness bar – if there are three families of unjust factors – claimant-sided and consent-related, defendant-sided, and policy-motivated – then there is an obvious role for a voluntariness bar: if a claimant-sided consent-related unjust factor is made out, then by definition the claimant did not act voluntarily; whilst if it can be affirmatively established that the claimant acted voluntarily then it would follow that a claimant-sided consent-related unjust factor cannot be made out. Hence, voluntariness is a defence to one family of unjust factors, but only this family. It says nothing in respect of the other two families, where the claimant's voluntariness is not relevant to the matters which constitute the relevant causes of action. This provides a coherent view of how voluntariness might operate in respect of personal claims; and, although the subrogation cases seem to take a different view of voluntariness, nevertheless, if this view were applied, it would at least have the merit of clarifying the law on a decidedly unclear issue. Although this is not Mitchell's own view,[267] his approach nevertheless opens up the possibility of resolving the voluntariness imprecisions in this way.

All of these advantages would now seem to accrue in the aftermath of the decision in *Banque Financiere de la Cite v Parc (Battersea) Ltd*, where the House of Lords unequivocally held that subrogation is an equitable remedy designed to reverse or prevent unjust enrichment. Thus, Lord Steyn held that "the place of subrogation on the map of the law of obligations is by and large within the now sizeable corner marked out for restitution".[268] And Lord Hoffmann said that the term subrogation is "used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived"[269] which he said meant that it is an institution "radically different" from contractual insurance

[267] His discussion in the context of subrogation is inconclusive, though the refinement in the context of contribution is capable of application in the subrogation context: s2.7 above.

[268] [1999] 1 AC 221, 228.

[269] *Ibid*, 231.

subrogation: "One is part of the law of contract and the other part of the law of restitution".[270]

But though the House of Lords in *Parc* were unequivocal about the restitutionary nature of subrogation, there is little else that is unequivocal in that case. BFC lent DM30million to Parc who used it (as £10.097m) to write down an earlier loan from Royal Trust Bank (Switzerland) which had been used to purchase development land at Battersea Wharf, London (and which had been secured by a first charge upon the property). Upon Parc's insolvency, BFC obtained judgment for St£12m against Parc; Omnicorp Overseas Limited (OOL) obtained a judgment for £30m against Parc; and BFC sought by means of subrogation to have priority over OOL's charge against Parc, a claim that succeeded at first instance and failed in the Court of Appeal.

In the House of Lords, BFC modified its stance having regard to the nature of the loan made by BFC to Parc. In order to avoid a disclosure obligation on BFC under Swiss Federal Banking Regulations, the transaction had been structured as a loan by BFC to Mr Herzig, an officer of Omni Holding AG, the holding company for the group of which Parc was a member. Mr Herzig then paid it on to Parc, which later issued him with a promissory note to assign to BFC as security. BFC also demanded and received from Mr Herzig a postponement letter which provided that no company in the Omni group would demand payment of any loans granted to Parc until after the full repayment of the BFC loan to Mr Herzig. BFC expected that the letter protected it against loans granted by Omni group companies to Parc, an expectation that was mistaken and was in the event unfulfilled when the group collapsed and Parc went into liquidation. OOL was another company in the group; it had made loans to Parc to finance the purchase of the Battersea Wharf property, secured by a second charge on it on foot of which it had obtained its judgment for £30m. Neither Parc nor OOL had been aware of Mr Herzig's postponement letter; he had no authority to commit OOL to it, and OOL was not bound by it. In the House of Lords, BFC nevertheless argued that because of the postponement letter, its rights took priority over the rights of OOL, not so much by subrogation to OOL's security as by means of a direct restitutionary remedy against it.

[270] *Ibid*, 231-232.

Applying the four enquiries of the principle against unjust enrichment, Lord Steyn found for BFC on the ground of its mistaken belief that the postponement letter was a form of security which protected it from intra-group indebtedness by postponing payment of loans from companies in the Omni group until repayment of the BFC loan. "In these circumstances there is in my judgment a principled ground for granting a restitutionary remedy".[271] Lord Steyn was at pains to stress that BFC merely sought the "reversal of OOL's unjust entitlement at the expense of BFC. BFC merely asserts restitutionary rights against" OOL.[272] He then held:

> In my view, on an application of established principles of unjust enrichment BFC are entitled to succeed against OOL. But, if it were necessary to do so, I would reach the same conclusion in terms of the principles of subrogation. It would admittedly not be the usual case of subrogation to security rights in rem and in personam. The purpose of the relief would be dictated by the particular form of security, involving rights in personam against companies in the group, which BFC mistakenly thought it was obtaining. It is true that no decided case directly in point has been found. But distinguished writers have shown that the place of subrogation on the map of the law of obligations is by and large within the now sizeable corner marked out for restitution … And there can be no conceptual impediment to the remedy of subrogation being allowed not in respect of both rights *in rem* and rights *in personam* but only in respect of rights *in personam*.[273]

In many ways, this is an important holding: having held that BFC were entitled to a remedy to reverse OOL's enrichment at its expense, he went on to hold that this remedy could be achieved by means of subrogation. So far, so good, for the unjust enrichment explanation of subrogation. However, there are many techniques by which claimants can have restitution (money had and received, account, various trusts), and it does not necessarily follow from the fact that the claimant can have restitution that it must have subrogation; some other technique might be equally if not more appropriate. And so it is here, since it is very difficult indeed to conceptualise BFC's claim in subrogation terms. Put simply, there is nothing in its claim in the House of Lords which meets the classic triangular fact-pattern of a claimant seeking subrogation to a creditor's rights and securities as against a debtor: BFC were not claiming to be subrogated to a continuing or revived security held by anyone against Parc. In Mitchell's language, a claimant subrogates to a creditor's rights against a debtor to prevent or reverse that debtor's unjust enrichment at the claimant's expense; if BFC are the claimant, and OOL the debtor, the

[271] *Ibid*, 227.

[272] *Ibid*, 228.

[273] *Ibid*.

question is: to which rights of which creditor does BFC seek to subrogate to prevent or reverse OOL's unjust enrichment? Indeed, their Lordships adverted to this issue:

> The Court of Appeal considered that subrogation if allowed would place BFC in a better position than if the postponement letter had been binding on Parc and OOL The Court of Appeal considered the matter from the point of view of BFC seeking to step into the shoes of OOL as chargee. But it has now been made clear that BFC merely seeks reversal of OOL's unjust entitlement at the expense of BFC. BFC merely asserts restitutionary rights against OOL. In the circumstances conceptual difficulties about the remedy sought by BFC disappear.[274]

This begs various questions. The Court of Appeal,[275] as reported by Lord Steyn, considered the matter from the perspective of BFC seeking to be subrogated to OOL's charge against Parc. If BFC's money been provided to Parc to write down OOL's charge, and if the parties had so intended, then this could almost have been a straightforward case of a lender seeking to be subrogated to the rights discharged by the application of the loan. But BFC's money was used to write down not OOL's loan but Royal Trust's loan, so it would have made sense had BFC sought to be subrogated to Royal Trust's security, a first charge upon the Battersea Wharf property which indeed would have had priority over OOL's second charge. Lord Steyn commented that "the repayment of £10m of the [Royal Trust] loan *pro tanto* improved OOL's position as chargee". That *may* be sufficient to find enrichment for a personal restitutionary claim[276] (which was the context in which Lord Steyn made the comment), but it is certainly insufficient to justify subrogation to OOL's charge. If it were, it would mean that the payor of a senior encumbrance could have his choice to subrogate to any more junior encumbrance. No case goes that far; indeed, the authorities are clear that the right of subrogation only arises as against the specific charge which is traceably paid off.[277] But even assuming *per impossible* that payment of the prior Royal Trust charge could have allowed BFC to subrogate to OOL's subsequent charge, this is not what BFC sought; instead they wanted a security superior to OOL's charge.

For Lord Steyn, this problem was easily overcome; with one great bound, BFC were free of this conceptual difficulty: "BFC *merely* asserts restitutionary rights against OOL".[278]

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274 *Ibid.*

275 Unreported, 29 November 1996; Mitchell (1998).

276 Though probably not: Worthington (2000) 72-74.

277 See n233 above.

278 [1999] 1 AC 221, 228, emphasis added. *Cp* "*BFC* [is not an example of] subrogation to a security [*Rem*] … [but of] subrogation merely to the indebtedness itself [*in personam*] … BFC succeeded in the

Everything hangs on that "merely"; BFC in the House of Lords were not seeking subrogation to a charge held by OOL (or for that matter by Royal Trust) against Parc; they were making a direct personal claim against OOL. In the sentence just quoted, Lord Steyn recognised that it was a direct claim; and in the last sentence of the main quote set out above, he recognised that it was a personal claim. BFC were seeking from OOL an amount equal to the loan they had made earlier to Parc in the application of which they claimed OOL were enriched. And they succeeded in that direct personal action. In which case, subrogation had nothing to do with BFC's successful direct personal claim against OOL. It seems, then, that the House of Lords, whilst granting the direct claim, unnecessarily and confusingly dressed it up in inappropriate subrogation language. They may have provided BFC with a restitutionary remedy, but they certainly did not allow it to subrogate.

Not only are there serious problems with *BFC*, but the perceived stability which the unjust enrichment understanding of subrogation brings comes with a very heavy price. First, the distinction between simple and reviving subrogation is unnecessary, at least in the way that Mitchell draws it. The central case of simple subrogation is insurance, which is sufficiently different from other cases of subrogation to be treated separately from them;[279] true cases of subrogation all fall, or ought to fall, within what Mitchell characterises as reviving subrogation.[280] Second, many reviving subrogation cases do indeed conform to a restitutionary pattern, but both Rotherham[281] and Hedley[282] query whether it is possible always to fulfil the terms of the four enquiries mandated by the principle against unjust enrichment.

House of Lords on the more limited claim … to be subrogated to RTB not in its capacity as chargee (with accompanying proprietary rights and remedies) but merely in its capacity *as debtor having priority over OOL*". *Halifax v Omar* [2002] EWCA Civ 121 [70] (Jonathan Parker LJ.

279 *Pace* Burrows, who argues that simple subrogation cannot be restitutionary if its aim is to prevent rather than reverse an unjust enrichment (Burrows, 81-82; drawing a gloss from Mitchell (2003) 37-38, [2.37]-[2.38]), prophylactic remedies can easily be accommodated (Williams (2000); O'Dell (2002)). The objection here is that simple subrogation is an unnecessary refinement. Mitchell's instinct to treat the insurance cases separately is correct, but he should have taken one step more, and excluded them completely from his analysis.

280 The procedural differences which Mitchell attaches to the two categories, though they detained the courts in the *Caledonia* case are so easily gone round (even, in the end, in *Caledonia*!) that they are probably more apparent than real: Hedley (2001) 142-144; *Niru Battery Manufacturing v Milestone Trading (No 2)* [2003] 2 All ER (Comm) 365 [44]-[46] (Moore-Bick J).

281 Rotherham (2002) 250-254.

282 Hedley (2001) 132-146; Quinn (1996); *Niru Battery Manufacturing v Milestone Trading (No 2)* [2003] 2 All ER (Comm) 365 [39]-[46] (Moore-Bick J) (confused as to the nature of 'unjust').

As to enrichment, in the context of reviving subrogation, the debtor's enrichment at the claimant's expense arises by virtue of the fact that the claimant's payment to creditor of the debt which the debtor owed to the creditor, discharged the debtor's liability on that debt. If the claimant's payment to the debtor did not discharge the debtor's liability to the creditor, then the claimant cannot be subrogated to the creditor's rights and security as against the debtor. The caselaw, however, is unclear as to when payments by claimants have the effect of discharging debtors' liabilities to creditors. In the indirect-payment cases, no difficulty arises, because payment by the debtor will discharge the debtor's debt.[283] In direct-payment cases, no difficulty arises in most surety cases, but difficulties can arise in cases where it is unclear whether the payor is a surety and in cases where a part-owner of property makes the payment. To resolve these difficulties, Mitchell[284] accepts that the authorities have taken the view that not all such payments by a claimant will automatically discharge the debtor's liability, but argues that "because the case law is in a confused state, and because support for the automatic discharge rule can be found in some of the cases, the House of Lords at least would be justified in holding that such a rule should be adopted in the future".[285] Although his argument allows every such payment automatically to discharge the liability; it is better read as allowing every payment *where there is an unjust factor* automatically to discharge the liability. But, even so qualified, it is not necessary to have recourse to a rule as broad as this. In the indirect-payment cases, where the parties' actual intentions matter, then whether the debtor's payment of the claimant's money to the creditor will discharge the debtor's liability to the creditor should be seen also as a matter of intention,[286] and the parties will usually intend that the payment will have that effect. If however – exceptionally – they do not want the payment to have that effect, the law should respect that, with the consequence that no subrogation will be possible. Again, in direct-payment cases, where the claimant's status gives rise to a presumption of intention in favour of subrogation, that status should also give rise to a presumption of intention to discharge the debt; and if there is evidence that the parties – exceptionally – did not intend that the payment discharge the debt, the law should also

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[283] The same should also hold true for direct payment in the intermediate cases.

[284] (1994) chapter 2; 126-130.

[285] *Ibid*, 20; 25-26; *cf* Mitchell (2003) chapter 9 (discussing the *Caledonia* case; *esp* 176 [9.04]; for a more orthodox approach: Birds (1999); Birds (2000)). But the sky will not fall in if all such payments do discharge; French law survives quite well with such a rule as its starting point, and still reaches conclusions not dissimilar to the common law's outcomes: Whittaker (2000).

[286] The same should also hold true for direct payment in the intermediate cases.

respect that, with the consequence that no subrogation will be possible. This coheres with the general rule that whether a payment discharges a debt is a matter of intention,[287] and provides further support for the general approach to subrogation emerging from this chapter. The cases do not usually concern themselves with the question of discharge, and this may very well be because that question is answered by the intention inquiry, whether that intention to (discharge and) subrogate is presumed from status or arises on the facts.

As to whether that enrichment is at the claimant's expense, this is simply to restate the requirement that is only where it is clear that the claimant's money has achieved the discharge of the debtor's debt to the creditor that the claimant will be able to subrogate.[288] And although Mitchell felt that this requirement was satisfied in *Parc*,[289] it is difficult to see how this could be so when the money paid by BFC was used by Parc to write down its liability to Royal Trusts's charge rather than to OOL.

As to the unjust factor enquiry, it is well nigh impossible to sustain it. Admittedly there are cases in which it is more than possible to *find* unjust factors such as mistake,[290] failure of consideration,[291] and, even, free acceptance.[292] But even though it is possible to find them *ex post facto*, the judges rarely expressed themselves in those terms; and, worse, too many cases have to be overstretched to find an unjust factor, which is often frankly fictional. Take sureties and part-owners; Mitchell explains subrogation in both cases as based on compulsion. For Mitchell, sureties constitute the central case of the principle that "[w]here

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287 See the authorities discussed in the materials cited in n218 above; in particular, note Friedmann (1983)'s argument; *cp* Hedley (2001) 141-142.

288 See text with and in n224 above; *cf* Hedley (2001) 144-146.

289 Mitchell (1998).

290 See Mitchell (1004) chapter 9; Rotherham (2002) 257-260; the obvious example is now *BFC v Parc*.

291 *Boscawen v Bajwa* [1996] 1 WLR 328; [1995] 4 All ER 769 is a good example. The claimant expected to obtain a charge from the purchaser as legal owner after completion of the sale, and, in the event which happened of there being no such completion, did not intend its money to be used at all ([1996] 1 WLR 328, 339; [1995] 4 All ER 769, 781 (Millett LJ); *cp BFC v Parc*[1999] 1 AC 221, 233-234(Lord Hoffmann). This is classic failure of basis language.

292 In his chapter on voluntariness (chapter 12), Mitchell (1994) also discusses some of the part-owner cases which are explained here as examples of status-based subrogation, but is rather puzzled that they demonstrate no plaintiff-sided consent-related unjust factor; however, if it is clear that, when the claimant discharged the creditor's charge against debtor, the creditor freely accepted this, then in principle this should allow the claimant to be subrogated to the creditor's charge against the debtor. In other words, if an unjust factor has to be found to organise these cases, it might be found in free acceptance. If so, the claimant's voluntariness would not form a bar to the claim (s2.7 above).

a plaintiff has been legally compelled to make a payment or, being compellable by law, has made a payment in respect of which a defendant is primarily liable and his payment discharges that obligation, the plaintiff … may … be entitled to [acquire] rights .. via reviving subrogation".[293] As for part owners, their payments are not voluntary at all but "made under a form of practical compulsion … by dint of [their] possession of an interest in [the debtor's] property, [the part-owner claimants] would be so affected by [the creditor's] exercise of his rights against the property that he is effectively compelled to pay [the debtor] himself in order to protect his interest".[294] This is simply not true. In the context of sureties,[295] there is no compulsion in any real sense of the word. The only compulsion arises from "the enforcement of an obligation that was voluntarily assumed".[296] It is *a fortiori* in the case of part-owners who directly pay off an incumbrance.[297] Indeed, Rotherham also concludes that "subrogation in this context is best regarded as a *sui generis* dispensation given to those with a partial interest in property"[298] and not as an example of compulsion.

More recently, Mitchell has shifted ground. At least in the context of sureties, he no longer sees the unjust factor as the claimant-sided consent-related ground of compulsion; instead he now proposes a "better, policy-based explanation",[299] proposing a policy against accumulations[300] to share the burden properly between the parties.[301] However, policy-motivated restitution must be treated with care, lest it become a proxy for untrammelled discretion, loaded with the same baggage that 'unjust' enrichment has so recently

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293 Mitchell (1994) 51.

294. *Ibid*, 167; *cp* Rotherham (2002) 262.

295 For the same reasons, it is difficult to accept Mitchell's characterisation of an indemnity insurer as compelled ((1994) 67), although too much should not be made of this because of the *sui generis* nature of insurance subrogation, and there may exceptionally be some circumstantial compulsion: *Drake Insurance v Provident Insurance* [2003] EWCA Civ 1834; *cf Legal and General v Drake* [1992] 1 All ER 283.

296 Rotherham (2002) 264; who argues that "if sureties want rights against principal debtors they should bargain for them" (*id*); and of course many often do.

297 To be fair, Mitchell (1994) 168 does accept that the element of compulsion in such cases often "seems rather notional" and free acceptance might provide an alternative unjust factor in such cases.

298 Rotherham (2002) 263.

299 Mitchell (2003), 59 [3.28]; *cp* Hilliard (2002) (arguing that the better focus is not on the claimant's impaired consent but instead upon the *fair* distribution of the discharge of the relevant obligation); Kull (2003).

300 On this policy, *cp* Degeling (2003) chapter 8.

301 *Ibid*. 126, 175, [6.13], [9.02]; *cp Drake Insurance v Provident Insurance* [2003] EWCA Civ 1834.

overthrown, or worse, a category reached for in despair when those who would bring a doctrine within unjust enrichment cannot satisfactorily explain it terms of either of recognised unjust factors or a generalised failure of basis. Policy-motivated restitution should be tightly constrained: the policy must be a strong one, independent of the law of unjust enrichment, arising elsewhere in the law but demanding a restitutionary response;[302] such policies should in the first instance be given effect by means of existing unjust factors, and it is only where they prove inadequate to the task that the policy itself should motivate restitution,[303] provided always that restitution should not merely be open on the policy but *mandated* or demanded by it.[304] Mitchell's policy is nothing of the sort. It consists of a circular argument, to the effect that, since that the law says give it back, there must be a policy demanding that it be given back, to justify requiring it to be given back. Such bootstrapping should be avoided if *unjust* enrichment is not once again to fall foul of objections that 'unjust' is no more than a synonym for untrammelled judicial discretion. In the end, Mitchell's argument amounts to the assertion that it is self-evident that sureties can subrogate (and have the underlying personal claims in contribution and reimbursement) simply because they are sureties. All told, it would be easier simply to have said so.

