

TRACING IN THE AGE OF RESTITUTION

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Restitution is a remedy by which a plaintiff may recover a benefit, enrichment or value that the defendant has obtained at the expense of the plaintiff. Although variously described as a right, a remedy and a mechanism, tracing is generally accepted as being more in the nature of a process¹ and is a precursor to the assertion of a personal or a proprietary claim either at common law or in equity.² Described in general terms, it is a process for identifying value that the defendant has received, whether or not in the form of specific assets, and establishing a link between that value and the plaintiff.

Essentially, tracing and restitution are directed to the same issue.³ Expressed at a level of generality sufficient to comprehend both doctrines, the issue is the position of a person at whose expense another person has been benefited in circumstances where, for one or other reason, it is unjust that the beneficiary should retain the benefit. Both doctrines are directed to vesting that benefit, in some form or other, in the person at whose expense it was obtained and are limited to that benefit or to its equivalent value.⁴ The value of the benefit (be it property or otherwise) may be greater or less than the loss suffered or the expense occasioned and thus they differ from compensatory remedies which are directed to restoring the person's former position irrespective of whether any benefit was received by the party obliged to make compensation or the value of any such benefit.⁵

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1 *Boscawen v Bajwa* [1996] 1 WLR 328, 334 (Millett LJ); *Foskett v McKeown* [2001] 1 AC 102, 109; *Re Global Finance Group Pty Ltd* [2002] WASC 63, [94].

2 See generally Peter Millett, 'Restitution and Constructive Trusts' (1998) 114 *Law Quarterly Review* 399, especially 403; *Cashflow Finance Pty Ltd v Westpac Banking Corporation* [1999] NSWSC 671, [452].

3 For present purposes it is not necessary to consider the view that the law of tracing is part of the law of restitution. It is sufficient to note that it has a significant role to play in relation to restitution; see generally Michael Tilbury, *Civil Remedies Volume 1: Principles of Civil Remedies* (1990) [4105]–[4135]; David Hayton, 'Equity's Identification Rules' in Peter Birks (ed), *Laundering and Tracing* (1995); Peter Millett, 'Tracing the Proceeds of Fraud' (1991) 107 *Law Quarterly Review* 71.

4 *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1962] 2 QB 330; *Boscawen v Bajwa* [1996] 1 WLR 328; *Commissioner of State Revenue v Royal Insurance Australia* (1994) 126 ALR 1, 14–15; *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 75.

5 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39; *Registrar of Titles v Spencer* (1909) 9 CLR 641, 645; *Robinson v Harman* (1848) 1 Exch 850, 855; 154 ER 363, 365; *Wenham v Ella* (1972) 127 CLR 454, 460.

The common concern of restitution and tracing is evident in the many expressions of the underlying principle of each doctrine that are equally applicable to both. For example Lord Wright, speaking in the context of a restitutionary claim for money paid for consideration that failed, said:

It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money or some benefit derived from another which it is against conscience that he should keep.⁶

The same principle, expressed in terms of proprietary rights in the context of a tracing claim, was identified as a fundamental concept of justice by Lord Dunedin in *Sinclair v Brougham*:

Now I think it is clear that all ideas of natural justice are against allowing A to keep the property of B which has sometimes got into A's possession without any intention on the part of B to make a gift to A.⁷

Both doctrines presuppose that there is a wrong to be remedied. They do not in themselves tell us very much about that wrong. This is a key issue for the integrity and justification of both doctrines but, unfortunately, one that cannot be given detailed consideration here.⁸

Although the doctrine of tracing has a role in relation to restitution in general, the term, as it is more commonly used, is concerned with the vindication of property rights rather than the reversal of unjust enrichment. In contrast, though restitution may involve property, this is not an essential element for relief. In this paper we will use the term 'tracing' to refer to the process as a precursor to a proprietary claim. Despite these differences, the shared concern of tracing and restitution is such that, given the present expansion of interest in restitution, the question inevitably arises whether it is necessary for the law to retain these doctrines as independent features of the legal landscape or whether it might usefully be simplified by the development of a single unified doctrine.⁹ The issue might be presented more aggressively, by asking whether the complexity inherent in having two separate doctrines directed to the same end requires strong justification. Either way, the question requires a careful analysis of the scope of each doctrine through a more detailed analysis of the cases than is common.

Descriptions of the tracing process commonly resort to metaphor. Tracing is described, for example, as a right or a process that allows a claimant to follow his or her property into the hands of another. But metaphor, however vivid or insightful, only suggests a resemblance and does not pretend to accuracy or analysis. It appeals to the emotions as well as to the intellect and thus may obscure important elements of a concept. So it is with tracing. The metaphor of

6 *Fibrosa Spolka Akcyjina v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61.

7 [1914] AC 398, 431.

8 See generally Joachim Dietrich, *Restitution, A New Perspective* (1998), especially 44–9; P D Finn, 'The Liability of Third Parties for Knowing Receipt or Assistance' in Donovan Waters (ed) *Equity, Fiduciaries and Trusts* (1993).

9 See Millett, above n 3, 85; Simon Evans, 'Rethinking Tracing and the Law of Restitution' (1999) 115 *Law Quarterly Review* 469; F O B Babafemi, 'Tracing Assets: A Case for the Fusion of Common Law and Equity in English Law' (1971) 34 *Modern Law Review* 12.

following property into the hands of another is apt, not because it explains or even gives much insight into how tracing works, but because it suggests a justification for depriving persons of what would otherwise be their property. It presents the proposition that the property in question is that of the claimant as justification for the same proposition as a conclusion. As a justification this may have some merit but as an argument it is circular: it first assumes the property belongs to another and then ‘concludes’ that it is really the property of that other.