Hence, in the direct-payment cases, there is too much academic legerdemain in the *post facto* ascription of barely plausible unjust factors: neither compulsion nor policy is entirely satisfactory. Indeed, there are many leading cases where no unjust factor is findable at all. To take only one example, in the lender case of *Re Chipboard Products Ltd*, Barr J allowed subrogation where nothing had vitiated the relevant creditor's consent, contract or security, and the decision is not susceptible of explanation in restitutionary terms at all. Furthermore, in the indirect-payment cases, the usual contract between the claimant and defendant-debtor would not only preclude a claimant-sided impaired-consent-related unjust factor but would of itself constitute a bar to restitution.[305] There are, therefore,

302 Thus, there are strong public law policies demanding a restitutionary response to which effect is given by means of the principle in *Woolwich v IRC* [1993] AC 70.

303 The *Woolwich* context again supplies an example, as there the policy was reached for only after mistake and duress had been found wanting.

304 Again, in *Woolwich*, the strong public law considerations mandated the restitutionary response.

305 Goff & Jones (2002) 51 [1.063].

simply too many cases in which subrogation occurs but which the unjust enrichment explanation cannot accommodate.

Furthermore, adopting the unjust enrichment approach entails the necessary rejection of an intention-based approach. Mitchell rejects it; following him, so does Lord Hoffmann in *Parc*.[306] As with Chambers' approach to resulting trusts, such a rejection would shift the focus from a presumed intention on the part of the claimant to the impairment of the claimant's consent. There are therefore important similarities between the enterprises upon which Chambers and Mitchell are engaged. Both are concerned to displace an explanation of each area of the law based upon presumed intention, and replace it with one based upon unjust enrichment. And, as with Chambers' approach, in the end, the Mitchell endeavour does not quite succeed. It does explain some of the case-law, but not enough to make it a compelling account of the principles at work in the area. It did however convince the House of Lords in *Parc*, and although that case threatens to collapse under the weight of its own contradictions, its unjust enrichment analysis is unlikely to go away any time soon.

Nevertheless, in *Halifax v Omar*, Jonathan Parker LJ confined *BFC* to personal claims and, in "a straightforward case involving property rights, calling into play well-settled principles",[307] followed *Thurstan* and *Burston Finance v Spierway* for an approach which was "not in any way affected by the reasoning or the decision of the House of Lords"[308] in *Parc*. The approach here is constructed upon the lines of authority of which *Thurstan* and *Burston Finance* are examples. If *Omar* comes to be accepted, then *Parc* will be confined to the direct personal actions of which the *ultra vires* cases are a major example and *Parc* itself is another, and intention-based orthodoxy – of which the approach here is a refinement – will apply to the three-party cases. It may also be that, in the future, claimants would continue to rely as before upon the existing categories set out in this chapter, whilst new categories of case might develop *either* by analogy with the existing categories *or* – guided by *Parc* – on the basis of the principle against unjust enrichment. But that principle should have no further role in the law of subrogation, and in particular, it should not be taken to organise the existing categories.

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306 See text after n198 above.

307 *Halifax v Omar* [200;2] EWCA Civ 121 [71] (Jonathan Parker LJ).

308 *Ibid*, [80]; approved *Eagle Star Insurance v Karasiewicz* (Court of Appeal, unreported, 25 April 2002) [19].

3.4 Conclusion.

Each of the other views examined here – the archipelago view taken by Meagher, Gummow & Lehane; the various confederation views associated with Hedley and Lord Salmon; and the confederation view associated with Mitchell's unjust enrichment thesis – is wanting in some significant respects. However, on the analysis presented here, another relatively tight federation view emerges from the cases, constructed upon the intentions of the parties, presumed from the status of the claimant or arising on the facts. It runs into few of and solves most of the problems associated with the other approaches; it provides a high degree of predictive utility; and it does not require the wholesale abandonment of long lines of authority or subtle and interlocking principles.

4. Conclusion

The modern law of subrogation is an inheritance from many sources. There are echoes of ancient laws;[309] and many Roman law ideas[310] evolved into the modern civilian doctrine of subrogation[311] which shares many commonalities with its common law counterpart.[312] Whether the modern civilian and common law doctrines are cases of parallel evolution or transplantation, it is clear that the common law has fully absorbed the doctrine, and the modern law is busy trying to put it on a theoretical footing which is not ahistorical and yet predictively useful. In this quest, it has not – to put the point charitably – been entirely successful. As Lord Hoffmann remarked in *Parc*, "the subject of subrogation is bedevilled by problems of terminology and classification which are calculated to cause confusion".[313] If the argument developed here is correct, then Lord Hoffmann has contributed to, rather than helped to clear up, this confusion. It will not be cleared up by Mitchell's unjust enrichment analysis, but rather by one which sees subrogation as based on intention: in direct-payment cases, the claimant's intention to subrogate is presumed from the claimant's status; in other cases, the relevant intention is matter of fact.

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[309] Greenblatt (1997) 1339 n10 (Talmud); Kelly (1988) 168 (Brehon).

[310] Marasinghe (1976). In *Edwards v Motor Union Insurance Co* [1922] 2 KB 429, 252 McCardie J suggested that at least in the context of insurance subrogation, the doctrine was an inheritance from Roman sources; and in *Re Lough Neagh Ship Company*; *Ex parte Workman* [1895] 1 IR 533, 539-540 Porter MR commented that the word subrogation is taken from the civil law and referred to Justinian's *Digest*, D 20.4.16.

[311] Article 1251 *Code Civil*.

[312] See Murray (1986) 91.

[313] [1999] 1 AC 221, 231.

CHAPTER 5. EQUITABLE SALVAGE

The Lost Prince

1. Introduction

The principle of equitable salvage can give a person with an interest in land who saves a superior interest or the property itself a lien over the property. This doctrine has largely been lost to English – though not to Irish – law. As with subrogation, it too arises in three-party cases, and here too the quest is to explain precisely why it arises. On this quest, section 2 will locate the essence of the principle, its elements will be distilled in section 3, and objections to it considered in section 4. Finally, its similarities with subrogation will be teased through in section 5, where the conclusion will be that, unlike subrogation, an unjust enrichment explanation may not only be possible but also entirely appropriate.

2. The essence of equitable salvage

Consider the common chain of head-landlord, tenant, and sub-tenant. At common law, if the head-landlord forfeits the head-lease – on the grounds, for example, of non-payment of rent by the tenant – then the sub-lease carved out of it would fall with it.[1] To avoid this, such a sub-tenant might pay the head-landlord the arrears of rent to keep the head-lease and thus the sub-lease on foot. It came to be established,[2] and statute subsequently confirmed,[3] that the sub-tenant could deduct such payments over time from his own rent to the tenant.

A sub-tenant who has been compelled[4] to make the payment to the head-landlord would also have an action for money had and received against the tenant. In *Ryan v Byrne*,[5] the sub-tenant had paid the head-landlord after ejectment orders had been obtained by the head-landlord against both the claimant sub-tenant and the defendant tenant. Palles CB

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1 *Viscount Chelsea v Hutchinson* [1994] 2 EGLR 61; Statute has ameliorated this by allowing a sub-lessee to apply to court for relief: see s4 of the Conveyancing Act, 1892 (Ireland); s146(4) of the Law of Property Act 1925 (England and Wales).

2 *Sapsford v Fletcher* (1792) 4 TR 511; *Taylor v Zamira* (1816) 6 Taunt 524; *Carter v Carter* (1829) 5 Bing 406; *Jones v Morris* (1849) 3 Ex 742, 746-747 (Pollock CB); *Graham v Alsopp* (1848) 3 Ex 185, 198 (Rolfe B); *Ahearne v McSwiney* (1874) IR 8 CL 568, 574 (O'Brien J).

3 Ss20 and 21 of the Landlord and Tenant Law (Amendment) (Ireland) Act, 1860 (Deasy's Act).

4 As where the head-landlord demands payment, or distrains, or threatens or takes proceedings to recover it: *Graham v Alsopp* (1848) 3 Ex 185, 199 (Rolfe B); *Ahearne v McSwiney* (1874) IR 8 CL 568, 574 (O'Brien J); *Grogan v Regan* [1902] I IR 196, 198 (Madden J).

5 (1894) 17 ILTR 102.

held that the claimant, having paid under compulsion of law, was entitled to recover.[6] Indeed, even where the sub-tenant has not been compelled, if the tenant subsequently adopts the benefit of the sub-tenant's payment, then the sub-tenant has an action for money had and received against the intermediate landlord.[7] And if there is a number of sub-tenants, and one pays off arrears of head-rent in order to save the estate from eviction, the payor is entitled to contribution from the other sub-tenants.[8]

This is a claim at law, but equity too plays role here,[9] granting the sub-tenant a lien in the property or estate thereby preserved; this will often be attractive to sub-tenants: if the tenant had not the money to pay the head-landlord, he is unlikely to be a satisfactory mark for a personal obligation to the sub-tenant.[10] In *Locke v Evans*,[11] the claimant made various payments to the head-landlord to prevent the defendant tenant's ejectment, and was entitled to a lien in that amount over the tenant's interest in priority to all other charges upon it. In *O'Geran v McSwiney*,[12] O'Sullivan MR described this outcome as

> a most reasonable one; if the sub-tenant, in a case like the present, does not make the advance, his own interest and that of his landlord will be lost for ever. To save his own interest from the gross default or misconduct of his landlord … the effect of this payment is, of course, to set up not merely his own interest but the actual interest of the defaulting mesne landlord himself. What is more reasonable than that this interest, so set up by the payment of the sub-tenant's money, should be made to answer for the money which has saved it? It appears to me that there are many heads of equity which do not rest on grounds so high.[13]

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6 *Ibid*, 103; followed: *Murphy v Davey* (1884) 14 LR Ir 28, 30 (Murphy J): claimant "did not make a voluntary payment at all, but acted under the strongest compulsion, namely to save himself from being turned out of possession of a house which he had built on the lands".

7 *Ahearne v McSwiney* (1874) IR 8 CL 568. This subsequent adoption is a clear case of free acceptance.

8 *Allison v Jenkins* [1904] 1 IR 341, 346 (Porter MR), drawing an analogy with general average (the Provost, Fellows and Scholars of Trinity College Dublin were the head-landlord); *Craig v AG* [1926] NI 218, 220-221, 228.

9 Sutton (1991).

10 *O'Geran v McSwiney* (1874-1875) 8 Ir Rep Eq 501, 503 (O'Sullivan MR).

11 (1848) 11 Ir Eq Rep 52n (decided 1823); *Warnock v Leslie* (1882-1883) 10 LR Ir 68.

12 *O'Geran v McSwiney* (1874-1875) 8 Ir Rep Eq 501; *aff'd* (1874-1875) 8 Ir Rep Eq 624.

13 (1874-1875) 8 Ir Rep Eq 501, 504. *Cp Ferguson v Ferguson* (1886-1887) 17 LR Ir 552, 579 (Barry LJ): "it seems to me consonant to natural justice to hold that there is a lien on this property for the expenditure, and I am fond of believing, that if you arrive at the natural justice between the parties, you arrive at what is the law or equity of the case"; *cp ibid*, 571 (Naish LC). Similar sentiments have been expressed in respect of equitable liens more generally, see, *eg*, *Todd v Moorhouse* (1874) LR 19 Eq 69, 71 (Jessel MR); *Re Johnson* (1880) 15 ChD 548, 555-556 (Jessel MR); *Whitebread v Watt* [1902] 1 Ch 835, 838-840 (Stirling LJ); *Davies v Littlejohn* (1923) 34 CLR 175, 185 (Isaacs J); *Hewett v Court* (1983) 149 CLR 639, 667 (Deane J).

The principle upon which such claimants succeed is the doctrine of equitable salvage,[14] by which a party with an interest in property making payments for the preservation of another interest in the property which would otherwise have been lost or destroyed can have a lien over the interest so preserved. In *Hill v Browne*, a tenant for life had allowed arrears to build up which were about to be fatal to his estate and to all others with an interest in it (such as a mortgagee), and Sugden LC posed the question: "If the estate is about to be lost, what is the mortgagee to do? I apprehend he is entitled to salvage. If he does not, the estate is lost to all parties …".[15] In *Hibernian Bank v WJ Yourell*,[16] Lord Parker held that "there can be no doubt that a mortgagee has a lien on the mortgaged premises for moneys paid by him to preserve the subject-matter of his security".[17] The traditional justification for such a claim is said to be the element of compulsion under which the payor acted, and the benefit which accrued to all concerned. In *Fetherstone v Mtichell*,[18] Brooke MC said that he had

> always understood the priority which Courts of Equity give to the salvage creditor is this, that *the payment is in a manner compulsory* and that, in the common danger*, it is for the benefit of all* to encourage the advance of money, with which the mortgagor himself and every one of his creditors must suffer a serious loss. It is considered beneficial for all parties to give the most ample remedies to him who has saved the common security, provided that they are confined to that property which, but for his advance, would have been lost to every one concerned.[19]

The claimant was the assignee of a judgment creditor whose judgment attached to the defendant's lease for lives renewable forever, and Brooke MC and Jackson J awarded him a salvage lien on the defendant's leasehold interest in respect of payments of the defendant's arrears of rent to redeem the lands from eviction. Moore J, who agreed as to the principle, dissented on the grounds that the claimant had not been compelled but rather had made the "the advance solely with a view to his own interest … [hoping that] when the value of the estate is realised the fund will reach his demand …".[20] Similarly, if the risk of

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14 Anon (1913); Anon (1953); Lyall (2000) 408-409; 826; Wylie (1990-) [10.36]; Wylie (1997) 798 [13.158].

15 *Hill v Browne* (1844) 6 Ir Eq Rep 403, 406.

16 [1918] AC 372.

17 *Ibid*, 394; *cp* [1916] 1 IR 313, 316 (O'Connor MR at first instance). It was held that the payments were not salvage payments but instead loans from the bank to the defendant ([1918] AC 372, 390 (Lord Atkinson), 394 (Lord Parker), 401 (Lord Wrenbury)).

18 (1848) 11 Ir Eq Rep 35. Followed: *O'Geran v McSwiney* (1874-1875) 8 Ir Rep Eq 501, 505 (O'Sullivan MR); *O'Loughlin v Dwyer* (1884) 13 LR Ir 75, 81 (Chatterton VC); *Allison v Jenkins* [1904] 1 IR 341.

19 *Ibid*, 42, emphasis added.

20 *Ibid*, 46.

eviction is brought about not by the defendant intermediate landlord but by the claimant himself, then the salvage claim will fail.[21]

The sub-tenant payment cases provide an excellent example of Brooke MC's principle, as all of the successful claimants had acted under the compulsion of a demand made or distress levied or the threat of legal action or the enforcement of a judgment by the head-landlord. Furthermore, just as the underlying personal claim extends from compulsion of law[22] at least to cases of practical compulsion,[23] so also does the salvage principle extend from cases of compulsion of law (such as the sub-tenants cases[24]) to cases of practical compulsion,[25] such as the necessity to protect the vulnerable property of a dying old lady,[26] or to preserve the income-producing capacity of the property,[27] or to carry out necessary repairs[28] or reconstruction on the property. For example, in *Re Lisnavagh Estate*,[29] on the application of the tenant for life of settled land, Dixon J held that the salvage lien is a remedy for preventing an imminent loss to a sufficient part of the estate,[30] and authorised the expenditure by the trustees of capital monies in respect of substantial necessary works on the mansion house on the estate.

In such cases, the salvage lien is again justified on the grounds of compulsion, not compulsion of law, however, but rather a practical compulsion or necessity arising from

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21 *Craig v AG* [1926] NI 218.

22 *Moule v Garrett* (1872) LR 7 Exch 101.

23 *Exall v Partridge* (1799) 8 TR 308.

24 See also *Re Smith's Settled Estates* [1901] 1 Ch 689, 691 (Buckley J) (a tenant for life compelled to pay expenses incurred by the local authority "entitled to be recouped and to keep the charge alive in his own favour").

25 Indeed, the sub-tenants could also be described as having paid pursuant to the practical compulsion of the necessity to save their interests from "absolute destruction" (*O'Geran v McSwiney* (1874-1875) 8 Ir Rep Eq 501, 503 (O'Sullivan MR)).

26 *Re Pike. Burke v Burke* (1889-1890) 23 LR Ir 9.

27 *Re McDonnell's Estate* [1900] 1 IR 295; *Neill v Neill* [1904] 1 IR 513.

28 *Re Johnson's Settlement* [1944] IR 529. *Ferguson v Ferguson* (1886-1887) 17 LR Ir 552, 577 (Palles CB): "non-completion by the tenant for life would necessarily have led to the loss not only of the outlay already made, but to the total loss of the value of the whole property to the persons who were, under the trusts of the will, to take it in succession" (*cp* 578 (FitzGibbon J)).

29 *Re Lisnavagh Estate*; *Lord Rathdonnell v Colvin* [1952] IR 296; *Bank of Ireland v Geoghegan* (1955-1956) Ir Jur Rep 7 (same). See also *Frith v Cameron* (1871) LR 12 Eq 169; *Re Jackson* (1882) 21 ChD 786; *Re Household* (1884) 27 ChD 553; *Re Hotchkys* (1886) 32 ChD 408; *Conway v Fenton* (1888) 40 ChD 512; *Re Freman* [1898] 1 Ch 28.

30 *Ibid*, 302.

the circumstances of the estate itself. The cases also illustrate another extension of the salvage doctrine, from the protection of interests in property to the preservation of the property itself. Of course, a "man spends money in improving another man's property at his peril",[31] unless there is some compulsion or equivalent to justify a salvage claim, which was made out in *Dent v Dent*.[32] The claimant, tenant for life, worked a mine sufficiently to prevent the Columbian government taking it over, in the process converting it from loss-making to profit-making; and Romilly MR held that he was entitled to a salvage lien against the defendant remainderman in the amount of his expenditure.[33] The work preserved both the interest (it prevented forfeiture to the government) and the property itself (it prevented desuetude and produced an incoming-producing asset). But there are also many cases in which the work merely preserved the property and not the interest. In *Dent* itself, the claimant's lien covered not only the saved mine but also the completion of a mansion house begun by the testator;[34] and in *Hibbert v Cooke*,[35] a testator commenced the construction of a mansion house upon the estate, and the tenant for life was entitled to a salvage lien over it for its completion.

In *Ferguson v Ferguson*,[36] the executors of an estate, at the request of the tenants for life, completed the construction of 13 houses on the testator's property, preventing them from falling into disrepair and allowing them to be rented out for the benefit of the estate. The tenants for life were held liable to the executors, and the Court of Appeal held that the tenants for life in turn had a lien against the remaindermen over the property preserved. Palles CB went so far as to say that "the principle of salvage applies, and … the authorities not only authorize, but coerce us to hold that the appellants are entitled to this lien".[37] Even more striking is the decision of Porter MR in *Re Pike*.[38] The hall door of 2 Synge Street

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31 *Ferguson v Ferguson* (1886-1887) 17 LR Ir 552, 565 (Porter MR).