Defining tracing without resort to metaphor, it is the process by which a claimant who has been deprived of property (the ‘original property’) seeks to assert title, whether legal or equitable, to other property (the ‘target property’) because the target property has, in some way, been acquired from exploitation of the original property. The process involves establishing an unbroken chain of transfer and transformation from the original property to the target property.¹⁰ When the claim succeeds the target property is deemed to be the rightful property of the claimant.

Strictly, tracing is only concerned with situations where there is an element of transformation. Without this the claim would simply be an assertion of title to be resolved by application of the well established rules and principles governing the competition between titles and possessory interests, whether legal or equitable. Tracing is required when the target property (held by B) is different from the original property of which A has been deprived. At law the principle identified by Lord Dunedin¹¹ will still apply so long as the target property can be identified as deriving solely from the proceeds of the original property.

The principle is exemplified in the leading case of *Taylor v Plumer*,¹² which concerned a dishonest broker who was entrusted by his principal with a draft for money so that he might purchase exchequer bills for the principal. Instead, the broker converted the money received into American stock and bullion, intending to abscond with it to America. Lord Ellenborough upheld the right of the principal to the American stock and bullion as against the broker’s assignees in bankruptcy, saying,

the property of a principal entrusted by him to his factor for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified, and distinguished from all other property.

...

10 *Birdeb (UK) Ltd v Scottish Tube Products Ltd* [1981] Ch 25, 46.

11 *Sinclair v Brougham* [1914] AC 398, 431. See above n 7 and accompanying text.

12 (1815) M & S 562; 105 ER 721.

It makes no difference in reason or law into what other form, different from the original, the change may have been made ... for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact not of law, and the dictum that money has no ear-mark must be understood in the same way; ie as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money ... are so far ear-marked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains, (as the property in question did) in the hands of the factor, or his general legal representatives.¹³

The common law of tracing has never overcome the difficulty posed by the admixture of money or other fungibles to which Lord Ellenborough refers. At common law the right to trace applies against the original property so long as it has retained its identity, or against the target property which has replaced it by sale or exchange without any mixing with other property. The mixing of the property with other funds has generally been seen as fatal to ascertainment of the original property, such ascertainment being fundamental to the right to trace.¹⁴

Common law tracing (sometimes referred to as 'following') was most commonly applied in cases of principal and agent, such as *Taylor v Plumer*, where the principal, having given money to the agent for a purpose and the money having been misapplied, was permitted to ratify the unauthorised act of the agent and assert legal title to the property acquired by the application of the principal's funds. At common law, if the principal's money was mixed with that of another it became impossible to establish legal title and therefore impossible to follow it. Despite suggestions to the contrary by Lord Haldane LC in *Sinclair v Brougham*,¹⁵ this did not preclude tracing money (in the form of a chose in action) into a bank account as long as the account did not mix money from more than one source.¹⁶ Despite this concession, however, the common law's failure to trace beyond admixture is largely responsible for the irrelevance of common law tracing today and for this reason we do not propose to discuss it further.¹⁷

Unlike the common law, equity will allow tracing into (and out of) mixed funds, ie funds derived from more than one source. However, it is not always easy to say if the circumstances involve a mixed fund. In *Foskett v McKeown*¹⁸ the House of Lords had to decide who had the right to a death benefit of about £1 million paid by insurers pursuant to a whole of life policy. Certain of the policy premiums had been paid from money misappropriated from the appellants by the deceased. The respondents in the appeal were the children of the deceased.

13 Ibid 574–5, 725–6.

14 See *Re Diplock's Estate* [1948] Ch 465, 521 ('*Re Diplock*').

15 [1914] AC 398, 419.

16 *Banque Belge pour L'Etranger v Hambrouck* [1921] KB 321, 335 (Atkin LJ). Lord Justice Atkin was prepared to allow a right to trace into a bank account in either common law or equity. See also *Re Diplock* [1948] Ch 465, 519, where Lord Greene MR stated that he saw no reason to distinguish between 'a chose in action such as a banker's debt to his customer and any other debt'.

17 Robert L A Goff and Gareth Jones, *The Law of Restitution* (3rd ed, 1986) 67; Millett, above n 3.

18 [2001] 1 AC 102.

In the words of Lord Browne-Wilkinson:

The question which arises in this case is whether, for tracing purposes, the payments of the fourth and fifth premiums on a policy which, up to that date, had been the sole property of the children for tracing purposes fall to be treated as analogous to the expenditure of cash on the physical property of another or as analogous to the mixture of moneys in a bank account.¹⁹

By a majority the House of Lords (Lords Browne-Wilkinson, Hoffmann and Millett) held that the latter analogy was more appropriate. Where a claimant relies on tracing out of a mixed fund, the claim depends on an equitable interest in the whole of the mixed fund pursuant to an equitable charge, rather than on title to specific property.²⁰

Equity has also developed its own restrictions. In particular, it requires that there be a fiduciary obligation owed to the claimant either by the holder of the target property or a third party through whose hands the relevant property (either the original property, the target property or some intermediate form) has passed. The present strength of this requirement deserves consideration. The need for a fiduciary relationship before equity's assistance can be invoked is linked to the principle that equity acts on the conscience of the recipient, as well as to the associated need for an unbroken chain of proprietary interests. The requirement, which has been the subject of much criticism, stems from the Court of Appeal's interpretation and acceptance in *Re Diplock*²¹ of the views expressed in *Sinclair v Brougham*,²² and in particular those expounded by Lord Parker of Waddington.