32 (1862) 30 Beav 363.

33 *Ibid*, 370, 932.

34 Indeed, this principle seems to apply where the settlement comprises shares rather than real property: *Todd v Moorhouse* (1874) LR 19 Eq 69 (Jessel MR) (tenant for life, who had made an advance to a trustee, had equitable lien over the shares).

35 (1824) 1 Sim & St 552; *cf Gilliland v Crawford* (1868-1870) Ir Rep 4 Eq 35, 41 (Chatterton VC) (testator commenced construction of houses for letting; tenant for life who completed them not entitled to a remedy; *Dent* and *Hibbert* distinguished).

36 (1886-1887) 17 LR Ir 552.

37 *Ibid*, 573; *cp* 571 (Naish LC); 577-578 (FitzGibbon J); 579 (Barry J).

38 (1889-1890) 23 LR Ir 9.

being ajar, the Dublin Metropolitan Police were called, and they found an old lady semi-unconscious, helpless and dying. They brought her to hospital, and took the necessary steps to protect the house and contents, including cash, jewellery, and bank-books, by posting a guard on the house until the old lady had died. The Commissioner successfully claimed in the administration of her estate for the amount of the pay of the constables who had guarded the property and therefore been "the means of preserving, for the benefit of the persons now entitled to it, this large amount of property …".[39]

On the other hand, it seems that, to justify a salvage lien, the tenant for life of settled land will be sufficiently compelled only where the property is preserved from destruction, and not where it merely needs improvement or current maintenance. In *Re Hurst*[40] Porter MR considered that only repairs absolutely necessary to preserve the property and make it modestly habitable would attract a lien. Again, in *Re De Teissier's Settled Estate*,[41] Chitty J held that a salvage lien would lie where the work was done because property had been condemned by the sanitary authority as a dangerous structure,[42] but would not lie where the tenant for life merely sought to make some improvements to the settled estate. In *Re Legh's Settled Estate*;[43] a tenant for life had incurred significant expenditure working on the mansion house of a settled estate. Kekewich J held that the he was entitled to claim some of the expenditure under statute,[44] but that he could not on the facts recover the remainder as a salvage payment, since it was impossible to say that the it had been spent on preserving the property from destruction rather than on mere improvements.[45]

The principle has been cautiously applied not only in respect of settled land but also in respect of trusts settling other property, such as shares. In *Re New*, Romer LJ held that,

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39 *Ibid*, 12.

40 (1892-1893) 29 LR Ir 219; *Re Jackson* (1882) 21 ChD 786; *Re Cobden's Estate* [1923] 1 IR 1, 3 (Wylie J) (expenditure "necessarily made to save the estate from actual danger of destruction").

41 [1893] 1 Ch 153

42 *Ibid*, 161-162 (Chitty J) disussing *Re Hurst*.

43 [1902] 2 Ch 274; *Re Montagu* [1897] 2 Ch 8.

44 Section 13 of the Settled Land Act, 1890; *cp Re Dunham Massey Settled Estates* (1906) 22 TLR 595; see also *De Vere v Perceval and Cole* [1945] Ir Jur Rep 9; *Re O'Farrell; O'Farrell v Stapleton* [1959] IR 387; *cf Re De Teissier's Settled Estate* [1893] 1 Ch 153, 161 (Chitty J).

45 *Ibid*, 281; claims in respect of improvements (*Dent*) or the repair of dry rot (*Hibbert*) were not included in the salvage liens; *Re Cobden's Estate* [1923] 1 IR 1, 4 (Wylie J) (repairs to an embankment to prevent an immediate breach constituted salvage, the improvement of the draining system did not).

thought it is a jurisdiction to be exercised with caution, if there are peculiar circumstances of emergency, the court can sanction salvage actions by the trustees not otherwise authorised by the trust deed.[46] this was approved by the House of Lords in *Chapman v Chapman*,[47] who quite properly declined to expand salvage into a general jurisdiction in the court to alter trusts. The principle only applies where there is some compulsion or necessity, where some unforeseen development threatens to make a shipwreck of the settlor's intentions;[48] so, if there is no such emergency, as there was not in *Chapman*, there is no jurisdiction to sanction salvage actions and no salvage lien can arise.

3. The elements of a salvage claim

Compulsion, legal or practical, is the essence of the salvage principle, but though is necessary, it is not sufficient to maintain a salvage claim. There are further conditions, helpfully set out by Holmes LJ in *Re Power's Policies*.[49]

> Three conditions are necessary to constitute a good salvage payment. 1. It must have had the effect of saving for the benefit of everyone interested property which would otherwise have been lost. 2. It must be made by a person having a charge on or an interest carved out of the estate of the ultimate owner of such property. 3. The salvagor must make it voluntarily for his own advantage, and not in pursuance of an obligation or in the performance of a duty, or as the agent of another.[50]

This passage is neither comprehensive nor entirely accurate: it is not comprehensive in that it does not refer to the requirement that the claimant have been compelled or contemplate the application of the doctrine to property rather than interests in property, and it is not entirely accurate in that in the analysis below, some of the wording – particularly of the third condition – will be found wanting. Nevertheless, Holmes LJ's three conditions provide helpful structure for this part of the analysis.

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46 *Re New* [1901] 2 Ch 534, 544-545; *Re Tollemanche* [1903] 1 Ch 457, 463-464 (Kekewich J); *affd* [1903] 1 Ch 955 (no emergency).

47 *Chapman v Chapman* [1954] AC 429, 445 (Lord Simonds LC), 452-455 (Lord Morton) ("great caution", "exceptional jurisdiction"), 469 (Lord Asquith).

48 *Ibid*, 469 (Lord Asquith).

49 [1899] 1 IR 6.

50 [1899] 1 IR 6, 27; followed: *Re McDonnell's Estate* [1900] 1 IR 295, 297 (Ross J); *Munster and Leinster Bank v McCann* [1936] Ir Jur Rep 40, 41 (Kennedy CJ), 42 (FitzGibbon J).

i. *It must have had the effect of saving for the benefit of everyone interested property which would otherwise have been lost.*

The sub-tenant cases are excellent examples of the fulfilment of this condition: the payment by the sub-tenant protects his own interest, that of the tenant, and those of the owners of any other interests subsidiary to the tenant's. Similarly, where renewal fines or the like are paid to preserve the property to the benefit of all concerned, the payer will be allowed a lien on the property.[51] In *Hamilton v Denny*,[52] the parties were joint-lessees, the claimant had twice paid the renewal fine to renew the lease, and Manners LC held that the payments made by the claimant for the benefit of the estate should be recovered out of it.

ii. *It must be made by a person having a charge on, or an interest carved out of, the estate of the ultimate owner of such property.*

Again, the sub-tenant cases are excellent examples of the fulfilment of this condition: sub-tenants plainly have a sufficient interest carved out of the estate of the ultimate owner of the property. Similarly, tenants for life[53] and trustees[54] of settlements, mortgagees of property,[55] and judgment creditors,[56] have all been held to have such an interest. As Brooke MC put it in *Fetherstone v Mitchell*,[57] the "remedies and privileges yielded to the creditor who saves the estate are founded on the principle that every just encouragement should be given to any interested party who, in the common emergency, will advance money for the good of all".[58] As FitzGibbon LJ put it in *Power's*, Equity does not give a lien for money paid for, or with the effect of, preserving property "unless there is some recognised privity or relation between the parties or between the preserver and the property".[59]

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51 *Manlove v Bale* (1688) 2 Vern 84; *Lacon v Mertins* (1743) 2 Atk 1; *Brice v Williams* (1781) Wall Lyn 325 (Lord Lifford LC).

52 (1809) 1 Ball & B 199.

53 See pp130-132 above.

54 *Neill v Neill* [1904] 1 IR 513; *Re Johnson's Settlement* [1944] IR 529.

55 *Kelly v Staunton* (1826) 1 Hogan 393; *Hill v Browne* (1844) 6 Ir Eq Rep 403; *Re McDonnell's Estate*[1900] 1 IR 295; *Munster and Leinster Bank v McGlashan* [1937] IR 525; *Hibernian Bank v WJ Yourell* [1918] AC 372.

56 *Kehoe v Hales* (1843) 5 Ir Eq Rep 597; *Fetherstone v Mitchell* (1848) 11 Ir Eq R 35.

57 (1848) 11 Ir Eq Rep 35

58 *Ibid*, 43.

59 [1899] 1 IR 6, 25; which is an entirely accurate statement of this condition, provided that "privity" is understood as a synonym for "relation" in that passage.

On the other hand, a claimant who has no interest carved out of the ultimate estate will not be entitled to a salvage lien. In *O'Loughlin v Dwyer*,[60] Chatterton VC said that it is "a fundamental rule in claims for liens for salvage payments that a mere third person who voluntarily makes a payment by which an estate or interest is preserved for the benefit of the persons interested therein cannot claim a lien for money so paid".[61] O'Loughlin assigned his tenanacy to Dwyer, who got into arrears, which the landlord compelled O'Loughlin to pay. However, since he had retained no interest in the property after assignment to Dwyer, he had "no interest authorising him to make a salvage payment".[62] Again, in *Munster and Leinster Bank v McCann*,[63] the deceased owed a debt to the Land Commission in respect of certain property; and, at his request, his brother paid that amount; but the latter's claim to a salvage lien failed because he was "not a claimant against, nor a person having an interest in or a charge on, the estate".[64] Similarly, in *Re Kavanagh Ltd*,[65] the claimant was a shareholder in, director of, and solicitor to, a company, for which he paid rent and rates to prevent forfeiture. Nevertheless, as he had no interest in the property, his salvage claim failed.

iii. The salvagor must make it voluntarily for his own advantage, and not in pursuance of an obligation or in the performance of a duty, or as the agent of another.

The pith of this condition is plain enough: the claimant must have acted in effect for himself, rather than in the performance of some other duty; but Holmes LJ's language is more than a little awkward, if not unwelcome, for at least three reasons.

First, it is unfortunate that that he have described such a claimant as having acted voluntarily, not least because the concept of voluntariness is notoriously mercurial. Indeed, in many of the cases relating to Holmes LJ's second condition that the payment must be

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60 (1884) 13 LR Ir 75.

61 *Ibid*, 80. *Kavanagh v Waldron* (1846) 9 Ir Eq Rep 279, 283 (Sugden LC) (voluntary payment); *Fetherstone v Mitchell* (1848) 11 Ir Eq R 35, 46 (Moore J): (third party, not having any interest to preserve); *Munster and Leinster Bank v McCann*[1937] Ir Jur Rep 40, 42 (Kennedy CJ) (voluntary payment).

62 *Ibid*, 84, though of course he would still have had his personal action for money had and received: *ibid*; see *Moule v Garrett* (1872) LR 7 Exch 101; *Re Healing Research Trustee Ltd* [1992] 2 All ER 481, 484-485 (Harman J).

63 [1937] Ir Jur Rep 40 (SC).

64 *Ibid*, 42 (Kennedy CJ); 42 (FitzGibbon J) (stranger in interest); 43 (Murnaghan J); *cp Hooper v Eyles* (1704) 2 Vern 480 (guardian borrowed to pay off an incumbrance on the infant's estate; lender to the guardian failed in a claim to have the loan repaid out of the estate).

65 [1952] Ir Jur Rep 38.

made by a person having a sufficient interest in the property, persons without such an interest are often described as having paid voluntarily. Plainly, he cannot have meant to require by the second condition that claimants not have acted voluntarily and by the third that they have done so.

Second, if it were strictly the case that salvagors must not have acted in the performance of an obligation or duty, then those sub-tenants compelled by operation of law to pay the head-rent would fail to fulfil this condition. Rather, it seems that what Holmes LJ had in mind was that not only must the claimant be a party interested in the property (the second condition) but also that the payment must be made *in that capacity* (which seems to be the essence of the third condition).

Third, not only do Holmes LJ's three conditions not take any account of *Fetherstone v Mitchell*, but if it were strictly the case that the claimant must have made the payment voluntarily (albeit "voluntarily for his own advantage"), then the third condition would contradict the *Fetherstone v Mitchell* requirement that in such cases "the payment is in a manner compulsory" – if it is compelled, it can hardly be voluntary. On the other hand, if all that is meant by Holmes LJ's third condition is a requirement that the payment be made in the claimant's capacity as a party interested in the property, then there is no conflict with *Fetherstone v Mitchell*, where the claimant claimed in his capacity as judgment creditor. All of this confusion would be avoided if the word 'voluntary' were avoided altogether, at least in the context of this third condition, the essence of which is that not only must the claimant be a party interested in the property but the payment must also be made in that capacity, and not on the basis of some other capacity or in the performance of another duty or obligation; in so doing, the claimant will have acted in effect for himself, rather than in the performance of some other duty.

The sub-tenant cases once again provide an excellent example of the fulfilment of this condition: a sub-tenant compelled to pay arrears of the head-rent has a sufficient interest in the property and pays in that capacity and not on the basis of some other capacity or in the performance of another duty.[66] On the other hand, *Power's* itself is an example of a salvage claim failing in part, because the payment was made not in his capacity as a puisne

[66] *Cp Re McDonnell's Estate* [1900] 1 IR 295; *Hamilton v Tighe* [1898] 1 IR 123.

mortgagee but in the performance of a duty which the claimant already owed in another capacity, as solicitor or agent for the mortgagor.

A loan to Mrs Power was secured by a mortgage in favour of Mrs Hearne on two policies of assurance upon Mrs Power's life. When Mrs Power died, Mrs Hearne claimed the proceeds; and she was met by a claim by representatives of Pierce Kelly, who had paid premia to preserve the policies. When he made the payments, Kelly was solicitor for both Mrs Hearne and Mrs Power, himself a puisne mortgagee on the policies, and land agent for Mrs Power, and for a time, for one of her sons. Mrs Hearne only of Kelly's capacity as her solicitor, though in subsequent correspondence he informed her that he had paid, for the previous six years, and would continue to pay, the premia to keep the policy alive "for her benefit", and on foot of her studiedly ambiguous reply he continued so to pay.

Fitzgibbon LJ held that Kelly's payments for the six years prior to his letter could not be recovered at law,[67] or on the basis of a salvage lien, because he had made the payments on behalf of and as agent and solicitor for Mrs Power[68] and not in his capacity as puisne mortgagee.[69] Likewise, Holmes LJ held that it "would have been part of the business of the land agent … to pay the premiums on those policies out of the rents received" and that the correspondence showed that "up to that time Kelly had been paying the premiums on behalf of Mrs Power, the mortgagor".[70] Thus, these payments were not salvage payments.[71] However, the Court held that because Mrs Hearne's reply knowingly allowed Mr Kelly to keep the policies up at his own expense for the protection of his own interest as puisne mortgagee, he would be entitled to a salvage lien in respect of the payments after the date of his letter to Mrs Hearne.[72] Hence, in respect of the first six years' worth of payments, Mr Kelly, though as a puisne mortgage he had an interest in the property, nevertheless made those payments not in that capacity but rather in the performance of another duty or obligation arising in his capacities as land agent and solicitor for the mortgagor; whilst in respect of his payments after his letter to Mrs Hearne, he made those

67 [1899] 1 IR 6, 20.

68 *Ibid*, 21.

69 *Ibid*, 22.

70 *Ibid*, 28.

71 *Cp Re Kavanagh Ltd* (above).

72 *Ibid*, 24-25 (FitzGibbon LJ); 29 (Holmes LJ).

payments in his capacity as a puisne mortgage and not in the performance of another duty arising in his other capacities. As a consequence, the decision is an excellent illustration of this understanding of Holmes LJ's third condition in *Power's* itself.

The cases seem therefore to establish four conditions necessary to constitute a good salvage payment. (i) The claimant must have been acting under compulsion or something akin to it. (ii) It must have had the effect of saving, for the benefit of everyone interested, property, or an interest or estate in property, which would otherwise have been lost. (iii) The claimant must have had a subsidiary rather than the main interest in the property or estate or interest thereby saved, or something akin to such an interest, such as a sufficient relationship with the owner of the main interest in the property or with the property itself. (iv) The claimant must have made the payment in that capacity, and not on the basis of some other capacity or in the performance of another duty or obligation.

Of course, if a volunteer cannot maintain the underlying personal claim in an action money had and received,[73] then neither should one be able to maintain the more potent proprietary claim to a salvage lien. If one or other of these requirements is not made out, then of course, the claimant can be (and is in the cases often) characterised as a volunteer and the payment voluntary, but the further addition of a voluntariness bar to this formulation would be confusing and unnecessary.

4. Objections to the principle

The principle of equitable salvage is plainly neither the doctrine in insurance relating to saving physical things remaining after the assured has been paid for a total loss nor the doctrine in maritime law relating to salvaging ships lost at sea, though it has some affinities at least with the latter. It was a relatively common doctrine in England and Ireland until the middle of the nineteenth century; thereafter, the histories divide: the doctrine survived and prospered in Irish but not in English chancery courts. The tide may have been turning as early as the 1850s. When Sir Edward Sugden was Lord Chancellor of

[73] *Ahearne v McSwiney* (1874) IR 8 CL 568, 574 (O'Brien J), 576 (Fitzgerald J); *Ryan v Byrne* (1894) 17 ILTR 102, 103 (Palles CB); *Grogan v Regan* [1902] I IR 196;see also pp104-111 above.

Ireland, he decided *Hill v Browne* in 1844;[74] subsequently, as Lord St Leonards, Lord Chancellor of England, he decided *Re Tharp* in 1852,[75] commenting:

> *In Ireland, it is a very common equity* to have as a prior charge to all other incumbrances, what is called salvage money. Where a lease-hold estate, or an estate held for lives to which half a dozen people are entitled in succession, many of them being mortgagees, according to certain priorities, the last man of all who is entitled after everybody, being in possession, redeems, I may say, the estate by paying the landlord, who otherwise would have recovered the estate and taken it from everybody: this payment is what is called salvage money. *That is an established equity and a very proper equity*. He that pays the salvage has a prior incumbrance to every other charge and interest, because, so far as any interest is left to anyone beyond the charge, it is acquired by that payment in the shape of redemption money.[76]

But there was something of King Canute about this; not only did it not turn back, but the incoming tide swept away many of the traces of equitable salvage on English shores.[77] In *Re Leslie, Leslie v French*,[78] Fry LJ held the Lord Chancellor "was referring to a practice in the Irish law of conveyancing, which probably had its basis in agreement; and … the proposition would seem to be inconsistent with the general law of the land".[79] The deceased had effected an insurance policy on her own life; when she married, her husband took over the payments, and when he died, they were paid out of his estate. Upon her death, his estate claimed a lien on the proceeds in respect of the premia so paid. Plainly, no salvage lien would arise here; the first of the four conditions distilled above – that the claimant must have been acting under compulsion or something akin to it – is plainly not fulfilled.[80] Nevertheless, counsel for the husband's estate sought to rely upon *Hamilton v Denny* and *Re Tharp*.[81] Fry LJ held that a lien could arise by contract, by subrogation,[82]

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74 (1844) 6 Ir Eq Rep 403; two years later he also decided *Kavanagh v Waldron* (1846) 9 Ir Eq Rep 279 in which he held that a volunteer could not rely upon the doctrine.

75 (1852) 2 Sm & G 578.

76 *Ibid*, 578-579, 533, emphasis added, approved: *Re Power's Policies* [1899] 1 IR 6, 26 (Holmes LJ).