Sinclair v Brougham concerned the winding up of an insolvent building society that had been carrying on business as a bank *ultra vires*. The trade creditors of the society had been paid in full and the remaining funds of the society were insufficient to meet the claims of the depositors and the contributors to the society, the latter being equivalent to shareholders. The House of Lords decided that the funds available should be shared rateably between the depositors and the contributors on an equal basis, subject to the rights of individual depositors or contributors who could trace their money into any particular asset of the society. Lord Parker took the view that the directors of the society owed fiduciary obligations to the depositors and the contributors alike and thus the directors held the payments made by the depositors on trust, the nature of which was not specified. The fiduciary obligations of the directors were, in his Lordship's view, a necessary precondition to any right that the depositors and contributors might have to trace the payments that they had made to the directors.

Sinclair v Brougham has been a remarkably influential case considering the difficulty later courts have had understanding it and the almost universal disapprobation with which it has been received.²³ It is difficult to understand, for

19 Ibid 109–10.

20 *Boscawen v Bajwa* [1996] 1 WLR 328, 336.

21 [1948] Ch 465.

22 [1914] AC 398.

23 See, eg, the trenchant criticism of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 709–14. His Lordship referred to it as 'a bewildering authority' in which 'no single *ratio decidendi* can be detected' and in which 'all the reasoning is open to serious objection': 713.

instance, the basis on which directors could be said to owe fiduciary obligations to depositors. For present purposes, however, it is not necessary to analyse the case in any detail, as its influence largely comes from the way in which it was interpreted and applied by the Court of Appeal in *Re Diplock*. In *Re Diplock*, Lord Greene MR commented that the court found the different opinions in the case difficult to follow and to reconcile with one another, and apart from that case the tendency has been to treat *Sinclair v Brougham* as confined to its own facts. Despite that, Lord Greene referred to the case as being of ‘fundamental importance’ to the doctrine of tracing.

In *Re Diplock* the defendants were the executors of the estate of Caleb Diplock, who died in 1936. The plaintiffs were Mr Diplock’s next of kin. There was thus no difficulty in establishing the required fiduciary relationship. Mr Diplock’s will instructed his executors to apply his residuary estate:

for such charitable institution or institutions or other charitable or benevolent object or objects in England as my acting executors or executor may in their or his absolute discretion select and to be paid to or for such institutions and objects if more than one in such proportion as my executors or executor may think proper.

By 1939 the executors had paid over £200 000 to 139 charitable institutions. The charitable institutions were volunteers in that they provided no value for the money. In 1939 the testator’s next of kin challenged the validity of the will’s disposition of the residuary estate and put the recipients on notice of their claim. In 1944 the House of Lords held that the residuary bequest was void because of the uncertainty engendered by the phrase ‘or benevolent’ in the passage quoted above.

The next of kin commenced proceedings designed to recover the payments made to various charitable institutions. At first instance Wynn-Parry J held, *inter alia*, that the payments had been made under a mistake of law and for this reason the plaintiffs could not maintain a claim for the return of the money as money had and received.²⁴ The matter went to the Court of Appeal which held that the plaintiffs had rights both *in personam* and *in rem*:

These claims fell broadly under two heads which have been compendiously described as claims *in personam* and claims *in rem*. The former ... are personal claims which, it is said, the appellants are able to make in equity against each of the respondents. ... The claims *in rem* rest on the application of the principles alleged to underlie the well-known case of *In re Hallet* explained and expanded (as it is said) in *Sinclair v Brougham*, so as to enable the appellants to ‘follow’ or ‘trace’ the moneys paid to the several respondents into the various assets held by such respondents wholly or partly attributable to those moneys.²⁵

The right to trace the payments mistakenly made by the executors extended to mixed funds so long as the payments could be identified and disentangled. The court also commented that a disposition which was invalid under the general law,

24 *Re Diplock’s Estate* [1947] 1 All ER 522. At the time a claim for money had and received was confined to mistake of fact as opposed to law: *Bilbie v Lumley* (1802) 2 East 469; 102 ER 448. The distinction, which was also influential in *Sinclair v Brougham*, has now been rejected in England and in Australia: *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

25 *Re Diplock*, [1948] Ch 465, 475 (Lord Greene MR, Wrottesley and Evershed LJ agreeing).

although made *bona fide*, was incapable of conferring upon the recipients any moral or equitable right to retain what they had received against the persons with legal entitlement.

Lord Greene MR identified three reasons for the difference between tracing at common law and equity: the materialist approach of the common law, the fact that the common law did not recognise equitable claims to property and the limited nature of common law remedies.²⁶ Equity's ability to give relief by a declaration of charge, and its extensive use of specific relief as distinct from damages, enabled it to deal with mixed funds in a way that was beyond the materialist approach of the common law. In Lord Greene's words,

it was the metaphysical approach of equity coupled with and encouraged by the far-reaching remedy of a declaration of charge, that enabled equity to identify money in a mixed fund. Equity, so to speak, is able to draw up a balance sheet, on the right-hand side of which appears the composite fund, and in its left-hand side the two or more funds of which it is to be deemed to be made up.²⁷

In expounding the basis of tracing in equity, Lord Greene firmly located the doctrine's foundations in principles of property law and rejected the notion that a declaration of charge might be 'a suitable means of dealing with any case where one person has, without legal title, acquired some benefit by the use of the money of another – in other words, any case of what is often called "unjust enrichment"'. His Lordship referred to Lord Dunedin's opinion in *Sinclair v Brougham* which appeared to treat the remedy of equitable charge as applicable wherever 'a superfluity, expressed or capable of being expressed in terms of money is found to exist'. In Lord Greene's view that approach was inconsistent with the necessary precondition of a right to trace in equity, namely that there be 'a fiduciary or quasi-fiduciary relationship or ... a continuing right of property recognized in equity'.²⁸

The requirement of a fiduciary relationship as a precondition of equitable intervention was given a different focus in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*,²⁹ another case which reflects the continuing influence of *Sinclair v Brougham*. The Chase Manhattan Bank, which carried on business in New York, was instructed to pay \$2 000 687.50 to another New York bank for account of the defendant, the Israel-British Bank (London) Ltd. On 3 July 1974, it made the payment but made a second payment of the same amount later the same day by mistake. Justice Goulding found that on 5 July 1974 the defendant 'either knew it was a mistake, or was put fully on inquiry by facts that should have indicated it might be a mistake'. One month later the Israel-British Bank applied to the English High Court for an order that it be wound up. The order was granted in December 1974. In August 1976 the plaintiff sought to trace and recover in equity the \$2 000 687.50 paid to the defendant in mistake. In April

26 Ibid 518–21.

27 Ibid 520.

28 In affirming the decision of the Court of Appeal, Lord Simmonds (with whom the other Law Lords unanimously agreed) described the 'reasoning and conclusion' of the Court of Appeal as 'unimpeachable': *Ministry of Health v Simpson* [1950] AC 251, 265.

29 [1981] Ch 105 ('*Chase Manhattan Bank*').

1977 Oliver J held that the plaintiff had a valid claim for money had and received and directed the defendant to admit the plaintiff's proof of debt, also holding that the plaintiff was not precluded from asserting a proprietary claim over specific assets if it was possible to trace its money into them.

As the defendant was insolvent and the plaintiff had no prospect of recovering the whole of its loss from the dividends in the winding up, the tracing right took on a special significance in terms of the plaintiff's competition with the defendant's general creditors. Justice Goulding considered the 'initial question of principle, whether the plaintiff is entitled in equity to trace the mistaken payment and to recover what now properly represents the money'.³⁰ His Honour accepted the following passage from *Scott on Trusts* not only as a good summary of the American case law but also of the relevant English law:

where chattels are conveyed or money is paid by mistake, so that the person making the conveyance or payment is entitled to restitution, the transferee or payee holds the chattels or money upon a *constructive trust*. In such a case, it is true, the remedy at law for the value of the chattels or for the amount of money paid may be an adequate remedy, in which case a court of equity will not ordinarily give specific restitution. If the chattels are of a unique character, however, or if the person to whom the chattels are conveyed or to whom the money is paid is insolvent, the remedy at law is not adequate and a court of equity will enforce the constructive trust by decreeing specific restitution. The beneficial interest remains in the person who conveyed the chattel or who paid the money, since the conveyance or payment was made under a mistake.³¹

Counsel for the Israel-British Bank submitted that these views were in conflict with the decision in *Re Diplock*³² and that the court was therefore not entitled to follow them. It was submitted that the correct principle was that

there is no equitable right to trace property unless some initial fiduciary relationship exists, the right being founded on the existence of a beneficial owner with an equitable proprietary interest in property in the hands of a trustee or other fiduciary agent.

Justice Goulding accepted *Re Diplock* as holding 'an initial fiduciary relationship is a necessary foundation of the equitable right of tracing' but noted that the Court of Appeal also considered that 'the relationship between the building society directors and depositors in *Sinclair v Brougham* was a sufficient fiduciary relationship for the purpose'.³³ According to Goulding J, this showed that 'the fund to be traced need not (as was the case in *In Re Diplock* itself) have been the subject of fiduciary obligations before it got into the wrong hands ... It is enough that ... the payment into the wrong hands itself gave rise to a fiduciary relationship'. His Honour held that:

a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right.

In *Chase Manhattan Bank* the problem was the bank's mistake in making the

30 Ibid 116.

31 A W Scott, *The Law of Trusts*, (3rd ed 1967) vol 5, 3428 (emphasis added).

32 [1948] Ch 465.

33 *Chase Manhattan Bank* [1981] Ch 105, 118–19.

same payment twice. Goulding J held that as the moneys paid by mistake had never beneficially belonged to the defendant, the plaintiff was entitled to trace them. His Honour directed an enquiry into what had become of the payment or what assets (if any), in the power of the defendant, represented the money or any part of it.