77 There are many English cases in the footnotes to this chapter, but they seem almost to have disappeared without a trace.

78 (1883) 23 ChD 552.

79 *Ibid*, 562.

80 Though it had been in the earlier *Sherman v British Empire Assurance Co* (1872) LR 14 Eq 4 (Lord Romilly MR) (payments of premia on a policy on his life by a bankrupt after bankruptcy held to constitute salvage payments; widow of the deceased bankrupt held entitled to recover them in the proceeds of the policy).

81 *Ibid*, 555-556; counsel opposing the application dismissed *Hamilton v Denny* as "an Irish case" (*ibid*, 557) and said of *Tharp* that it "depended on the right of a consignee of West Indian estates and on Irish law, both of which are peculiar" (*ibid*, 558)!

and by "reason of the right vested in mortgagees, or other persons having a charge upon the policy, to add to their charge any moneys which have been paid by them to preserve the property".[83] This formulation, far from rejecting salvage, is, rather, a classical statement of the doctrine. It emphasises the compulsion or necessity under which the claimant as the owner of a subsidiary interest must operate; indeed, Fry LJ held that voluntary payments and payments by the full owner do not qualify.[84] Consequently, Fry LJ could have decided the case as he did, against the claim of salvage on the facts, without disparaging the doctrine, which he got right in his fourth ground for lien, but which he fundamentally misrepresented in his comments on *Tharp*: salvage rarely arises in conveyancing cases and has nothing to do with agreement; and beyond mere assertion, he gave no reason why the Irish doctrine was inconsistent with the general English law.[85] Nevertheless, in the later *Falcke v Scottish Imperial Insurance Company*,[86] he expressed the wish that the expression "salvage" had "remained on the other side of the channel where it seems to have arisen. I doubt whether any doctrine which is expressed by the word 'salvage' applies to cases of this description".[87]

In *Falcke*, Emanuel, the owner of the equity of redemption of a life assurance policy, paid a year's premium; when the policy was sold at the application of the widow of the holder of a charge over the policy; it was held that he had no lien over the proceeds. As with *Leslie*, plainly no salvage lien would arise here; the second of the four conditions distilled above – that the claimant must have had a subsidiary rather than the main interest in the property or estate or interest thereby saved – is plainly not fulfilled: as the owner of the equity of redemption, Emanuel was the owner of the main interest in the policy. Indeed,

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82 He held that a lien would arise either by reason of the right of trustees to an indemnity out of the trust property for money expended by them in its preservation, or by subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property. On the limits of such subrogation, see *Foskett v McKeown* [2001] 1 AC 102, 118-119 (Lord Hope), 140 (Lord Millett) (payor not compelled, no subrogation).

83 (1883) 23 ChD 552, 560. Rotherham, 325, comments that this categorisation of lien "amounts simply to an enumeration of different cases in which a lien arises rather than an effort to explain why the right should be available in these cases and why it should be denied in others".

84 *Ibid*, 561, 563.

85 In *Re Power's Policies* [1899] 1 IR 6, 23-24 FitzGibbon J made this point a little more stridently, and he took care to demonstrate that the outcome was entirely consistent with *Leslie* and *Falcke*.

86 (1886) 34 ChD 234.

87 *Ibid*, 254.

this is the basis upon which Bowen LJ rejected his claim.[88] All three members of the Court of Appeal also held that a stranger paying a premium acquires no lien on the policy or its proceeds,[89] and though an action might be founded upon a request by the owner to the stranger,[90] there was no such request here. But Bowen and Fry LJJ went further, in effect rejecting the doctrine of equitable salvage altogether. Bowen LJ held that no doctrine similar to maritime salvage "applies to things lost upon land, nor to anything except ships or goods in peril at sea",[91] and Fry LJ "exceedingly doubt[ed] whether that word ['salvage'] can with any propriety be applied to cases of this description".[92] However, as the terms of the doctrine were not established in this case, Bowen and Fry LJJ could have decided the case as they did, against the claim of salvage, without disparaging the doctrine.

Nevertheless, that attitude took hold. In *Re De Teissier's Settled Estate*,[93] Chitty J described many salvage claims as "very often of a very loose character indeed, and the Court has to examine with care to see whether the case is one of salvage or not".[94] In *De Teissier*, properly treating the doctrine with care, Chitty J held that work, compelled by a local authority and necessary to protect the property of a settled estate, could come with in the doctrine, but that mere repairs would not.[95] Again, the result, denying the salvage claim for mere repairs, is entirely consistent with the doctrine itself, as the repairs were neither compelled nor necessary.

Furthermore, this retrenchment is consistent with the more general English approach to equitable liens. In *Nicholson v Chapman*,[96] the claimant had a personal claim for recompense for saving timber from floating downstream, but not a lien over the timber.[97]

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[88] *Ibid*, 250-251, *cp* 253 (Fry LJ).

[89] *Ibid*, 241 (Cotton LJ); 248 (Bowen LJ); 253 (Fry LJ).

[90] *Ibid*, 241 (Cotton LJ); 249 (Bowen LJ).

[91] *Ibid*, 249; *cp* 239 (*arguendo*)

[92] *Ibid*, 254.

[93] [1893] 1 Ch 153 (Chitty J).

[94] *Ibid*, 161; *cp Chapman v Chapman* [1954] AC 429, 452-455 (Lord Morton). ("great caution", "exceptional jurisdiction").

[95] *Ibid*, 161-162.

[96] (1793) 2 H Bl 254; *cf* Dagan (1999) 1153.

[97] It was also held that the case did not come within the principle of maritime salvage; *cp The Goring* [1988] AC 831; for the view that *Nicholson* stands with *Falcke* in resisting a general salvor's lien at English law, see Rotherham, 315.

Similarly, in *Great Northern Railway v Swaffield*,[98] a stable which took in a horse unclaimed at a railway station had a personal claim against the owner for the livery charges, but not a lien over the horse. Rather, the attitude of Fry LJ in *Leslie*, that equitable liens arose only in limited categories of case,[99] held sway; and resulted in unnecessary narrowness even in the existing categories.[100]

Of course, the Irish courts were well aware of this English retrenchment; some judges simply chose not to follow it,[101] others expressed bafflement at the English position; in *Power's*, FitzGibbon LJ did not believe

> that there is any difference in principle between the equities which are recognised in England as 'incidental or accessorial' and those which we metaphorically describe in Ireland as 'salvage' and 'graft'. It is remarkable that these terms, so long and familiarly known here, like some other Irish products, do not seem to find favour in England. Our English brethren have objected to the introduction into equitable terminology of a word borrowed from Admiralty law, … Our calling such payments 'salvage payments' where they confer a lien, or give rise to an equity, is merely a matter of nomenclature, and describing a 'salvage claim' as 'incidental or accessorial' is merely translating a good metaphor into prose.
>
> I do not know, or admit, that 'salvage' or 'graft' has ever been rightly established in Ireland upon any ground which would not have supported the same claim in England, though, … the instances in which 'salvage claims' have been discussed and recognised by our Courts of Equity have been much more numerous in this country.[102]

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[98] (1874) LR 9 Ex 132. There is, therefore, no right at common law to *retain* a rescued pointer-dog (*Binstead v Buck* (1777) 2 WmB 1117) or a horse (*Flannery v Dean* [1995] 2 ILRM 393 (HC, Costello P) until such expenses have been paid, though the position has been modified in the UK by statute: s149 of the Environmental Protection Act 1990. Similarly, in the US, a personal claim will lie but a lien will not arise (*Meekins v Simpson* 176 NC 136 (1918); *Bailey v West* 105 RI 61; 249 A2d 414 (1969)).

[99] See, *eg*, Waters (1988) 24 ("list of equitable liens … something of a themeless rag-bag"); Phillips (1988) 975; Wright (2001); 42; Burns (2002) 7; Wright (1998) 109-111 [3.59] provides full list of such categories.

[100] Worthington (1994).

[101] *Re Power's Policies* [1899] 1 IR 6, 18 (Ashbourne LC); *Re McDonnell's Estate* [1900] 1 IR 295, 297 (Ross J); *Munster and Leinster Bank Ltd v McCann* [1937] Ir Jur Rep 40, 41 (Kennedy CJ); *Neill v Neill* [1904] 1 IR 513; *Re Lisnavagh Estate; Lord Rathdonnell v Colvin* [1952] IR 296, 302-303 (Dixon J); *De Vere v Perceval and Cole* [1945] Ir Jur Rep 9.

[102] *Ibid*, 23-24 (FitzGibbon LJ); on 'graft', a species of constructive trust liability for breach of fiduciary duty associated with the taking up of leases which ought to have been renewed for the benefit of another, see Power (2001) 326, discussing *inter alia* eighteenth century English cases which form the basis for the Irish development.

There were many salvage cases in Ireland in the century after the English retrenchment;[103] so that, whatever about its status in England, the doctrine of salvage is well established as a matter of Irish law. Furthermore, notwithstanding *Leslie*, *Falcke* and *De Teissier*, there are still authoritative traces of the doctrine of salvage in English law. It has been relied upon in settled land cases;[104] it has twice been approved by the House of Lords,[105] and a salvage argument was entertained on its merits in *Re Downer Enterprises Ltd*.[106] Pennycuick J held that a party, Schick, who was secondarily liable for rent and had paid it, was entitled to be subrogated to the landlord's claims against the party primarily liable for the rent. Schick's case was also put in salvage terms, that "by paying the rent, Schick had preserved this asset for the benefit of the company in liquidation and, accordingly, Schick ought to be recouped its expense in so preserving the asset".[107] For Pennycuick J, the "answer to that attractive argument … [was that Schick had] paid this sum not by arrangement with the liquidator, but because Schick was bound to pay it under the general law …".[108] The "attractive" salvage failed, not because such an argument was unstateable, but instead for a reason entirely consistent with the doctrine: the fourth of the four conditions distilled above – the claimant must not have made the payment in the performance of another duty or obligation – is plainly not fulfilled: Schick was bound to made the payment under the general law.

These cases are consistent with recent important cases recognising once again the importance of the equitable lien. The High Court of Australia in *Hewett v Court*[109] liberalised the lien from the shackles of the recognised categories and unselfconsciously

103 The most recent cases seem to have been in the 1950s: *Re Lisnavagh Estate; Lord Rathdonnell v Colvin* [1952] IR 297; *Re Kavanagh Ltd* [1952] Ir Jur Rep 38; *Bank of Ireland v Geoghegan* (1955-1956) Ir Jur Rep 7. But then, so is *Chapman v Chapman* [1954] AC 429!

104 See pp129-132 above.

105 *Hibernian Bank v WJ Yourell* [1918] AC 372, 390 (Lord Atkinson), 401 (Lord Wrenbury), 394 (Lord Parker) (admittedly, on appeal from Ireland); *Chapman v Chapman* [1954] AC 429, 445 (Lord Simonds LC), 452-454 (Lord Morton), 469 (Lord Asquith).

106 [1974] 2 All ER 1074.

107 *Ibid*, 1084.

108 *Ibid*.

109 (1983) 149 CLR 639; see Hardingham (1985); Christie (1986); Malcolm (1987). In *Hewett*, the High Court imposed a lien over the purchase money paid where a contract to purchase land had gone off; in *Re Barrett Apartments* [1985] IR 350; [1985] ILRM 679; Coughlan (1988); the Supreme Court declined to extend this to a booking deposit.

imposed a lien over the part-payment of the purchase price on a building contract,[110] whilst the House of Lords in *Napier and Ettrick v Kershaw*[111] held that, having indemnified the insured, the insurer has a lien over any sums recovered by the insured.

Hence, though the doctrine of equitable salvage has been lost outside of Ireland, there is no reason why it cannot find its place in the emerging *zeitgeist* represented by *Hewett* and *Napier*. A minimal development would simply accept the salvage lien as just another recognised category; more expansively, it could guide the development of the equitable lien beyond the recognised relationships; either way, an appreciation of the basis upon which salvage liens arise will greatly aid in any such rediscovery.[112]

5 Explaining salvage by the light of subrogation

There are very great similarities between salvage and subrogation: both doctrines operate in three-party configurations; and both generate proprietary priorities. That they are closely related emerges from a number of cases.[113] In *Lord Harberton v Bennett*,[114] Lord Hart LC held that a surety who pays a debt relating to land held by the principal debtor is entitled to be recouped out of the land,[115] which is a status subrogation case which comes very close to salvage; *Carter v Carter*[116] is another example from the subrogation side of the line; and in *Patten v Bond*,[117] Kay J held that "the doctrine of subrogation applies: it is a clear salvage case".[118] In *Hamilton v Denny*,[119] an example from the salvage side of the line,

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[110] Worthington (1994); Burns (2002) 13-24. *Morris v Morris* [1982] 1 NSWLR 61; *Electrical Enterprise Retail v Rodgers* (1989) 15 NSWLR 473

[111] [1993] AC 713; Gummow (1993); Rotherham, 281-292; *cf Foskett v McKeown* [2001] 1 AC 102.

[112] Burns (2002); another route is to track the similarities with the constructive trust: Monaghan (1960); Wright (2001).

[113] See also chapter 4, nn40-42.

[114] (1829) Beatty 386

[115] But this principle will not apply where the creditor is a landlord and the principal debtor his tenant; in such circumstances, the remedy of a landlord when a tenant fails to pay the rent is to distrain or to forfeit the lease by re-entry; and the right of distress is neither a security within the meaning of s5 of the 1856 Act nor a remedy which a surety paying the principal debtor's debt is entitled to use: *BSE Trading v Hands* (Court of Appeal, unreported, 23 May 1996).

[116] *Carter v Carter* (1829) 5 Bing 406; *Re Johnson* (1880) 15 ChD 548; *cp* Wright (2000) 147 comparing "remedial subrogation and remedial equitable liens".

[117] (1889) 60 LT 583.

[118] *Ibid*, 585; despite a reference to *Falcke.*

Manners LC granted a salvage lien by analogy with subrogation principles. Indeed, as *Downer* demonstrates, the doctrines are often pleaded in parallel, though – since the subrogation claim succeeded but the salvage claim failed, both quite properly – it also illustrates that they are separate doctrines. Nevertheless, the various views advanced to explain subrogation can be applied in the quest to explain salvage.

Because four precise conditions must be fulfilled to establish a salvage lien, and notwithstanding *dicta* referring loosely to concepts of natural justice,[120] the archipelago and confederation views of subrogation can be dismissed as explanations of salvage. As for the federation views of subrogation associated with intention and unjust enrichment, equitable salvage has strong affinities with both. For example, like the status-based subrogation cases, salvage turns on the fact that the claimant was the owner of an interest in land and made the payment in that capacity;[121] however, in the case of salvage, the lien does not depend on an intention presumed from that status, instead it turns on the fact that the claimant was acting under compulsion or something akin to it. And this suggests that an unjust enrichment explanation of the salvage lien is entirely plausible.[122] Of the four conditions necessary to establish a salvage lien, the requirement of compulsion or something akin to it can be seen as a requirement of an unjust factor; the requirement that it benefit everyone, including the defendant, can be seen as a requirement of enrichment; and the requirements that the claimant be an owner an interest in property (or something akin to that) in which capacity the payment is made can be seen as a very tight requirement that the enrichment be at the expense of the claimant; and it might even be presented as a sufficient justification to regard the remedy not only as restitutionary but also proprietary. Many equitable proprietary doctrines often have a restitutionary pattern or component, but may not be exclusively restitutionary; subrogation may very well be of this nature; but salvage, it would seem, is not: if the equiperation of the four conditions emerging from the

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[119] (1809) 1 Ball & B 199. *Ulster Railway v Banbridge, Lisburn and Belfast Railway* (1868) IR 2 Eq 190 might be seen as a salvage claim very close to the *Wenlock* species of subrogation. In *Hewett v Court* (1983) 149 CLR 639, 645-646 Gibbs CJ saw the purchaser's lien as close to subrogation; Phillips, (1998) 978-979.

[120] Text with and in 13 above.

[121] *Cp* Burns (2002) 7 (describing the established categories of lien as situations "status-based" categories"), 9 (the authorities demonstrate that a general lien is appropriate where land was concerned).

[122] *Cp* Waters (1964) 52 (suggesting that the courts could "evolve a true equitable restitutionary lien" by analogy with the vendor's lien cases); Cope (1992) 35 (on the use of the equitable lien more generally to prevent unjust enrichment); in *Cadorange Pty Ltd v Tanga Holdings Pty Ltd* (1990) 20 NSWLR 26 (Young J) the lien imposed by analogy with *Hewitt v Court* was in support of a personal claim for unjust enrichment.

cases as necessary to establish a salvage lien with the terms of the principle against unjust enrichment is correct, then the doctrine of equitable salvage is entirely directed to reversing unjust enrichment.

Perhaps the strongest indication that a salvage lien is a response to unjust enrichment follows from that fact that when other unjust factors are made out and the other three conditions are satisfied, a claim for a salvage lien will lie. Thus we have already seen the extension from compulsion of law to practical compulsion or necessity; but there are cases in which mistaken payments[123] have generated salvage claims; and the aspect of *Re Power's Policies* in which the salvage claim succeeded is a classic example of free acceptance: Mrs Hearne knowing that the benefit would not be conferred gratuitously and with the opportunity to reject it nevertheless permitted Mr Kelly to continue to make the payments.[124] Consequently, unlike subrogation, a restitutionary explanation of salvage may be not only possible but also entirely appropriate. Hence, if English law is once again to retrieve the doctrine of equitable salvage, it may turn out – unlike subrogation – to provide an example of a proprietary remedy to reverses unjust enrichment.

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[123] *Re Sargent's Trusts* (1897) 7 LR (Ir) 66 (Sullivan MR) (estate of mistaken payor of premiums had lien on proceeds of policy); *cp Cooper v Phibbs* (1867) LR 2 HL 149 (after rescission of a contract of sale of a fishery from uncle to nephew on the grounds that the nephew already owned the fishery, the House held that the uncle was entitled to a lien to secure his expenditure on it).

[124] In *Hamilton v Denny* (1809) 1 Ball & B 199 the claimant made two payments; in respect of both, the unjust factor probably is practical compulsion; but in respect of the second, it might also be free acceptance: knowing that the claimant had paid the first renewal fine, the defendant permitted him to make the second.

Chapter 6. Constructive Trusts

Feel The Fear, and Do It Anyway!

"The constructive trust has been a ready means of developing our property law in modern times … the process is a continuing one".[1]

1. Introduction

The constructive trust,[2] protean and malleable, with its predecessor the constructive use, has long been a good and faithful servant of equity; and it is regularly presented as a candidate proprietary remedy to reverse unjust enrichment. To evaluate this candidature, section 2 will define the constructive trust, in particular the remedial constructive trust, while section 3 will insist upon the necessary separation of the concepts of unjust enrichment and the remedial constructive trust; this in turn will have clarified the basis upon which section 4 can discuss some objections to the remedial constructive trust as a proprietary remedy for unjust enrichment, and upon which section 5 can discuss the possible grounds for the establishment of the trust.