Although the influence of *Sinclair v Brougham* is evident in *Chase Manhattan Bank*, Goulding J was conscious of the criticism of that case in *Re Diplock*, in particular the rejection of Lord Dunedin's views. His Honour was able to reconcile his decision with *Re Diplock* on the basis that:

the whole subject of the Court of Appeal's condemnation was the suggestion that the tracing remedy could be applied wherever the defendant could be shown to have got unjust enrichment, a superfluity as Lord Dunedin called it. The court insisted on the more precise test of a continuing right of property recognised in equity or of what I think to be its concomitant, 'a fiduciary or quasi-fiduciary relationship' ... At the same time they recognised that exactly what relationships were sufficient for the purpose had not yet been precisely laid down.³⁴

The difficulty with the approach in *Chase Manhattan Bank* lies in the notion that a person who makes a payment in mistake retains a proprietary interest and the recipient is subject to a fiduciary duty from the moment of receipt. There is no explanation of how the conscience of the recipient can be affected if he or she is unaware of the mistake. The same objection applies to the view in *Sinclair v Brougham* that the conscience of a recipient of an *ultra vires* payment is similarly affected.

The reasoning (but not the result) in *Chase Manhattan Bank* seems to us to be flawed. The finding that the recipient of the payment owed fiduciary obligations to the Chase Manhattan Bank seems to be a conclusion subsequent to the conclusion that the mistaken payment should be repaid, rather than antecedent to it. As such the concept of a fiduciary relationship between the parties added nothing to the analysis of the problem but served only to obscure the reasoning of the court.

One possible approach is that put to the court in *Port of Brisbane Corporation v ANZ Securities Limited*,³⁵ namely that a resulting trust arises as soon as the property is transferred 'but that the transferee does not become subject to a fiduciary duty or liable for breach of trusts until he is aware of his position' because it is not until then that the conscience of the transferee is affected.³⁶ Inherent in this position is the proposition, which must surely be correct, that a resulting trust is not a fiduciary relationship, at least not until the trustee becomes aware of the position.³⁷ This, however, is not how Goulding J reasoned. The proposition adopted from *Scott on Trusts* refers to a 'constructive trust' in which, unlike a resulting trust, the conscience of the trustee must be affected, this

³⁴ Ibid 119 (citations omitted).

³⁵ [2002] QCA 158, [32] ('*Port of Brisbane*'); see also *Creak v James Moore & Sons Proprietary Ltd* (1912) 15 CLR 426, 432–3.

³⁶ *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 375.

³⁷ Millet, above n 2, 405. Our acceptance of this proposition should not be taken to signify acceptance of the proposition that 'a constructive trust does not necessarily attract fiduciary obligations' but it is not necessary to discuss this issue here: see 406.

unconscionability being the reason for the imposition of the trust.

In Australia it appears to be established that it is not necessary for there to be a subsisting fiduciary relationship as a precondition of the equitable right to trace. This much is suggested by the comments of O'Connor J in *Black v S Freedman & Co* that stolen money is 'trust money in the hands of the thief, and he cannot divest it of that character'.³⁸ In such a case, of course, there is no doubt that the conscience of the thief is affected from the outset and therefore the problems raised by *Chase Manhattan Bank* do not arise. In the light of *Black v Freedman* the correct analysis seems to be that, at least in Australia, rather than requiring that there be a pre-existing fiduciary relationship, it is necessary to show that, on the facts, the conscience of the defendant must, on established equitable grounds, be seen to be affected.³⁹ Once that position is reached it would seem that the resulting trust referred to in *Port of Brisbane* is replaced by a constructive trust. The difference is significant. A mere resulting trust, carrying no fiduciary obligations, would support a proprietary claim against the target property but the trustee would not be subject to a personal obligation to make restitution. However, once the conscience of the trustee is affected he or she would be subject to such obligations.⁴⁰

This approach is similar to the view expressed by Lord Browne-Wilkinson in relation to *Chase Manhattan Bank*. In *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*⁴¹ Lord Browne-Wilkinson was critical of the reasoning in *Chase Manhattan Bank*. His Lordship stated that a claimant for restitution of money paid under an *ultra vires* contract has a personal right to recover those moneys because there has been a total failure of consideration but that such a claimant should have in equity neither a proprietary nor a personal claim. He rejected Justice Gouling's view that where money was paid under a mistake the payer retains equitable property in the money paid and the recipient incurs a fiduciary obligation to respect that interest. His Lordship observed, however, that the case 'may well have been rightly decided' because the retention of the moneys after the recipient knew of the mistake 'may well have given rise to a constructive trust'.

The difficulties that can arise in making a proprietary claim against an insolvent defendant and the significance of the principles of property law are well illustrated by *In re Goldcorp Exchange Ltd*.⁴² Goldcorp Exchange Ltd, which dealt in gold and other precious metals, was 'hopelessly insolvent' and receivers were appointed. Its assets, which included a stock of gold, silver and platinum bullion, were insufficient to meet its secured debts. The case concerned proprietary claims made by its private customers.

One group of customers bought non-ascertained bullion for future delivery.

38 (1910) 12 CLR 105, 110 ('*Black v Freedman*').

39 *Puma Australia Pty Ltd v Sportsman's Australia Ltd (No2)* [1994] Qd R 159, 163–4; *Cashflow Finance Pty Ltd v Westpac Banking Corporation* [1999] NSWSC 671, [406].

40 *Agip (Africa) Ltd v Jackson* [1990] Ch 265, 291; see also *Lurgi (Australia) Pty Ltd v Sandess Pty Ltd* [2000] VSC 278 [74]–[75].

41 [1996] AC 669, 713.

42 [1994] 3 WLR 199.

Goldcorp was to be responsible for storing and insuring the customers' bullion on terms that possession of the bullion could be taken on seven days' notice. These customers had paid the purchase price and understood that, although the bullion would be stored in a bulk lot, Goldcorp would maintain separate and distinct stocks of each type of bullion sufficient to meet all of their demands. Goldcorp failed to do this. Because specific bullion had never been appropriated to the contract, the purchasers did not acquire title to the bullion, nor did they retain title to the purchase moneys. Accordingly, they had no right to trace either the purchase moneys or the bullion.

Another group of Goldcorp customers had purchased bullion from Walker & Hall Commodities Ltd before its business was acquired by Goldcorp. There had been sufficient ascertainment and appropriation of bullion for title to have passed to these customers. Their bullion was stored by Goldcorp which had unlawfully misappropriated it by mixing the Walker & Hall bullion with its own bullion, removing bullion from the mixed stock and adding more bullion to the mixed stock without intending to replace the Walker & Hall bullion. The Privy Council held that, although the Walker & Hall customers had a proprietary interest, their rights could not exceed the lowest balance of the bullion held by the company between the accrual of their rights and the commencement of the receivership. Referring to Lord Greene's observation in *Re Diplock*, that 'equitable remedies presuppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent property acquired by means of such a fund', the Privy Council rejected all of the customers' claims to an interest in the general assets of Goldcorp.

Goldcorp reflects the limits that traditionally apply where tracing is a precursor to the claim of an equitable proprietary interest. This approach has been described as a 'transactional approach' as distinct from a 'causal approach'.⁴³ The former approach focuses on the transactions which form the links between the original property and the target property. This emphasis on continuity of property rights explains how equity's metaphysical approach has been able to overcome the common law's reluctance to follow property into mixed accounts, and yet has drawn the line at overdrawn accounts. In such a case the right to trace is limited to the lowest intermediate balance in the account.⁴⁴ The original owner is seen as having no claim to funds paid into the account by the account holder after that point, even though it may be clear that the account holder has been enriched by the claimant's money. The rule does not apply where it can be shown that the repayments into the mixed account were made for the specific purpose of restoring the target (ie, trust) property. The issue, however, is not whether the account holder has been enriched but the consequences for unsecured creditors of extending the ambit of a proprietary remedy.

Equity's refusal to impute an intention to restore the trust property is a policy

43 Hayton, above n 3; Evans, above n 9.

44 *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62, 68; *Bishopsgate Investment Management Limited (in liq) v Homan* [1995] 1 All ER 347.

decision that limits the right to a proprietary remedy in respect of funds in the account to funds that can be seen as coming from the original owner. In other circumstances, however, equity shows no reluctance to impute an honest intention to the trustee. For example, where a trustee mixes his own money with trust money and then withdraws part of the mixed fund, the trustee is assumed to have been acting honestly and to have drawn out his own money in preference to the trust money.⁴⁵ In that situation, however, the competing interests are those of the trustee and the beneficiary where, because of the transactional links, the beneficiary's money is seen to be impressed with a trust before it is deposited in the mixed account. There are two issues here: what is the appropriate limit for the grant of proprietary remedies and what benefit is there in determining that limit by reference to concepts of property?

The common law's concern with justice and good conscience is the basis of actions in restitution today. Quasi-contract as the basis of the actions for money had and received is now discredited.⁴⁶ A right to relief in restitution does not depend on proprietary analysis. Restitution does not depend on the transactional analysis that characterises equitable tracing or the principles of property law but on a causal analysis that is directed to the question of whether the defendant has been unjustly enriched at the expense of the plaintiff. In Australia, however, a claim of unjust enrichment cannot be made at large. As Deane J explained in *Pavey & Matthews Pty Ltd v Paul*⁴⁷ it is a unifying principle that a defendant will be obligated to make fair and just restitution for a benefit derived at the expense of a plaintiff. Its concern with the defendant's enrichment means that, as the High Court has pointed out on a number of occasions, the claim is not defeated 'simply because the plaintiff has recouped the outgoing from others'.⁴⁸

Although restitution is a remedy at law there is considerable overlap with equitable remedies. This is not surprising. Equity's concern with unconscionable conduct and restitution's focus on unjust enrichment have much in common. Given that, at the very least, law and equity are administered by the same courts, it would be remarkable if the concepts did not influence each other's development. Justice Gummow has referred to the common law's shift in favour of the preference for substance over form that has characterised equitable analysis. Having discussed the scope of the action for money had and received Gummow J observed that the examples given by Lord Mansfield in *Moses v Macferlan*⁴⁹ are not exhaustive and commented:

45 *Re Hallett's Estate* (1880) 13 ChD 696, *Brady v Stapleton* (1952) 88 CLR 322, 337–8; but see *Re Oatway* [1903] 2 Ch 356.

46 Justice Keith Mason and John Carter, *Restitution Law in Australia* (1995) 71–9; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 539–57 (Gummow J) ('*Roxborough v Rothmans*').

47 (1987) 162 CLR 221, 256–7.

48 *Commissioner of State Revenue (Vict) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 75 (Mason CJ); *Roxborough v Rothmans* (2001) 208 CLR 516, 529 (Gleeson CJ, Gaudron and Hayne JJ), 542 (Gummow J).

49 (1760) 2 Burr 1005; 97 ER 676.