2. Defining constructive trusts

It is a trust which arises by operation of law, without reference to the intention (agreed, express, implied, presumed, or inferred) of either or both of the parties,[3] to impose upon a person who holds title to property[4] an equitable duty to convey it to another or to hold or apply it for the benefit of that other. Such a trust arises to vindicate the claimant's pre-existing proprietary interest, and in such cases other – fiduciary – duties are also imposed in support of this primary duty.[5] Such constructive trusts arise in recognised and relatively well-defined circumstances, such as in the case of secret trusts, mutual wills, specifically enforceable contracts for the sale of land, the completion of gifts where the donor has done all that he or she could have to transfer a benefit, or for breach of fiduciary duties. Such instances are hallowed by history, but, beyond that, seem to defy greater precision in analysis: the boundaries of the constructive trust "have been left perhaps deliberately vague so as not to restrict the court by technicalities in deciding what the justice of a

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1 *Sen v Headley* [1991] Ch 425, 440 (Nourse LJ).

2 Waters (1964); Elias (1991); Cope (1992); Oakley (1997).

3 Cope (1992) 7; Martin (2001) 297; Delany (2003) 194.

4 Paradigmatially legal title, though in principle a trustee can also hold equitable title on trust for a beneficiary.

5 Worthington (2003) 62, 71.

particular case may demand".[6] Leaving aside the justice of the case for the time being, there have been some attempts to address this perceived vagueness of definition.

Waters has sought to explain all of these instances of the constructive trust as turning on unjust enrichment; whilst Elias has sought to explain them as resting on three principles, the *perfection* of ineffective dispositions, the *reparation* of loss, and the *restitution* of unjust enrichment. Oakley and Cope take more atomistic views, that there are as many rationales as rules, so that the constructive trust cannot therefore be coherently rationalised on foot of a single principle or set of principles at all. On the basis of these approaches, the constructive trust responds entirely, partially or not at all, to unjust enrichment. Waters' and Elias' accounts are largely descriptive of the extent to which the trusts they describe conform to a restitutionary pattern, but – as with Oakley and Cope – each is largely content to assume the proprietary nature of the constructive trust, and none of these accounts offers much by way of justification for it. In this respect they are of little help in seeking to understand why the law imposes proprietary liabilities to reverse unjust enrichment.

Beyond the constructive trust which arises in defined contexts, there is another string to that trust's bow. It recalls Edmund-Davies LJ's comment that underlying these contexts is the general rubric of the justice of the case, and it poses the question whether a primary duty to convey property can also be imposed *de novo* (for reasons other than the vindication of the claimant's pre-existing proprietary interest); and, if so, whether any other fiduciary duties should also be imposed to support it. Lord Denning certainly thought so:

> it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone …".[7]

This "constructive trust of a new model"[8] has found a ready – if controversial.[9] – home in

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6 *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276, 300 (Edmund-Davies LJ).

7 *Hussey v Palmer* [1972] 1 WLR 1286, 1290; *Binions v Evans* [1972] Ch 359, 368; *Cooke v Head* [1972] 1 WLR 518, 520. Oakley (1973) (critical).

8 *Eves v Eves* [1975] 1 WLR 1338, 1341 (Lord Denning MR); *DHN Food Distributors v London Borough of Tower Hamlets* [1976] 1 WLR 852, 859. For a self-consciously modern development, it is a curiously old-fashioned description, recalling the Roundheads' New Model Army in the 1640s, or George III's description of his royal family as a New Model Family in the 1780s.

9 Mee (1996); Mee (1999) chapter 6; Delany, 254-271.

Ireland,[10] most recently in *Kelly v Cahill*.[11] In this respect, Ireland is no different from other jurisdictions in the common law world.[12] Indeed, in *Westdeutsche*, Lord Browne-Wilkinson commented that

> [u]nder an institutional constructive trust the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the potentially unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court. [13]

And, at a later part of his speech, he commented that:

> [a]lthough the resulting trust is an unsuitable basis for developing proprietary restitutionary remedies, the remedial constructive trust, if introduced into English law, might provide a more satisfactory road forward. The court by way of remedy might impose a constructive trust on a defendant who knowingly retains property of which the plaintiff has been unjustly deprived. Since the remedy can be tailored to the circumstances of the particular case, innocent third parties would not be prejudiced and restitutionary defences, such as change of position, are capable of being given effect. However, whether English law should follow the United States and Canada by adopting the remedial constructive trust will have to be decided in some future case when the point is directly in issue.[14]

These passages distinguish between, on the one hand, the substantive or institutional constructive trust which arises in historically sanctioned contexts in response to pre-existing proprietary interests, and, on the other, the remedial constructive trust which arises or is imposed not for such institutional reasons but as a remedy.[15]

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10 *Heavey v Heavey* (1977) 111 ILTR 1, 3-4 (Kenny J); *CM CB v SB* (High Court, unreported, 17 May 1983, Barron J) 5; *NAD v TD* [1985] ILRM 153, 160 (Barron J); *In Re Irish Shipping* [1986] ILRM 518, 522 (Carroll J); *HKN Invest Oy v Incotrade PVT*[1993] 3 IR 152, 162 (Costello J); *Reidy v McGreevy* (High Court, unreported, 19 March 1993, Barron J) 5; *Murray v Murray* [1996] 3 IR 251, 255 (Barron J); *Dublin Corporation v Building and Allied Trades Union* (High Court, unreported, 6 March 1996, Budd J) 34-37, 103-105, 108-109, 119-120; the issue was not reached on appeal: [1996] 1 IR 468; [1996] 2 ILRM 547); O'Dell (1998) 161-181.

11 [2001] 1 IR 56; [2001] 2 ILRM 205; Hourican (2001); Peart (2001); O'Dell (2001); Keating (2003).

12 Wright (1998).

13 *Westdeutsche*, 714-715.

14 *Ibid*, 716; *In re Goldcorp Exchange* [1995] 1 AC 74, 104 (Lord Mustill); *Re Polly Peck International (No 2)* [1998] 3 All 812, 831 (Nourse LJ).

15 On the dichotomy: Dewar (1982); Waters (1990); O'Connor (1996); Rotherham (2002) 12; *Atlas Cabinets and Furniture Ltd v National Trust Co Ltd* (1990) 68 DLR (4th) 161; *Dublin Corporation v Building and Allied Trades Union* (High Court, unreported, 6 March 1996, Budd J) 108.

The leading case drawing this distinction is the decision of the New Zealand Court of Appeal in *Fortex v Macintosh*.[16] Tipping J held that an institutional constructive trust arises by operation of the principles of equity upon the happening of the events which bring it into being, the later order of the court simply recognises in a declaratory way that the trust came into being at the earlier time.[17] On the other hand, a "remedial constructive trust is one which is imposed by the Court as a remedy in circumstances where, before the order of the Court, no trust of any kind existed";[18] the trust "depends for its very existence on the Order of the Court; such order being creative rather than simply confirmatory".[19] An employer had failed to pay to a pension fund either the relevant deductions from the employees' wages or the contributions it was required to make. The fund had successfully sued the employer for breach of contract, but, as the employer was in liquidation, the judgment was of no realistic benefit. So, in this action, the fund claimed, *inter alia,* a remedial constructive trust; the claim failed. Tipping J held that, in "order to defeat, *pro tanto*, the secured creditors' rights at law under their security by the imposition of a remedial constructive trust, the [claimants] must be able to point to something which can be said to make it unconscionable – contrary to good conscience – for the secured creditors to rely on their rights at law".[20] There was nothing of this nature on the facts,[21] so no remedial constructive arose in the case itself.

Attempts to locate proprietary responses to unjust enrichment in resulting and *Quistclose* trusts, and subrogation, have all proved unavailing. Before these attempts, the remedial constructive trust had seemed the most promising line for the development of such responses. Now that those other attempts are seen to have been futile, Lord Browne-Wilkinson's speech in *Westdeutsche* redirects attention back to the remedial constructive trust. Lord Denning's constructive trust of a new model having been rejected in its own

16 [1998] 3 NZLR 171; Birks (1998); Rickett & Grantham (1999); Wright (1998); (1998)a; (2000); (2000)a.

17 *Ibid*, 172.

18 *Ibid*.

19 *Ibid*, 173; *cp* 179 (Henry J). The distinction was sufficient for the purposes of the case, which called for no closer closer analysis of whether the remedial constructive trust formed part of New Zealand law (*ibid*, 173 (Tipping J); 182 (Blanchard J)); *cf Elders Pastoral v Bank of New Zealand* [1989] 2 NZLR 180; *Liggett v Kensington* [1993] 1 NZLR 257; Scott (1993); *Re Goldcorp Exchange* [1995] 1 AC 74, 104 (Lord Mustill); *Lankow v Rose* [1995] 1 NZLR 277.

20 *Ibid*, 175, 178; *Lankow v Rose* [1995] 1 NZLR 277, 294.

21 *Ibid*, 178-179; *cp* 181 (Henry J).

terms in English law,[22] nevertheless, the remedial constructive trust is the rubric under which it is being given effect elsewhere in the common law world. It is in this context that many principles of proprietary liability are being worked out, and it is to those principles that this chapter is primarily directed. However, the remedial constructive trust has been bedevilled – as is Lord Browne-Wilkinson's *dictum* above – with an analytical association with the language of unjust enrichment, and *vice versa*. For clarity of analysis, it is necessary to separate the issues.

3. Separating 'unjust enrichment' from 'the remedial constructive trust'

There are two entirely separate debates here. The first is as to the recognition of the remedial constructive trust *per se*; if recognised, it might be imposed as a remedy for many reasons, which may or may not include unjust enrichment. The second is as to whether the principle against unjust enrichment ought to organise some or all of the field occupied by constructive trusts in general or the remedial constructive trust in particular. The debates certainly have an overlap, but they are clearly not co-extensive, and the necessity of separating them is obvious, if not always observed.

There are many ways in which unjust enrichment and the remedial constructive trust have been yoked together. Lord Denning's new model constructive trust, founded on liberal principles of justice and good conscience, has been equated with Lord Mansfield's language in *Moses v Macferlan*,[23] and described as restitutionary.[24] That assumes that the remedial constructive trust is always restitutionary. This cannot be right, if only because the remedial constructive trust can in principle be imposed as a remedy for many reasons, not merely for unjust enrichment. In Australia, the remedial constructive trust is imposed to remedy unconscionability, and the Australian courts had for a long time maintained a separation between two alternative lines of authority, one relating to the personal action

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[22] *Re McKeown* [1974] NI 226; *Re Sharpe* [1980] 1 All ER 198, 203 (Browne-Wilkinson J) ("novel"); *Burns v Burns* [1984] Ch 311; *Grant v Edwards* [1986] Ch 638, 674 (Nourse LJ); *Springette v Defoe* [1992] 2 FLR 388, 393 (Dillon LJ); *Polly Peck*, 831 (Nourse LJ). *Quaere* whether Lord Denning MR's judgment in *Cunningham v Harrison* [1973] QB 942 (approved: *Hunt v Severs* [1994] 2 AC 350) is a disguised new model contructive trust (Rotherham (2002) 289)?

[23] (1760) 2 Burr 1005.

[24] *Hussey v Palmer* [1972] 1 WLR 1286, 1290 (Lord Denning).

giving effect to the concept of unjust enrichment,[25] the other relating to the imposition of a remedial constructive trust on the basis of unconscionability.

Early developments of that trust had tentatively sought either to build upon Lord Denning's views,[26] or to reject them;[27] but Australian law was set upon its own distinctive course[28] by the judgment of Deane J in *Muschinski v Dodds*.[29] Unmarried partners had purchased property in their joint names intending various developments, but the relationship broke down before any of it could be done. Ms Muschinski had paid for the purchase, and the majority held that Mr Dodds held his share on a remedial constructive trust for her. Deane J recalled the remedial origins of the use and trust, and rejected any dichotomy between institutional and remedial constructive trusts; he stressed both that "the acknowledgement of the institutional character of the constructive trust does not involve a denial of its continued flexibility as a remedy",[30] and, conversely, that – *pace* Denning – the "fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice".[31] Consequently, he held that once "its predominantly remedial character is accepted, there is no reason to deny the availability of the constructive trust in any case where some principle of the law of equity calls for the imposition upon the legal owner of property, regardless of actual or presumed agreement or intention, of the obligation to hold or apply the property for the benefit of another".[32] That principle in this case was the unconscionability of Mr Dodds retaining his interest after the failure of the joint venture basis upon which he had received it:[33] "equity will not permit the other party to assert or retain the benefit of the relevant property to the extent that it would be

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[25] *Pavey & Matthews v Paul* (1986) 162 CLR 221; *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Baltic Shipping v Dillon* (*The Mikhail Lermontov*) (1993) 176 CLR 344; *Commissioner v Royal Insurance* (1994) 182 CLR 51.

[26] *Ogilvie v Ryan* [1976] 2 NSWLR 504; Neave (1978).

[27] *Allen v Snyder* [1977] 2 NSWLR 685.

[28] Distinctive, but with affinities to the Denning model: Mason (1993) 14.

[29] (1985) 160 CLR 583; Stone (1986); Evans (1987) 1; Dodds (1988).

[30] *Ibid*, 614.

[31] *Ibid*, 615, 616; *cp* 609 (Brennan J); Deane J's comments have been approved in Canada (*LAC Minerals v International Corona Resources* (1989) 61 DLR (4th) 14, 51 (La Forest J)) and in Ireland (*Bricklayers*', High Court, 116-117 (Budd J)).

[32] *Ibid*, 616, 614; Cope (1992) 15-17, 24-49, 486-488, 807-814, 868; Wright (1998).

[33] *Ibid*, 618-620; on this joint-venture analysis: Mee (1998) 252-266.

unconscionable for him to do so".[34] This analysis was unanimously confirmed by the High Court in *Baumgartner v Baumgartner*.[35] Unmarried partners had pooled their resources, and moved into a property which was put into Mr Baumgartner's name and paid for in part out of the proceeds of the sale of Mr Baumgartner's original property and in part out of the pool; after the relationship had broken down, the High Court held that Mr Baumgartner held the house on a remedial constructive trust for the parties in the proportions in which they had pooled their resources, subject to a charge in his favour for the proceeds of the sale of his house. In *Bathurst City Council v PWC Properties Pty Ltd*, the Court unanimously characterised the trust in *Muschinski* and *Baumgartner* as remedial,[36] but in the event held that declaratory and injunctive relief would be sufficient remedies on the facts. And in *Giumelli v Giumelli*,[37] the High Court described the trust in such cases as "a remedial response to the claim to equitable intervention made out by the plaintiff",[38] but in the event chose to remedy an estoppel promise by means of equitable compensation.

During the course of these developments, the Australian courts were careful to keep this trust remedying unconscionability separate from their concept of unjust enrichment:[39] in *Muschinski*, Deane J expressly held that unjust enrichment was not the basis of the unconscionability calling for a remedy on the facts;[40] in *Baumgartner*, Toohey J treated them as separate doctrines;[41] and in *Stephenson Nominees Pty Ltd v Official Receiver*, Gummow J held that even if there is a general principle of restitution for unjust enrichment, it does not necessarily follow that the constructive trust is always the appropriate means to reverse that unjust enrichment.[42] And this separation has been insisted upon academically: "in the long run, Australian judges must develop

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[34] *Ibid*, 620.

[35] (1987) 164 CLR 137, 147-149; Black (1988); Bryan (1990); Neave (1991); *Stephenson Nominees Pty Ltd v Official Receiver* (1987) 76 ALR 485 (constructive trust to remedy commercial unconscionability).

[36] (1998) 195 CLR 566 [40]-[41].

[37] (1999) 196 CLR 101; Burns (2001).

[38] *Ibid*, 112 (Gleeson CJ).

[39] Cope (1992) chapter 24.

[40] *Muschinski*, 617.

[41] *Baumgartner*, 152-154, albeit doctrines which would "inevitably" (*ibid*, 154) have the same result on the facts before him; *cp Gilles v Keogh* [1989] 2 NZLR 327, 333 (Cooke P); Neave (1992).

[42] (1987) 76 ALR 485, 502-504; *Bryson v Bryant* (1992) 29 NSWLR 188, 222-223 (Shellar JA) (liability for unconscionability but not unjust enrichment).

unconscionability according to its own lights … What must be avoided at all costs is an unthinking borrowing of the Canadian concept of unjust enrichment without a full understanding of the values that inform the concept".[43] Quite properly, therefore, unjust enrichment has not been equated with unconscionability. Unfortunately, however, and quite recently, the converse equation has not been resisted: Gummow J's concurrence in *Roxborough v Rothmans*[44] seemed to make unconscientiousness on the part of the defendant the basis of liability in unjust enrichment. This is unfortunate: theretofore, modern Australian law had rejected "idiosyncratic notions of what is fair and just"[45] as the basis of the concept of unjust enrichment, and had properly kept unjust enrichment and unconscionability separate. Gummow J's views, for no benefit, destablise settled unjust enrichment doctrine and open up another route by which unjust enrichment and the constructive trust imposed to remedy unconscionability could come to be conflated.

The Australian view that unconscionability covers many things other than unjust enrichment demonstrates the implausibility of the assumption that the remedial constructive trust is always restitutionary. On the other hand, there is the converse assumption – common in Ireland – that unjust enrichment is always reversed by means only of a (remedial) constructive trust.[46] This is the path down which Canadian law has travelled,[47] and it has only recently disentangled unjust enrichment and the remedial constructive trust.

In *Murdoch v Murdoch*[48] the majority of the Supreme Court rejected the claimant wife's claim for an interest in the ranch on foot of a traditional resulting trust, but Laskin J[49] in dissent would have given her a constructive trust to reverse her husband's unjust

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43 Bryan (1994) 79; Getzler (1990) 16; Finn (1998); *cf* McConvill & Baragic (2002)

44 (2001) 208 CLR 516; McInnes (2002)a; Beatson & Virgo (2002); Jaffey (2003); Kremer (2003).

45 *Pavey & Matthews v Paul* (1986) 162 CLR 221, 256 (Deane J).

46 *East Cork Foods v O'Dwyer Steel* [1978] IR 103, 111-112 (Henchy J); *Murphy v AG* [1982] IR 241, 316 (Henchy J); *Re Frederick Inns* [1994] 1 ILRM 387; *O'Rourke v Revenue Commissioners* (Supreme Court, unreported, 15 May 1996, O'Flaherty J) 3; *Kelly v Cahill*, above n11.

47 Mee (1999) chapter 7; Klippert (1980); Stevens (1989); Smith (1992); McInnes (1999)a, (1999)b, (2002).

48 (1974) 41 DLR (3d) 367; Doering (1974).

49 *Ibid*, 388-389; Rogerson (1985).

enrichment at her expense. In *Rathwell v Rathwell*,[50] the claimant successfully claimed a trust, which Dickson J[51] (following Laskin J in Murdoch) for the plurality described as constructive. In *Pettkus v Becker*,[52] Dickson J held that the claimant was entitled to an interest in the bee-keeping business and property in the defendant's name on the basis of a constructive trust, at the heart of which lay the principle of unjust enrichment.[53] And this development was approved by Dickson CJ for a unanimous court in *Sorochan v Sorochan*.[54] In the beginning, this development owed much to Lord Denning's trust:[55] in *Rathwell*, Dickson J relied upon *Hussey v Palmer*;[56] and in *Pettkus*, he tied that trust to *Moses v Macferlan*.[57] Thereafter, the Denning traces largely drop out for a time, and *Pettkus* becomes the basis of the subsequent developments. But there are three potential problems with the *Pettkus* formulation: its family law context; the impression that unjust enrichment gives rise to a remedy only by way of constructive trust,[58] and the converse impression that the constructive trust arises only by virtue of unjust enrichment.[59]

As to its family law context, in *Pettkus*, Dickson J said the trust operates where there is special relationship, tantamount to spousal.[60] This could have confined the trust to family cases;[61] but it was quickly established that the trust could also arise in commercial contexts.[62] Then it was said that a fair result for both parties was the goal of unjust

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50 (1978) 83 DLR (3d) 289.

51 McCamus (1991); Waters (1991).

52 (1981) 117 DLR (3d) 257; Klippert (1981); McClean (1982).

53 *Ibid*, 273-274.

54 (1986) 29 DLR (4th) 1; Bissett-Johnson (1987); Farquhar (1989).

55 Strathy (1974); Dewar (1982).

56 *Rathwell*, 306.

57 *Pettkus*, 273; *Hunter Engineering v Syncrude Canada* (1989) 57 DLR (4th) 321, 383 (Wilson J).

58 Litman (1988); Parkinson (1993).

59 Paciocco (1989) 319-320 (warning against this equation); Hoegner (1997) (same); *cf Fortex v Macintosh* [1997] 1 NZLR 711, 720-722 (Gallen J); [1998] 3 NZLR 171, 180-181 (Henry J).

60 *Pettkus*, 274.

61 *LAC Minerals*, 75-76 (Sopinka J) (dissenting).

62 *LAC Minerals*; *Hunter Engineering v Syncrude Canada* (1989) 57 DLR (4th) 321; *Soulos v Korkontzilas* (1997) 146 DLR (4th) 214; see also *Atlas Cabinets.* Fridman (1991); *cp* Dixon (1995); McCormack (1996).

enrichment unjust enrichment analysis in the family context;[63] but this surfeit of good intentions had the tendency to enable family law policy concerns to contaminate unjust enrichment analysis; and it was quickly established that the principle applied generally whatever the context, family, commercial, or otherwise.[64] Family law policies can only imperfectly be met by unjust enrichment and similar doctrines, which are largely inappropriate to the context of the breakdown of relationships,[65] and whilst such doctrines occasionally properly be made out in family contexts, they cannot be sensitive to general social policy which is properly the realm of public debate and legislation. This would avoid the otherwise serious danger[66] that well-meaning decisions driven by a policy of achieving an appropriate division of property upon the breakdown of a relationship would inhibit the proper course of the separate developments of the principle against unjust enrichment and of the constructive trust.

As for impressions that "the remedial notion of constructive trust is even conflated with unjust enrichment itself, as though where one is found the other must follow",[67] after *Pettkus* the Court was almost immediately concerned to dispel any impression that unjust enrichment gives rise only to constructive trust liability. In *Sorochan* and *Hunter Engineering*, Dickson CJ pointed out that the unjust enrichment gives rise to personal claims at law,[68] so that the constructive trust is only one of the remedies for unjust enrichment, [69] and later cases have echoed this.[70] And the converse impression that the constructive trust arises only by virtue of unjust enrichment was finally dispelled by

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63 Pollock (1978); Farquhar (1989); Scane (1991). *Rawluk v Rawluk* (1990) 65 DLR (4th) 161, 168, 180 (Cory J) (dissenting); Sheppard (1990); Rickett (1990); *Peter v Beblow* (1993) 101 DLR (4th) 621, 639-641 (Cory J) (dissenting); Farquahar (1993).

64 *Pettkus*, 274 (Dickson J); *Hunter Engineering*, 383 (Wilson J); *LAC Minerals* 48-49 (La Forest J); *Peter* 645, 649-650 (McLachlin J). However, there may be some flexibility applying the general rule in the family context (*Sorochan*, 9 (Dickson CJ); *Peter*, 650 (McLachlin J); *cp Gilles v Keogh* [1989] 2 NZLR 327, 333 (Cooke P)) where insolvency considerations don't apply (text with nn171-173 below).

65 Mee (1999) *passim*.

66 Paciocco (1989) 325-328; McInnes (1998) 529-533; Rotherham (2002) chapter 10; Mee (1999) chapter 7.

67 Peter, 644 (McLachlin J) (critical of the conflation)

68 *Eg*: *Delgman v Guaranty Trust of Canada* [1954] 3 DLR 785; *Peel v Canada* (1994) 98 DLR (4th) 140.

69 *Sorochan*, 7; *Hunter Engineering*, 349.

70 *LAC Minerals*, 48 (La Forest J); 76 (Sopinka J); *Rawluk*, 185-188 (McLachlin J); *Peter*, 649 (McLachlin J); 636, 639 (Cory J).

Soulos v Korkontzilas.[71] An estate agent purchased for himself property he had been instructed to purchase for the claimant. The claimant's relatively straightforward *Keech v Sandford*[72] case of a constructive trust for breach of fiduciary duty ran into the difficulty raised by the defendant that in the absence of an unjust enrichment of the defendant at the expense of the claimant in *Pettkus* terms, no such constructive trust could arise. However, McLachlin J held that the constructive trust "is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity …";[73] and that to the recognised categories of institutional constructive trusts Canadian law since *Pettkus v Becker* had *added* the constructive trust to reverse unjust enrichment,[74] so that the "assertion that a remedial constructive trust lies to prevent unjust enrichment … should not be taken as expunging … the constructive trust in other circumstances where its availability has long been recognised".[75] Indeed, she went further, arguing that the remedial constructive trust is not confined to cases of unjust enrichment but instead "may be imposed where good conscience so requires",[76] bringing the Denning influences centre stage once more, and giving the lie to the post-*Pettkus* assumption that the constructive trust arises only by virtue of unjust enrichment. Hence, in Canada, as in Australia, the remedial constructive trust "can remedy other injustices besides unjust enrichment".[77]

Hence, just as the Australian courts seem to be flirting with the conflation of unconscionability and unjust enrichment, the Canadian courts have managed to extricate themselves from the dangerous *non sequitur* that if a defendant has been unjustly enriched at the expense of the claimant, the defendant must hold the enrichment on remedial constructive trust for the claimant. Of course, this could not have been right: unjust enrichment of itself and without more simply gives rise to a personal duty to make restitution, it does not therefore give the claimant a proprietary claim against the defendant

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71 (1997) 146 DLR (4th) 214 (SCC); Smith (1997), (1998); McInnes (1998), (1999)a; Chambers (1999); Roman (1999), (1999)a; Ogilvie (2000).

72 (1726) Sel Cas Ch 61; Chambers (1999) 175-177. Indeed, the facts are very similar to the classic American case of *Beatty v Guggenheim* (1919) 225 NY 380; 122 NE 378 (1919).

73 *Soulos*, 221.

74 *Ibid*, 221-224, 229-230.

75 *Ibid*, 222-223; *cp Hunter Engineering*, 349 (Dickson CJ); 183-185 *Rawluk*, (McLachlin J).

76 *Ibid*, 227.

77 Hayton (1989) 210; Gardner (1994) 188.

or justify the imposition of any kind of trust, let alone the tragically abused remedial constructive trust. Where a defendant has been unjustly enriched but the claimant seeks a proprietary remedy, there must either be something else (an alternative proprietary doctrine which applies in parallel with the unjust enrichment; so that a claimant would have both a personal unjust enrichment claim against a defendant and also have in the alternative an unconnected, separate, proprietary claim) or something more[78] (a supplementary or additional factor which, cumulatively with unjust enrichment at the claimant's expense, justifies elevating a personal claim into a proprietary one, converting mere personal obligation into ownership). In the former case, the proprietary remedy co-exists – fortuitously for the claimant – with the personal unjust enrichment claim; in the latter, the proprietary remedy is directed to reversing the unjust enrichment. Because resulting and *Quistclose* trusts and subrogation do not respond to unjust enrichment, they constitute alternative claims (something else) rather than supplementary factors (something more). On the other hand, some discussions of some aspects of the remedial constructive trust present it not as an alternative claim but as a supplementary factor. That role is the focus for the remainder of this chapter.

4. Objections to the remedial constructive trust

4.1 Introduction

Much of the important work on the nature of proprietary liability in unjust enrichment has been done under the rubric of the remedial constructive trust.[79] For the court in *Fortex*, the key point of distinction between institutional and remedial constructive trusts is that whereas the former vindicate *pre-existing and continuing* titles, the latter create new ones.[80] All unjust enrichment claims are founded on a transfer of value from claimant to defendant, so that in those which are founded on a transfer of money or property, there is *always* a *pre-existing* title; the relevant distinction is between titles which *continue* and those which do not. If they continue,[81] then any constructive trust is an institutional one constructed upon a proprietary base. If they do not, then any constructive trust will be remedial constructed upon a new title. It is for that reason inappropriate to explain the

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[78] Rickett (1999) 319-332, (2000) 198-202.

[79] An excellent example is Glover (1991).

[80] Rickett (2000) 190.

[81] There are deep waters here, not least the question of whether rights born of tracing are *always* new ones, as Birks would have it, or can be based *either* on continuing titles (as in *Foskett v McKeown* [2001] 1 AC 102 (HL)) *or* on new ones; (see pp3-4 above).

remedial constructive trust to reverse an unjust enrichment on foot of a proprietary base.[82] The contours of an explanation on other grounds emerge clearest from a consideration of the arguments against the remedial constructive trust: that it is inappropriate, novel, discretionary, unprincipled, and unfair to third parties, especially insolvency creditors.

4.2 Appropriateness

If it was ever a real objection that, as a matter of principle it is inappropriate for equity to involve itself in commerce, it seems no longer to hold water: equity's "place in the law of commerce, long resisted by commercial lawyers, can no longer be denied. What they once opposed through excessive caution they now embrace with enthusiasm".[83] Analysis now focuses instead upon whether the relevant equitable doctrine, here the remedial constructive trust, is capable of producing legal and commercial uncertainty, imposing impractical standards of investigation, upsetting commercial bargains, or generating unfair priorities in insolvencies.[84] It might be said that uncertainty as to the grounds on which the trust arises can make pleading difficult, and uncertainty as to remedy can make settlement difficult.[85] But these concerns can too easily be overstated, and will certainly lose their force as the authorities provide guidance. Other aspects of uncertainty are often presented as elements of the next two objections, novelty and discretion.

4.3 Novelty

There is nothing particularly novel about elevating a personal claim into a proprietary one; this has long been equity's strategy for the generation of equitable proprietary rights.[86] Against this background, the fact that there was little or no authority for Lord Denning's new model constructive trust,[87] the basis in many ways of the modern remedial constructive trust,[88] cannot of itself be conclusive. The courts no longer adhere to the fiction that the common law is a brooding omnipresence in the sky[89] simply waiting to be

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[82] This is one (for the other: n127 below) of the themes Grantham (1996).

[83] Millett (1998)a 214.

[84] See pp48-49 above.

[85] Birks (2000) 14-15.

[86] Worthington (2003) 56-61, 79 (general), 66-68 (trust), 74 (lien), 124-129 (breach of fiduciary duty), 242-243 (specific performance and constructive trust), 244 (unpaid vendor's lien).

[87] Mee (1999) 178; Birks (2000) 9-14.

[88] *Soulos*, 224-230 (McLachlin J); Cope, 486; Halliwell (1997).

[89] *Southern Pacific Co v Jensen* 244 US 205, 222 (1917) (Holmes J).

declared by the judges; no, judges do make law, change it, develop it;[90] and novel doctrines are an inevitable part of this process.[91] This is the process by which equity itself developed; Lord Nottingham's flexibility has not been entirely displaced by Lord Eldon's early care and later desiccation; in modern times, equity's novelties have been of the first importance: one need only instance the *Mareva* injunction, the *Anton Piller* order, and equitable estoppel (novelties with Lord Denning's fingerprints all over them!). "In 1951 Mr Justice Harman …. made a celebrated observation: 'Equity', he said 'is not to be presumed to be of an age past child-bearing'".[92] In *Muschinski*, Deane J commented that "…the constructive trust has not outgrown its formative stages as an equitable remedy …".[93] Indeed, so far as the remedial constructive trust is concerned, courts in Australia, Canada, Ireland and New Zealand are long past the birth, and are now observing the growing pains of a precocious teenager. But equity, like all homes with teenagers, sometimes finds it difficult to accommodate its unruly offspring, and it is often thought unruly because of its discretionary nature.

4.4 Discretion

An important objection against the remedial constructive trust operating at all, let alone as a proprietary remedy for unjust enrichment, is that its discretionary nature makes its application unpredictable, productive of legal and commercial uncertainty. However, discretion of itself is not indefensible in legal reasoning.[94] Indeed, we have easily embraced such discretion in the context of proprietary estoppel,[95] and in an important recent case, this discretion comes with a strong constructive trust flavour,[96] directed to ensuring the appropriateness of the remedy. A similar discretion can easily be embraced in the context of the remedial constructive trust.

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[90] *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349.

[91] *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70.

[92] Millett (1995) 35; *cp Cowcher v Cowcher* [1972] 1 WLR 425, 430 (Bagnall J); *Lonrho v Fayed (No 2)* [1992] 1 WLR 1, 9 (Millet J); Mee, 179.

[93] *Muschinski*, 165.

[94] Gardner, (1994); Jensen (2003).

[95] Gardner (1999).

[96] *Yaxley v Gotts* [2000] Ch 162.

Such a discretion could be as to whether the necessary underlying facts are present; or the trust's existence may be automatic, but with a merely discretion as to its vindication.[97] If a remedial constructive trust is to be imposed to reverse an unjust enrichment, the latter flavour is inappropriate: unjust enrichment of itself ought not to give rise to a constructive trust, even if there is then to be a discretion as to whether there is to be a proprietary vindication. Unjust enrichment, in the first instance, gives rise merely to a personal remedy; the proper role of discretion – if at all – is as to whether to elevate that personal remedy into a proprietary one.[98] The previous chapters demonstrate that attempts to make this process conform to the rules associated with resulting or *Quistclose* trusts or subrogation have not worked. As Gardner puts it: "the central point in using discretion rather than rules is that discretion offers a better means than a rule of promoting some purpose of the law: here, the proprietary remedying of unjust enrichment".[99] Even guided by that purpose, there are many interweaving elements to the discretion.[100]

There is a discretion as to whether the necessary facts are present in the sense that there is as always discretion when judges find facts. There is a discretion as to what constitutes the necessary unconscionability to generate the remedial constructive trust, and this discretion might well be exercised differently in different jurisdictions.[101] There is a discretion as to the appropriate remedy[102] in both the Canadian[103] and the Australian[104] flavours of the trust, so that if a trust is appropriate, there are various discretions as to the details of what its effects should be:[105] it might give rise merely a personal duty to account; it could be

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97 Gardner (1994) 190-192.

98 *LAC Minerals*, 51 (La Forest J).

99 Gardner (1994) 197; also: 195-196.

100 Glover (1991).

101 Wright (2000) 210.

102 Remedial flexibility is a major theme in Wright (1998) *passim*, esp 150 [4.30].

103 McClean (1982) 171; Paciocco (1989) 320; *Sorochan*, 7 (Dickson CJ); *Hunter Engineering*, 349 (Dickson CJ), 384 (Wilson J); *LAC Minerals*, 17 (Wilson J), 47-51 (La Forest J); *Atlas Cabinets*, 174-175 (Lambert JA); *Rawluk*, 185-188 (McLachlin J); *Peter*, 637 (Cory J), 649 (McLachlin J); *Soulos*, 227 (McLachlin J).

104 Austin (1988) 67, 85; O'Connor (1996) 737-738, 745; *Daly v Sydney Stock Exchange* (1986) 160 CLR 371, 379-380 (Gibbs CJ); *Bathurst* [42], *Giumelli*, 113.

105 *Cf* Oakley (1992).

postponed to any relevant proprietary remedy to other proprietary or secured claims;[106] and there is a discretion as to the timing of the trust.[107] Furthermore, though it is not expressly mentioned in the cases, there must be a discretion to put the claimant on terms in the exercise of the rights under the trust – the discretion as to timing is merely an important example of this discretion to impose terms. And, finally, there is a discretion as to whether the primary proprietary consequences of the trust ought to be attended with secondary fiduciary duties on the part of the defendant.[108] [This point can, though need not necessarily, be taken two steps further; first, if it is possible to conceive of fiduciary obligations without an underlying proprietary nature,[109] the converse – proprietary nature without fiduciary obligations – is equally conceivable; second, if equity (perhaps under European influences) evolves an obligational rather than a property understanding of the trust,[110] then rather than a primary proprietary obligation and supporting secondary fiduciary obligations, there will simply be a spectrum of obligations from which, in the context of the remedial constructive trust, to choose the appropriate obligations].

On all of these discretionary issues, the issues of policy, principle and precedent seem evenly divided; there are no *a priori* answers, the best that can be done in the interests of certainty is first to adopt a sensible position and then to apply it consistently, so that, over time, the elements of the discretion can be filled in.[111] Understood in this way, these discretions are not unconstrained. In particular, by keeping one eye on the underlying purpose of reversing unjust enrichment, courts will become familiar both with the circumstances which will justify trusts as opposed to personal remedies and with the

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106 There may be analogies here with *Phillips v Phillips* (1862) 4 DeGF&J 208; *Latec Investments v Hotel Terrigal* (1965) 113 CLR 265; *Heid v Reliance Finance* (1983) 153 CLR 326, 341 (Mason and Deane JJ); Cope (1997) 104-106; Chambers, 171-184.

107 *Muschinksi* 616, 623 (Deane J); *Parson v McBain* [2001] FCA 376; *Fortex*, 172-173 (Tipping J), 180 (Henry J): "backdated proprietary interest"; *Rawluk*, 185 (McLachlin J); O'Connor (1996) 751-753, 757; Levine (1997); Birks (1998) 205; Wright (1998) 263 [8.1], (2000) 206, 217-218; Burrows (2001) 428; Rotherham (2002) 25-28.

108 *Lonrho v Fayed (No 2)* [1992] 1 WLR 1, 12 (Millett J); Paciocco (1989) 316; Harpum (1997) 446-448; Wright (1998) 270 [8.12]; Rotherham (2002) 20-22; Worthington (2003) 68, 266.

109 Not only in classic cases of fiduciary duties of loyalty without a necessary underlying trust, but also in one understanding of the liability to account for dishonest assistance in a breach of trust: "some constructive trusts create or recognise no proprietary interest. Rather there is the imposition of a personal liability to account in the same manner as an express trustee" (*Giumelli*, 112). It is an open question as to whether it is appropriate to characterise the situation as one of constructive trust at all: *Paragon Finance v Thakerar* [1999] 1 All ER 400, 408-409, 414 (Millett LJ); Mitchell (2002).

110 Hayton (2001); Parkinson (2002).

111 *Cp Soulos*, 227 (McLachlin J).

details and effects of those trusts,[112] such as their timing, the terms on which their beneficiaries might enforce them, and the extent to which they generate additional fiduciary duties. This is how rules come about. In fact, this is exactly what has happened in Australia: the discretion inherent in the principle of unconscionability has in the context of the breakdown of intimate relationships been filled in by the more specific concept of the failure of the joint-venture between the parties.[113] Whether or not one agrees with this concept as a matter of principle, its emergence demonstrates the process of the filling-in of discretionary principles by more specific concepts. Indeed, since the operation of rules involves discretion, and the operation of discretion involves rules, the distinction between rules and discretion is not so much a matter of kind as one merely of degree, between relatively constrained and relatively unconstrained devices.[114] The real objection to discretion in the end is simply a fear of the unknown; it is not that discretion is bad, it is that new or unfamiliar discretion is bad; however because the elements of discretion can be filled in over time,[115] we can conquer our fear of the unknown; we can learn to stop worrying and love discretion.