Further, in deciding cases such as the present which question the boundaries of the established categories, recourse should be had to the general considerations referred to in *Moses v Macferlan*. ... If those general considerations resonate with equitable notions, then in a system in which equity prevails that cannot be a source of surprise.⁵⁰

As an instance of the trend that he was describing Gummow J noted that, in addition to purely equitable remedies, restitution may lie in respect of moneys improperly received by a fiduciary.⁵¹ An example is the decision of the House of Lords in *Lipkin Gorman (a firm) v Karpnale Ltd*,⁵² a case which elucidated the concept of enrichment.

Like *Sinclair v Brougham* and *Chase Manhattan Bank, Lipkin Gorman* concerned the obligations of an innocent recipient of property. Unlike in those cases, in this case there could be no doubt that there was a breach of an existing fiduciary relationship as the case concerned a fraudulent partner in a firm of solicitors (Mr Cass) who misappropriated funds from his firm's client account and lost most of it gambling at the Playboy Club. As Lord Goff of Chieveley noted:

even if legal title to the money did vest in Cass immediately on receipt, nevertheless he would have held it on trust for his partners, who would accordingly have been entitled to trace it in equity into the hands of the respondents.⁵³

Despite this the solicitors' claim against the recipient of much of the stolen money was pleaded solely in terms of money had and received; that is, it was a claim *in personam*. It is not clear why this course was adopted; it may have been that the patent solvency of the defendant obviated the need for a proprietary remedy. Where this is so there are advantages in formulating a claim in restitution because it is not necessary to show the transactional linkages that are required to trace dealings in property. As Lord Goff observed, the court was not concerned with the fact that Cass may have mixed the money from the solicitors' client account with his own money before he gambled it away at the club. It was necessary for the solicitors to show that they had legal title to the money in the bank – in other words to the chose in action constituted by the debtor-creditor relationship between the bank and the solicitors,⁵⁴ for the purpose of showing that the enrichment of the club had been at the expense of the solicitors. This is the causal link approach⁵⁵ as distinct from the transactional link necessary for proprietary relief. In relation to the concept of enrichment, Mason and Carter comment:

50 *Roxborough v Rothmans* (2001) 208 CLR 516, 553.

51 *Ibid* 541.

52 [1991] 2 AC 548 (*Lipkin Gorman*). The insolvency of the defendant bank explains the importance to the Chase Manhattan Bank of a proprietary remedy.

53 *Ibid* 572.

54 *Ibid* 573–4.

55 Referred to by Professor Hayton as the 'but for' approach to unjust enrichment: Hayton, above n 3.

The requirement of enrichment 'at the plaintiff's expense' ... generally posits that the claim must be made in relation to a benefit which is not only a subtraction from the plaintiff's wealth but also an addition to that of the defendant. Although in this sense the benefit must be traced from the plaintiff to the defendant, in most such cases the process is so easy that it goes 'unnoticed'. What subsequently happens to the enrichment, that is, the money or the property, is generally irrelevant, since the purpose is simply to establish an enrichment. Recovery of a mistaken payment is an obvious example, but a claim for reasonable remuneration does not in this respect differ. In both cases the claim is of a personal nature. A claim for the return of money is not an assertion of title to money, and a claim of reasonable remuneration is not an assertion of title to property which is the end product of services rendered.⁵⁶

The net sum lost by Mr Cass and won by the club at the time he absconded was £174 745, comprising £20 050 from Mr Cass's own resources and at least £154 695 that was stolen from the solicitors' client account. In the light of legislation that rendered gaming contracts void⁵⁷ the House of Lords held that the Club had not given consideration for the money. When Mr Cass lost £154 695 in gambling, his payment was, in law, a completed gift of that amount to the club. The club argued that, although it was enriched by the money won by Mr Cass, it was not enriched unjustly and that it had accepted the money and innocently changed its position to its detriment by allowing Mr Cass to gamble and by paying him winnings.

The House of Lords held that in English law a *bona fide* change of position was, or should be, a good defence whenever such change made it inequitable to require the person to make restitution.⁵⁸ Nevertheless their Lordships rejected the defence in the case of the Playboy Club and allowed the solicitors' claim for the amount received by the club from Mr Cass, less the amount paid by the club to Mr Cass in winnings. As Lord Templeman said:

The club has not suffered any detriment. If the club pays £154 695 to the solicitors as a result of this appeal, the club will be in exactly the same position which would have obtained if Cass had not gambled away the solicitors' money. It is true that the club would have been in a better position if Cass had been gambling away his own money, but that plaintive observation does not entitle the club to retain the solicitors' money by which the club remains unjustly enriched to the extent of £154 695.⁵⁹

Though important in the development of the law of restitution, *Lipkin Gorman* is a comparatively simple case involving a single claim against a solvent defendant. It was not in contention that Mr Cass had misappropriated the funds taken from the solicitors' client account. Being a personal claim it was not necessary for the court to attempt to trace the actual payments made by Mr Cass into the accounts of the Playboy Club,⁶⁰ nor was it necessary to juggle competing claims of other victims. *Lipkin Gorman*, like the decision of the Court of Appeal

56 Mason and Carter, above n 46, 95.

57 *Gaming Act 1845* (UK) s 18.

58 *Lipkin Gorman* [1991] 2 AC 548, 577–81 (Lord Goff of Chieveley).

59 *Ibid* 562.

60 Despite this Lord Templeman commented that the difficult questions that arise when the donee of stolen money disposes of it did not arise because the club had retained the money: *ibid* 566.

in *Banque Belge pour l'Etranger v Hambrouck*,⁶¹ is an example of the common law recognising claims to substitute assets.

Earlier, we posed the question whether the personal claim seeking to reverse unjust enrichment and tracing as a precursor to an equitable proprietary claim can be justified. It has been argued that the distinction between what is required to establish personal and proprietary rights is hard to justify and implies that 'there is an additional (and unstated) condition that must be satisfied before a proprietary remedy will be available'.⁶² Evans discusses the argument that a proprietary remedy will only be granted if the enrichment of the defendant is located in some specific asset and refers to the decisions of Sir George Jessel and the Court of Appeal in *Lacey v Hill*.⁶³ He says:

Sir George Jessel drew a distinction between proving against the bankrupt estate of a thief and making a claim based on tracing. The right to prove against the thief's estate continued notwithstanding that the thief had gambled away the stolen money. On the other hand, the right to make a claim based on tracing depended on specific enrichment subsisting in the thief's estate. Although both Sir George Jessel and the Court of Appeal conceded that the estate of such a thief was enriched if he or she used the stolen money to discharge his or her debts, they did not regard this as sufficient for a claim based on tracing because neither the specific thing the claimant had lost – the money – nor any of its proceeds remained as part of the thief's estate.⁶⁴

Evans argues that the normative support for specificity is 'tenuous' and that the requirement is inconsistent with the approach to non-proprietary claims without there being any justification for the inconsistency. He advocates instead a causal approach in which the central focus is value. Under such an approach 'it is possible to trace the claimant's value into the defendant's assets even where it is not possible to trace the claimant's value into any specific asset, so long as there is a causal connection between the value received and the surviving enrichment'.⁶⁵ Under this 'swollen assets theory', the grant of a proprietary remedy would depend on which of the three versions of the theory one accepted. It is not necessary to consider the three versions here. That which Evans favours is the 'augmentation' theory which requires a claimant to demonstrate that the defendant has been enriched and his or her assets remain enriched. Evans states that it is only where there is surviving enrichment that the defendant's general creditors are not prejudiced.

Evans' proposal that tracing in the sense discussed in this paper be subsumed by an expanded doctrine of restitution should be considered with full appreciation of the differences between the two causes of action. In *Foskett v McKeown*, Lord Millett summarised those differences:

61 [1921] 1 KB 321.

62 Evans, above n 9.

63 (1876) 4 ChD 537.

64 Evans, above n 9, 475.

65 Ibid 492.

As I have already pointed out, the plaintiffs seek to vindicate their property rights, not to reverse unjust enrichment. The correct classification of the plaintiffs' cause of action may appear to be academic, but it has important consequences. The two causes of action have different requirements and may attract different defences.

A plaintiff who brings an action in unjust enrichment must show that the defendant has been enriched at the plaintiff's expense, for he cannot have been unjustly enriched if he has not been enriched at all. But the plaintiff is not concerned to show that the defendant is in receipt of property belonging beneficially to the plaintiff or its traceable proceeds. The fact that the beneficial ownership of the property has passed to the defendant provides no defence; indeed, it is usually the very fact which founds the claim. Conversely, a plaintiff who brings an action like the present must show that the defendant is in receipt of property which belongs beneficially to him or its traceable proceeds, but he need not show that the defendant has been enriched by its receipt. He may, for example, have paid full value for the property, but he is still required to disgorge it if he received it with notice of the plaintiff's interest.

Furthermore, a claim in unjust enrichment is subject to a change of position defence, which usually operates by reducing or extinguishing the element of enrichment. An action like the present is subject to the *bona fide* purchaser for value defence, which operates to clear the defendant's title.⁶⁶

It is to be hoped that our examination of tracing and restitution shows that, despite being directed to the same goals, the two doctrines have different organising principles. Tracing is concerned with continuity of property rights and 'its theoretical underpinning is property law not unjust enrichment. The plaintiff's property right to the traceable product is a response to and a vindication of the plaintiff's rights in the original asset'.⁶⁷

The justice of the principle that a person who wrongfully takes my property must return that property has immediate and widespread appeal, as does its extension to a person to whom my property is given. Application of the principle depends on my having property at the outset, on the person against whom the claim is made also having property into which it can be said that my property has been converted, and the transactional proprietary links being established. Whether the claim ultimately succeeds, however, depends on the rules and principles governing competing rights in property. This is so even if, as is likely, the motivation for a proprietary claim is priority over unsecured creditors. As McLure J has observed, 'it is necessary to have a clear understanding of the nature of the claimant's property interest and when and how it arose in order to assess whether the claimant can trace to the traceable product'.⁶⁸

The circumstances in which a plaintiff can claim a proprietary remedy have been identified with some precision. No doubt further refinement will occur as cases present themselves to the courts. The value of this slow accumulation of precedent and guidance should not be underestimated. The circumstances are varied and complex. Claims of proprietary and personal rights have significant consequences for commercial and domestic activity and these consequences have

66 (2001) 1 AC 102, 129.

67 *Re Global Finance Group Pty Ltd (in liq) (Supervisor Appointed) and Global Mortgage Investments Pty Ltd (in liq); Ex Parte Read and Herbert* [2002] WASC 63, [119].

68 *Ibid* [95].

been addressed by the courts in the particular context of each claim. In the light of this accumulated wisdom the issue is not so much the strength of the normative support for the present approach as the normative and practical implications of a change.