4.5 Principle

Discretion also gives rise to the fourth objection to the remedial constructive trust: that it is unprincipled, in the sense that it is a redistribution of property from one person to another, something our legal system does not contemplate except with the authority of statute.[116] This is perhaps the strongest objection, especially in jurisdictions with constitutional protections of property. Nevertheless, the fact that statute can do it suggests that the system can tolerate such redistribution; and proprietary estoppel illustrates that it can do so even where the rules derive from the courts rather than parliament. Indeed, courts do create property rights, sometimes on a grand scale.[117] The real objection is not so much that it happens as that legal rhetoric can obscure that it does,[118] thereby preventing an open

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[112] *Cp LAC Minerals*, 50-51 (La Forest J).

[113] See n33 above.

[114] Gardner (1994) 193-194.

[115] Some principles which can fill in the discretion are discussed in s5 below.

[116] Birks (1994)a 218-220; Birks (2000) 8-9; Rotherham (2002) 247; *Chapman v Chapman* [1954] AC 429, 443-446 (Lord Simonds LC); *Gissing v Gissing* [1971] AC 886, 898 (Lord Morris), 901 (Viscount Dilhorne); *Pettitt v Pettitt* [1970] AC 777, 805 (Lord Morris), 811 (Lord Hodson), 817 (Lord Upjohn); *Polly Peck,* 825 (Mummery LJ), 831 (Nourse LJ).

[117] *Mabo v Queensland (No 2)* (1992) 175 CLR 1; Tunney (2000).

[118] Rotherham, (1992), (1998), (2002) chapter 2.

assessment of the phenomenon and the policies which might justify or impugn it. On the other hand, those cases which have broken down the elements of the discretion into its component parts have conducted just such an assessment;[119] and again according as the policies are understood and implemented and the elements of discretion are filled in, this objection falls away. Other aspects of this objection are often presented as elements of the next two objections, the position of third parties, especially on insolvency.

4.6 Third Parties

A common objection to the remedial constructive trust is that it would have undesirable consequences against third parties:[120] the "efficiency of commerce depends upon security of title and protection of third parties from undisclosed charges".[121] Third parties who deal with debtors are liable to have their expectations dashed if those debtors are subject to capricious claims which reduce the debtors' estates. This is why Lord Browne-Wilkinson in *Westdeutsche* was concerned to reduce the prospect of off-balance sheet liabilities[122] of which third parties cannot be aware. The answer to this problem is always publicity and registration, which is why charges are unenforceable if unregistered, and why the courts have been concerned to keep within acceptable limits (by definition unregistered) retention of title clauses. But the example of retention of title clauses demonstrates that there is some 'wriggle room' here, that the law can accommodate some off-balance sheet liabilities that are not publicised to third parties. Furthermore, the case-law has been alive to this matter, and courts have been astute to craft the terms on which constructive trusts have been imposed to ensure that they do not prejudice third parties.[123] In particular, McLachlin J in *Soulos v Korkontzilas* held that there "must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case; *eg* the interests of intervening creditors must be protected".[124] However, the objection of prejudice to third parties has particular force in the context of the defendant's insolvency.

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119 See pp160-162 above.

120 Scott (1993) 349; Sherwin (1989) 329, 343-345; Goode (1991) 240-244; Wright (1998) 143 [4.20], 170-171 [5.18]-[5.19].

121 Paciocco (1989) 327; see also 321, 339; McClean (1982) 177; Grantham (1996) 563; Rickett (2000) 201; Wright (2002) 143 [4.20], 170-171 [5.18]-[5.19]; Worthington (2003) 266.

122 *Westdeutsche*, 704-705.

123 *Rawluk*, 188, 191 (McLachlin J); *Peter*, 638, 640 (Cory J).

124 *Soulos*, 230.

4.7 Insolvency

Here, the objection is that the remedial constructive trust would have undesirable consequences against third parties creditors in the defendant's insolvency[125] who have "a proper interest in the subject-matter [of the trust] which would be affected by the imposition of the trust".[126] This is a contextualised restatement of the general concern that equity has no place in commerce: by imposing a proprietary interest which would take the property out of the insolvency,[127] the remedial constructive trust would upset the carefully crafted regime of priorities in insolvency,[128] and, in particular, undercut the *pari passu*[129] equality of treatment between claimants whose claims rank the same in the insolvency.[130] On this view, it is both fair and efficient to rank creditors' entitlements on the basis of a statutory hierarchy that reflects and respects pre-insolvency rights and to ensure the maximal value of the estate available for distribution by preventing its piecemeal disintegration.[131] The *pari passu* rule has, therefore, "provided the basic distributional matrix in corporate insolvency law for nearly 150 years. Many of the existing distributional rules … are predicated upon the *pari passu* grundnorm".[132] As a consequence, the strength of the policy underlying the "hallowed principle of *pari passu* distribution"[133] is such that it precludes agreements by which creditors seek to improve their positions on bankruptcy or insolvency,[134] and had[135] difficulties accommodating a creditor who wishes to subordinate his debt to others and thereby potentially receive *less*

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125 McCormack (1997).

126 *Fortex*, 175, *cp* 179 (Tipping J).

127 Waters (1966) 1249-1254.

128 This is the second (for the first: n82 above) theme in Grantham (1996).

129 Farrar (1980); Oditah (1992); Finch (1997); Finch (1999); Keay & Walton (1999); Fletcher (2002) 2 [1.004], 8 [1.014], 310-311 [10.020], 658-662 [24.021-24.025].

130 Goodhart & Jones (1980) 511; Paciocco (1989) 322; Scott (1991) 389; Annetta (1992); Cope (1997) 2-15; Swadling (1997) 144-145; Goode (1998) 184; Evans (2000); Wright (2000)a 161, 168; Worthington (2003) 49, 267.

131 Schwartz (1981) (overview); Jackson & Kronman (1979), Jackson (1984), (1986) chapter 1 ("creditors' bargain") (distribution rules should reflect the collective mandatory nature of the proceedings); Scott (1986) (sharing risk best meets the "common disaster" to creditors of a debtor's insolvency"). Commentary: Oditah (1993) 461-463; Cantlie (1994) 413, 419-422; Finch (1997) 230-234; Mokal (2001) *LS* 400.

132 Milman (1991) 59; 72-73.

133 Goode (1987) 435, 444.

134 *Jeavons*, *Re*; *ex p MacKay* (1873) 8 Ch App 643 (bankruptcy); *British Eagle International Airlines v Compagnie International Air France* [1975] 1 WLR 758 (insolvency); *National Westminster Bank v Halesowen Presswork & Assemblies* [1972] AC 785 (insolvency).

135 Such difficulties have been overcome: *Re British and Commonwealth Holdings plc (No 3)* [1992] BCLC 322; *Re Maxwell Communications Corp plc (No 2)* [1994] 1 All ER 737; Ferran (1998).

(rather than more) than those others in the insolvency. Unsurprisingly, this strong a commitment to the view that it is not the function of insolvency law to disturb pre-insolvency entitlements would seem entirely to preclude the application of the remedial constructive trust in an insolvency context.

Considerations of this kind led the Court of Appeal in *Re Polly Peck International (No 2)*[136] to reject the remedial constructive trust outright. The applicants sought leave to institute proceedings against Polly Peck (PPI) in administration, contending that their properties in Cyprus had been expropriated by the government of the dubious Turkish Republic of Northern Cyprus, which in turn had leased those properties to subsidiaries of PPI. PPI sold its shares in the subsidiaries; and the applicants sought a trust over the proceeds of the sale. Mummery LJ held that no seriously arguable claim to an institutional constructive trust arose on the facts, and that no seriously arguable claim to a remedial constructive trust arose as a matter of law:

> … the effect of the statutory scheme applicable on an insolvency is to shut out a remedy [the remedial constructive trust] which would, if available, have the effect of conferring a priority not accorded by the provisions of the statutory insolvency scheme. … [But the law] cannot be legitimately moved by judicial decision down a road signed "No Entry" by Parliament. The insolvency road is blocked off to remedial constructive trusts, at least when judge-driven in a vehicle of discretion. … the scheme imposed by statute for a fair distribution of the assets of an insolvent company precludes the application of the equitable principles manifested in the remedial constructive trust …[137]

Nourse LJ agreed that

> where … there would be not simply a variation of proprietary rights but a variation of the manner in which the administrators are directed to deal with PPI's assets by the Insolvency Act 1986 it is not seriously arguable, even at the highest level, that a remedial constructive trust would be imposed. For myself, I would go further and hold that it would not be seriously arguable even if PPI was solvent.[138]

Similarly, in *Fortex v Macintosh*, the New Zealand Court of Appeal held that "the Court must be careful not to vary settled insolvency rules on too loose a basis".[139]

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136 [1998] 3 All ER 812.

137 *Ibid*, 827.

138 *Ibid*, 831.

139 *Fortex*, 179 (Tipping J).

It may be possible to distinguish these cases. First, whatever about the language of the Court in *Polly Peck*, it is clear that the Court in *Fortex* did not completely rule out the possibility of varying insolvency rules; indeed, by insisting that this must not be done too loosely, the Court plainly envisaged that it could be done on the basis of clear standards.[140] And second, there may be distinctions between personal bankruptcy, corporate insolvency, receivership, and administration (in Ireland, examinership) on the basis of differing degrees of strictness of the underlying policies, so that a regime such as administration which is founded upon a complete moratorium on all claims might preclude a remedial constructive trust,[141] whereas another regime might not.

However, rather than distinguishing these cases, it is better to meet their challenge head on as a matter of principle. And, as a matter of principle, a discretionary remedy is not *per se* inconsistent with the principle of equality underlying the *pari passu* principle. Two equally-circumstanced claimants are not treated equally if a judge considers in one case but not in the other whether to exercise the relevant discretion or not; however they *are* treated equally if the judge considers in both cases whether to exercise the relevant discretion, even if the discretion is exercised in favour of one but not the other. Even if the same party gets the proprietary remedy in both cases, the similarity of outcome does not disguise that the first process is not acceptable but the second is: both parties were considered according to the same standard, both were equally treated, even if the discretion was exercised in favour of one but not the other.

Furthermore, the insolvency problems can be overstated; the remedial constructive trust can be treated with caution without rejecting it entirely.[142] Indeed, property carries with it

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140 Birks (1998) argues that *Fortex* spelt the end of the remedial constructive trust in New Zealand because of this warning about the insolvency context, but Wright (2000)a 147, 153 argues that Birks claims too much on this point.

141 Rickett (2000) 204.

142 US courts sometimes allow claimants to raise remedial constructive trusts against insolvencies (Sherwin (1989) 313-329; the authorities are collected *ibid*, 313-315n74). Thus, a remedial constructive trust to recover a mistaken payment to a bankrupt was imposed in *Re Berry* 147 F 298 (1906). But this position has not been without its influential critics (Dawson (1951) 26-33; Palmer (1978) vol 1 [1.3]-[1.4], [2.14(c)]) and in *Re Omegas Group Inc: XL/Datacompp Inc v Wilson* 16 F3d 1443 (1994) the Court of Appeals for the 6th Circuit refused to accord a not merely mistaken but defrauded claimant a priority in bankruptcy. *Omegas* has in turn attracted its own influential critics (Kull (1998)) and in *Re Dow Corning Corp* 192 BR 428 (1996) Spector J was sympathetic to the project of limiting the role of constructive trusts in bankruptcy but was nevertheless deeply critical of the decision in *Omegas*. Hence, US courts accept that the remedial constructive trust can generate a priority in bankruptcy but properly treat it with caution.

not only rights but also duties.[143] A strong view of the property rights of creditors ignores the fact that their property also imposes duties upon them, duties which can ensure that the objectives of insolvency can be redistributive[144] rather than collectivist. Furthermore, the strength of the *pari passu* principle can be overstated: "the law has become beset by anomalies and inconsistencies … concerning the operation of the *pari passu* principle".[145] Indeed, on at least one view,[146] the *pari passu* principle is not an accurate description of how the assets of insolvent companies are in fact distributed, and does not explain the crucial features of the formal insolvency regime. There is much force in such criticisms: the *pari passu* rule is undermined by exceptions such as set-off, not to mention statutorily preferred or consensually subordinated debts; indeed, in an "overwhelming"[147] proportion of liquidations, "*nothing* is distributed to the unsecured creditors (the only category of claimant truly subject to the *pari passu* rule)".[148] As a consequence, most liquidations seem not in practice to be subject to the *pari passu* principle at all. On these views, there would seem to be little difficulty in principle in accommodating the remedial constructive trust to an insolvency regime.

But even the strong view of *pari passu* can accommodate the remedial constructive trust to reverse unjust enrichment:[149] although there is no basis in fairness or efficiency grounds to treat the different classes of personal claims in unjust enrichment either more or less favourably *inter se*, or to treat personal claims in unjust enrichment either more or less favourably than other personal claims in contract or tort,[150] fairness considerations do provide some support for according preferential status to unjust enrichment claimants seeking restitution of benefits which have been incontrovertibly added to the defendant's estate,[151] at least where the claim is related to specific property.[152] Furthermore, since

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[143] Macpherson (1964), (1978); *Nomos XXII*; Radin (1993); see also p4 above.

[144] Warren (1987); *cf* Baird (1987).

[145] Fletcher (2002) 660 [24.023]; Oditah (1992) 468-476.

[146] Mokal (2001); *cp* Finch (2000).

[147] Mokal (2001) 589.

[148] *Ibid*, 588.

[149] Finch & Worthington (2000); Rotherham (2002) 69.

[150] Finch & Worthington (2000) 7-13.

[151] *Ibid*, 10-13.

[152] *Ibid*, 12-13, 15-16.

many doctrines "demonstrate that the law, where it can, will deliver preferred status to the beneficiaries of obligations imposed by operation of law",[153] it follows that "unjust enrichment claimants merit proprietary status … by operation of law in a manner which is neither unfair nor inefficient when all the parties are considered",[154] but only if the grounds for the remedial constructive trust explored in the next section are established.

5. Grounds for establishing the remedial constructive trust

5.1 Introduction.

The arguments against the remedial constructive trust are insufficiently strong for it to fail *in limine*, and even though it is discretionary, some principles can nevertheless be discerned to fill in that discretion. In particular, if the claimant did not take the risk of the defendant's insolvency, *and* if the defendant was aware of the circumstances giving rise to the claimant's claim, it will usually be appropriate to impose a remedial constructive trust. Of course, as a matter of the court's discretion in a given case, one or other of these factors might be sufficient to establish the trust, and other factor may also be relevant;[155] but, as will emerge from the analysis below, neither risk nor awareness on its own will usually be sufficient to justify imposing a remedial constructive trust – rather, both risk and awareness will need to be established to impose one.

5.2 Risk.

It seems obvious that an unsecured creditor, by choosing to be unsecured, has taken the risk of the debtor's insolvency, and that a secured creditor, by choosing to be secured, has not taken the risk of the debtor's insolvency. The creditor had the opportunity to bargain for the security, and its absence is probably reflected in the price.[156] By analogy, it can be argued that where an unjust enrichment claimant has taken the risk of the defendant's insolvency, the law should not generate a proprietary claim, whereas if the claimant has

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[153] Ibid, 18-19

[154] *Ibid*, 19-20.

[155] *Eg*, Paciocco (1989); Scott (1991) (1993) (1995); Glover (1991); Rotherham (2000), (2002) 7-86, 343-347; *LAC Minerals*, 50-51 (La Forest J); all discussing such factors as the expectations of the parties, the behaviour of the defendant, the quality of the claimant's connection with the property and whether the defendant's assets have been swollen, whether the context is family or commercial, and whether any failure of the basis of the transfer was initial or subsequent.

[156] Swadling (1997) 142.

not taken the risk of the insolvency, the law should.[157] The unjust enrichment claimant is not a contractual claimant, and had *ex hypothesi* had no opportunity to bargain, consciously to assume the risk of the defendant's insolvency, and to choose to protect against it (for example, by security, or a higher rate of interest on credit) or not. Lord Templeman famously suggested just such an approach in *Space Investments v Canadian Imperial Bank of Commerce Trust Co*, holding that "the customers and other unsecured creditors voluntarily accept the risk that the trustee bank might become insolvent and unable to discharge its obligations in full" where the claimant trust would be entitled to a priority because it "never accepted any risks involved in the insolvency of the trustee bank".[158] In particular, a claimant who has not consented to the enrichment – as where the enrichment was pursuant to mistake or duress, or an initial failure of consideration –has not taken the risk of the creditor's insolvency; whereas, a claimant who has initially consented to the enrichment has taken the risk of the creditor's insolvency, even where that consent is subsequently undercut, as where the enrichment was pursuant to a subsequent failure of consideration.[159]

Plainly, some such notion of non-assumption of risk will be an important element in guiding a court's discretion. But it cannot be an exclusive guide, for at least six reasons. First, there are examples of claimants who have not accepted the risk of insolvency but who do not get priority. Despite the position in theory, not all general creditors on the ground accept the risk of their debtors' insolvencies, in particular where the creditor is a small trade creditor, the debtor is a large corporation, and there is no realistic chance for the small creditor to bargain with the large corporation.[160] But though they have not in reality accepted the risk of their debtors' insolvencies, these creditors are not afforded a proprietary claim.

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[157] Sherwin (1989) 335-338; Paciocco (1989); Glover (1991) 276; Scott (1993) 341-345; Friedmann (1999) 198; Rotherham (2002) 126-130, (2002) 81-86; McCormack (2000) 267; Burrows (2001) 425; *Westedeutsche*, 684 (Lord Goff).

[158] [1986] 1 WLR 1072, 1074; *cp Napier and Ettrick v Hunter* [1993] 1 AC 713, 737 (Lord Templeman); *Westedeutsche*, 684 (Lord Goff) (*semble*). However, the comment in *Space Investments* was *obiter*; the case concerned a claim by a trustee, such solicitude might not be shown to an ordinary trade claimant; and the Privy Council was equivocal about it in *In re Goldcorp Exchange* [1995] 1 AC 74 , 104-105, 109 (Lord Mustill).

[159] Scott (1991) 400-401; Burrows (2001) 426. *Cf* Chambers (1997) chapter 6 and Birks (2003) 166-178 drawing a similar distinction for proprietary base reasons.

[160] Poccacio (1989) 325; Houston (1995) 177; Rotherham (2000) 127; Rotherham (2002) 81.

Second, even if non-acceptance of the risk of insolvency is an appropriate basis upon which to consider affording priority, there can be many claimants other than unjust enrichment claimants who will have only personal rights against the debtor but who will also not have had the opportunity to bargain against the risk of the debtor's insolvency:[161] tort claimants are the classic example. This point can be met if it is accepted that in the case of an enrichment of a defendant at the expense of the claimant there is an analogy with the giving of credit by a creditor, whilst in the tort claim, not being founded upon a benefit being conferred upon the defendant, there is no such analogy.[162] But merely to assert the analogy is not to prove it, and, in the end, it seems not quite compelling enough to sustain the distinction constructed upon it.

Alternatively, there may be a valid distinction between the personal claims of the tort and unjust enrichment claimants because in the latter case the claim is founded upon an enrichment which can be located among the defendant's assets.[163] If this requires that the enrichment be *traceably* surviving, then it amounts to a continuing proprietary interest and is of little help in determining the principles sought here upon which a new one might be constructed. If, however, it merely requires, as Rotherham argues,[164] that the defendant's assets be swollen *generally*, though not necessarily traceably surviving at the time of judgment, then it amounts to little more than the assertion that an unjust enrichment claimant is entitled to a priority merely because he is an unjust enrichment claimant, and that the tort claimant is not entitled to a priority merely because his claim is in tort and not unjust enrichment:[165] the defendant's assets are equally swollen by retaining the enrichment, as by not paying the tort claimant, indeed as by not repaying a loan or paying an amount due under a contract. This 'swollen assets' or 'windfall' argument, therefore, is insufficient to distinguish the unjust enrichment claimant from other personal claimants and justify a proprietary response in the former case but not the latter.

Third, in the context of the analysis of insolvency priorities, assessments of acceptance of risk are usually deployed to assess the fairness and efficiency of the *statutory* schemes, in

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161 Swadling (1997) 142.

162 Burrows (2001) 425-426.

163 Sherwin (1989) 329-331; 337.

164 Rotherham (2000) 127; Rotherham (2002) 81.

165 Swadling (1997) 143-144.

such contexts, the argument is typically to the effect that, even where inability to distribute risk contractually justifies a priority, it does so *statutorily*; so that where any such priority is warranted, a statutory scheme can calibrate or reallocate the appropriate degree of priority – for example, preferred priority versus super-priority – which best accommodates the interests of the creditors as a whole.[166] From this perspective, non-acceptance of risk arguments would seem sufficient to justify only a legislative rather than a judicial reordering of insolvency priorities by the creation of what would amount to a super-priority allowing the property to be taken out of the insolvency.

Fourth, the concept of assumption of risk can be applied too expansively (or non-assumption applied too narrowly) and therefore unnecessarily exclude otherwise appropriate claimants. If the essence of the argument is that the claimant did not *voluntarily* extend credit to the debtor did not agree to a risk of loss, it might be argued that the negligent victim of a fraud should have taken more care and could have protected itself and ought thus be treated for the purposes of priority as having voluntarily extended credit to the defendant.[167] However, this smuggling of normative considerations of fault into this analysis is inappropriate precisely because it obfuscates the analysis.[168] Furthermore, it seems that the victim of fraud is more intuitively more rather than less worthy of protection by means of priority or otherwise.

Fifth, as to the flavour of the risk argument which distinguishes between initial and subsequent failures of basis, it certainly explains the outcomes in *In re Goldcorp Exchange*[169] and *Westdeutsche* where there was no initial failures of basis and thus on this view no justification for a proprietary remedy, but it cannot explain either the *Muschinski* or *Pettkus* lines of authority in which there was again no initial failures of basis but nevertheless proprietary remedies were imposed. Indeed, in *Muschinski*, Deane J expressly drew an analogy between subsequent failure of consideration and the failure of joint venture basis which constituted the unconscionability which justified the remedial

166 Cantlie (1994) 437-438, 443.

167 Sherwin, 337, 350-355.

168 Rotherham (2000) 113, 127-128; Rotherham (2002) 83-84.

169 [1995] 1 AC 74, 102-104 (Lord Mustill); and it explains the distinction between the trust claims which failed and those which succeeded in *Neste Oy v Lloyds Bank* [1983] 2 Lloyd's Rep 658 (QBD) 665-666, though Bingham J's unconscionability language in that case was approved in *Triffit Nurseries v Salads Etcetera* [2000] 2 All ER Comm 737.

constructive trust on the facts. The distinction may lie in the fact that the former cases are commercial and the latter relate to the breakdown of intimate relationships, with the acceptance of risk argument appropriate to the former cases but not the latter; or it may be that whether any failure of the basis of the transfer was initial or subsequent is not a matter of principle but rather simply a matter to be taken into account in the exercise of the court's discretion, and it won't be relevant in every case.

As a consequence, although the insolvency context could accommodate the remedial constructive trust, the justification for that trust seems not exclusively to be found in non-acceptance of risk.[170] This conclusion is reinforced when it is recalled that there are very many reasons why the claimant may want the proprietary interest conferred by the trust, of which priority in insolvency is only one.[171] That being so, it would be inappropriate, to say the least, to rely on insolvency considerations to justify a proprietary interest sought for non-insolvency reasons. Furthermore, even if a remedy would be denied in an insolvency for the kinds of reasons which motivated the Court of Appeal in *Polly Peck*, there is no reason[172] why it ought not to be available in the context of any of the other reasons why a claimant might seek proprietary relief. Indeed, this is borne out by the *Muschinski* and *Pettkus* lines of authority in which no insolvency considerations arose but such relief was appropriate in the context of the breakdown of intimate relationships.

Sixth, there is a logical fallacy at the heart of the assumption of risk argument. No doubt a claimant who did bargain to assume a risk should not obtain a priority. However, as a matter of logic, a converse cannot necessarily be derived from a proposition. (From the proposition 'if A, then B', the converse 'if not-A, then not-B' does not necessarily follow). Hence, it does not follow from the fact that those who assumed the risk of insolvency by not taking a security should not obtain a priority that those who had not assumed the risk should obtain a priority. As a consequence, risk is relevant only in the sense that those who accept the risk will not obtain priority (at least in a commercial context); and it does not follow from this proposition that non-acceptance of risk necessarily gives rise to a priority.

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170 *Pace* Burrows (2001); *cp* Young (1966) 1259-1263.

171 See pp6-7 above.

172 *Pace Polly Peck*, 831 (Nourse LJ); *cf Peter*, 640 (Cory J).

In the end, then, it would seem that the appropriate use of the risk analysis is partial, and negative rather than positive. It is partial, in that it seems to be appropriate only in commercial contexts. And it is negative rather than positive, because it tells us who in such contexts should not obtain priority (those who have accepted the risk of insolvency) but not necessarily those who should. At best, non-assumption of risk might be a useful guide to the possibility of a proprietary remedy, but it cannot on its own be determinative of the issue.

5.3 Awareness.

In *Westdeutsche*, Lord Browne-Wilkinson suggested that a trust would arise where the defendant is "aware …of the factors which are alleged to affect his conscience" such that the law can impose upon him a constructive trust which, from the date of its establishment, accords "the [claimant] beneficiary … in equity a proprietary interest in the trust property".[173] "Unless and until the trustee is aware of the factors which give rise to the supposed trust, there is nothing which can affect his conscience".[174] On this approach, the defendant's *awareness* of its unjust enrichment at the claimant's expense is the basis of the remedial constructive trust.[175] Similarly, in the *Bricklayers Hall* case in the High Court, Budd J held a constructive trust was appropriate because "it was unconscionable for the Guild to take the additional sum of money at the closing of the transaction when the officers of the Guild were well aware that the premises had already been demolished and there was no longer any intention to carry out the reinstatement".[176] And, at least according to Lord Browne-Wilkinson in *Westdeutsche*, the trust in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*[177] was justifiable (if not necessarily justified on this basis in the case itself) on the basis that "the defendant bank knew of the mistake made by the

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173 *Westdeutsche*, 705.

174 *Ibid*, 709; *Triffit Nurseries v Salads Etcetera* [2000] 2 All ER Comm 737. *Cp Hart v O'Connor*[1985] AC 1000, 1014 (Lord Brightman) (defendant "knew of or ought to have appreciated" claimant's incapacity); *Pastoral v Bank of New Zealand* [1989] 2 NZLR 180 (trust justified on the basis the defendant's knowledge).

175 This is an argument by analogy, rather than a direct application of Lord Browne-Wilkinson's speech. There, he required both such awareness and a proprietary base (*ibid*, 705: "identifiable trust property"; *cp* 707). But the analysis here is directed to cases where there is no proprietary base, and Lord Browne-Wilkinson's criterion of awareness is considered here not as the basis of all constructive trusts (as he presented it) but simply as the possible basis for the remedial constructive trust.

176 *Bricklayers'*, High Court, 114 ; *cp* 117-118, 123; the matter was not reached on appeal.

177 [1981] Ch 105; Tettenborn (1980); Jones (1980).

paying bank within two days of the receipt of the moneys … [and] the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust".[178]

However, as an explanation of the full panoply of constructive trusts, Lord Browne-Wilkinson's criterion of awareness is open to serious question,[179] not least because ritualistic invocations of conscience should be treated with caution.[180] It is unsurprising, therefore, that there are cases where constructive trusts have arisen without such awareness, and of where constructive trusts have not arisen even with such awareness. Priorities cases provide examples of trusts without awareness.[181] Again, in *Re Irish Shipping*[182] Korean Exchange Bank had made a mistaken payment into Irish Shipping's bank account. Following *Chase Manhattan*, Carroll J held that Irish Shipping held that payment on trust for Korean Exchange Bank, even though, as Carroll J expressly found, Irish Shipping did not know of Korean Exchange Bank's mistaken payment.[183] Furthermore, the constructive trust giving effect to a *donatio mortis causa* will arise even where the trustee is unaware of the circumstances giving rise to the trust.[184] As for cases in which no constructive trust arise evens though the defendant is aware of the circumstances,[185] there are many examples from land law where knowledge is not sufficient to generate a proprietary right,[186] in particular in the context of overreaching,

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178 *Westdeutsche*, 715. There are other problems with the trust imposed in *Chase Manhattan*, not least that the context of the inter-bank payment system is such that, on one view at least no asset is transferred from the claimant to the defendant, and thus there is nothing upon which a trust might be imposed (Calnan (2000) 184-186 discussing *R v Preddy* [1996] AC 815 (Fox (1996)); *cf* Smith (1996) 243-261, (1998); Kreltzheim (1999)). If Calnan's analysis holds, it would certainly preclude an institutional constructive trust based upon a continuing title, but it would not necessarily preclude a remedial constructive trust imposed *de novo* over the defendant's bank account.

179 Worthington (1996) vii-xxiv; Swadling (1998), (1998)a; Calnan (2000) 182; Rotherham (2002) 136-140, 152.

180 Such invocations tend to assume a wide variety of meanings and add little to the relevant analysis; indeed, they tend to obscure both the original analysis and subsequent developments: Klinck (2001); Swadling (1998) 231.

181 Swadling (1998)a 232-233

182 [1986] ILRM 518.

183 *Ibid*, 523.

184 *Sen v Headley* [1991] Ch 425. Similarly, the *Re Rose*; *Rose v Inland Revenue Commissioners* [1952] 1 Ch 499 constructive trust can arise without the knowledge of the trustee, the actions of the donor being both necessary and sufficient to generate it.

185 Barker & Smith (2000) 427; McCormack (1996), (1997)a, (2000) 265.

186 *Rhone v Stephens* [1994] 2 AC 310.

where a purchaser is often not bound by beneficial interests of which he has notice.[187]

But even if Lord Browne-Wilkinson's criterion of awareness is open to serious question as an explanation for constructive trusts in general, it could be an important element in guiding a court's discretion whether to impose a remedial constructive trust to reverse an unjust enrichment. When the focus is on the claimant (specifically upon the impairment of the claimant's consent), that is sufficient to generate a personal claim on the part of the claimant. However, something more than that is necessary to generate a proprietary claim, and if the analysis must shift from the claimant it is logical to enlarge the analysis and include the position of the defendant as well. Indeed, the criterion of awareness is not, in its language or attitude, a million miles away from the criterion of unconscionability at the heart of the Australian cases after *Muschinski*. Of course, in these cases the unconscionability lay not in the defendant's knowledge of the circumstances of the receipt (though this was relevant) but instead in the more particular retention of his interest after the failure of the joint-venture basis upon which he had received it. It demonstrates that the criterion of awareness is only one matter – albeit an important one, perhaps even the most important in English law on the current state of the authorities – to be considered by the judge in the exercise of the discretion of whether to impose a remedial constructive trust to reverse an unjust enrichment. Objections that such a criterion of awareness is an inappropriate basis for liability are not well-founded if it is not a sole criterion, but rather an additional factor once unjust enrichment at the claimant's expense has been made out, and it is not an entirely discretionary criterion because such discretions are rapidly filled in by the cases. If that is so, then proprietary claims are generated both by the claimant's rights (those based on the claimant's pre-existing and continuing proprietary interests, that is to say, those based upon a proprietary base, such as the institutional constructive trust[188]) and by the defendant's duties (those which arise *de novo* based in part on the defendant's awareness of the circumstances of the enrichment at the claimant's expense, that is to say, those based upon a remedial constructive trust).

Of course, as with acceptance of risk, this focus on awareness is probably not a complete answer either. Much of the analysis of this topic has been bedevilled with attempts to find the silver-bullet, that is, to find a single criterion of proprietary liability. Such attempts are

[187] Hill (2000) 28-29, 35.

[188] Goode (1991) 216-217, 219, 225, 232; Goode (1998).

probably misguided; since the issue is one of discretion, the answer will almost certainly be a blend of various indicative factors, of which risk and awareness are at present the most important. Neither is a complete answer, but if they both point in favour of the proprietary remedy, the argument in favour of the remedial constructive trust would seem to be unanswerable; likewise if they both point against it; and if they pull in opposite directions, all other things being equal, the awareness argument rather than the risk argument ought to be determinative – the problems with the risk argument make it unsafe as a single criterion of liability, whilst the defendant-sided awareness argument, additional to the plaintiff-sided unjust enrichment analysis, is an appropriate criterion upon which to elevate the claimant's personal claim into a proprietary one.

6. Conclusion

Lord Browne-Wilkinson's speech in *Westdeutsche*, and in particular, his criterion of awareness, has opened the door to the emergence of a remedial constructive trust at English law, a trust which can employed to provide an unjust enrichment claimant with a route to a proprietary remedy. This trust would avoid the problems associated of accommodating Chambers' vision of the resulting trust with unjust enrichment:[189] not only does it reach trusts of money or property arising from impaired intention, it can also reach trusts for services[190] or for wrongs,[191] or for unjust factors which are not intention-related, such as free acceptance or policy. But to reap these benefits, the trust must be understood correctly and handled with care: unjust enrichment does not equate with the remedial constructive trust, and *vice versa*. Furthermore, the insolvency concerns against the trust can be overstated, not least because the proprietary claim is often advanced for reasons other than priority; and the various discretions as to its basis and timing and so forth are in the process of being filled in. In particular, if the claimant did not take the risk of the defendant's insolvency, *and* if the defendant was aware of the circumstances giving rise to the claimant's claim, it will usually be appropriate to impose a remedial constructive trust.

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189 See pp22-23 above.

190 *Sorochan*, 10 (Dickson CJ); *LAC Minerals*, 14 (Law Forest J); *Rawluk*, 171 (Cory J); *Peter*, 649 (McLachlin J), 630-631, 633-634 (Cory J).

191 *AG for Hong Kong v Reid* [1993] AC 713.

CHAPTER 7. CONCLUSION

Unjust Enrichment: An Answer in Search of a Property Question?

For the past decade, analysis of the inter-relationship of property and unjust enrichment has determinedly been following the wrong path. Unjust enrichment explanations of the resulting trusts and the *Quistclose* relationship, *à la* Chambers, and of subrogation, *à la* Mitchell, neither reflect what the cases have said nor provide adequate explanations of the relevant doctrines. The rise of such explanations has distorted our understanding of the important question of when, if ever, there can be proprietary remedies for unjust enrichment. I am a great friend[1] of the principle against unjust enrichment,[2] and so I am not for expanding it,[3] as Chambers and Mitchell do, into territory where it can do more harm than good; this is precisely what has happened in the contexts of resulting trusts, secondary *Quistclose* obligations, and subrogation, where the imposition of an unjust enrichment explanation has served only to distort the coherence of principles revolving around intention which emerge from a fair reading of the authorities.

The resulting trust arises by operation of law in response to one of two essential facts (apparent gifts, and trusts which fail), and it is to these essential facts that analysis ought to be directed. Such a trust may however be rebutted *inter alia* by proof of the donor's intention to make a gift to the recipient, and in this respect, the proper role of the presence or absence of intention is not constitutive of the resulting trust but as responsive to it. Again, the foundations of the *Quistclose* relationship are contractual, directing attention to the mutual intentions of the provider and recipient, to the fiduciary as well as trust-based obligations of the recipient, and to the contractual remedies of the parties, all of which resolve many of the tensions which recent scholarship and case-law have created. Subrogation likewise turns on the intentions of the parties, but here it comes in two flavours. In the classic triangular fact-pattern, the claimant seeks to be subrogated to a creditor's claims against the debtor because, the creditor has been paid with the claimant's money; in cases where the claimant as a

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1 With apologies to Lord Mansfield: *Weston v Downes* (1778) 1 Doug 23, 24.

2 O'Dell (1993), (1998).

3 See n1 above.

surety or party with an interest in land paid the creditor directly, the claimant's intention to subrogate is presumed from the claimant's status; in all other cases, where claimant lacks the necessary status or where the claimant paid the debtor who in turn paid the creditor, the relevant intention arises not by presumption but as a matter of fact. These analyses emerge organically from the cases themselves; they take intention seriously without seeking to impose the same view of intention across the three contexts; and they render unjust enrichment analyses of the various doctrines unwelcome and unwise. Quite simply, since coherent internal principles may easily be distilled, it is unnecessary to seek to impose an external one from the field of unjust enrichment.

These doctrines are not the only contexts in which property and unjust enrichment bump against each other. For example, the principles distilled from the cases concerning the almost-lost doctrine of equitable salvage seem to reflect current unjust enrichment orthodoxy; if this is right, then of course it is more than possible to accommodate the equitable salvage lien within an unjust enrichment paradigm; and it may even be desirable to do so if its full potential is to be realised. The trajectory of the analysis is important: it set out from the cases themselves and happened to arrive at an unjust enrichment explanation, and not the other way around. Furthermore, the remedial constructive trust was the scene – prior to the rise of unjust enrichment explanations of resulting trusts, secondary *Quistclose* obligations, and subrogation – of many attempts to generate principles of proprietary liability for unjust enrichment. Provided that misleading conflations are avoided, it could once more return to that function, and provide fruitful paths for analysis; in particular, any discretion would attract constraints over time; and subject to that discretion, once personal liability for unjust enrichment of the defendant at the expense of the claimant is made out, if claimant did not take the risk of the defendant's insolvency *and* the defendant was aware of the circumstances of the claimant's claim, a court could impose a remedial constructive trust to provide a proprietary remedy to reverse that unjust enrichment.

The distillation of coherence and principle from a mass of conflicting caselaw is the essence of the common law method. On the other hand, though it often resembles this process, the imposition of a settlement on the basis of an external standard is in fact very different, even where it is presented as the discovery of principles which are

claimed always to have been immanent in the caselaw if only we would see them. The former and not the latter approach has been the guiding methodology of this thesis; and if there is a moral to be drawn from it, it is that we must not succumb to the temptation of elegance for its own sake, or sacrifice coherence of principle at its altar. Almost a century ago, Holmes J taught us that "[g]eneral propositions do not decide concrete cases. The decision will depend upon a judgment or intuition more subtle than any articulate major premise".[4] Unjust enrichment at the plaintiff's expense, though an important general proposition, does not in the end provide a sound basis for the explanation of resulting trusts, secondary *Quistclose* obligations, or subrogation. Neither, by itself, does it justify the imposition of a remedial constructive trust; however, in that latter context, when combined with risk and awareness, it might provide a more appropriate path for future analysis of proprietary responses for unjust enrichment. If we are on the right path, we stand a much better chance of solving the modern law's equivalent of Fermat's Last Theorem: the mysteries of the inter-relationship of property and unjust enrichment.

[4] *Lochner v New York* 198 US 45, 76 (1905).

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